

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

MOUNTAIRE FARMS, INC.,

Employer,

and

Case 05-RD-256888

UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL 27,

Incumbent Exclusive
Representative,

and

OSCAR CRUZ SOSA,

Petitioner.

BRIEF OF UNITED FOOD AND COMMERCIAL WORKERS LOCAL 27

Dated: August 21, 2020

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TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 3

 1. The Regional Director erred in finding that the union-security clause is facially
 unlawful 3

 2. The Board may not go beyond the issues necessary to decide this case and should
 not go beyond the single issue decided by the Regional Directory 8

CONCLUSION 13

CERTIFICATE OF SERVICE 14

TABLE OF AUTHORITIES

CASES

<i>Humboldt Lumbers</i> , 108 NLRB 393 (1954)	5,7
<i>Jet-Pak Corp.</i> , 231 NLRB 552 (1977)	7,9
<i>NLRB v. Bell Aerospace Co.</i> , 416 U.S. 267 (1974)	9,11
<i>NLRB v. Delaware Valley Armaments, Inc.</i> , 431 F.2d 494 (3d Cir. 1970)	10,12
<i>NLRB v. Wyman-Gordon Co.</i> , 394 U.S. 759 (1969)	9,10,11
<i>Paragon Products Corp.</i> , 134 NLRB 662 (1961)	<i>passim</i>
<i>Service America Corp.</i> , 307 NLRB 57, 61 fn. 6 (1992)	12,14
<i>Standard Brands, Inc.</i> , 97 NLRB 737 (1951)	4
<i>United States v. Florida East Coast Railway Co.</i> , 410 U.S. 224 (1973)	11,13

STATUTES

5 U.S.C § 551	10
29 U.S.C. §156	9,13
29 U.S.C. § 159	8,9,11

REGULATIONS

29 C.F.R. § 102.64(b)	9,10
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OTHER SOURCES

Attorney General’s Manual on the Administrative Procedure Act 12 (1947)	9
<i>Representation- Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective- Bargaining Relationships</i> , 85 Fed. Reg. 18366 (Apr. 1, 2020)	13

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On February 8, 2019, incumbent bargaining representative United Food and Commercial Workers Local 27 (“the Union”) and Mountaire Farms, Inc. (“the Employer”) executed a collective-bargaining agreement containing a union-security clause in a form unchanged in many successive contracts between the parties. The effective date of the collective-bargaining agreement is December 22, 2018, and the Union and the Employer agreed that the agreement would remain in effect until December 21, 2023. The agreement is the latest in a series of contracts dating back to 1978.

On February 22, 2020,¹ Oscar Cruz Sosa (“the Petitioner”) filed a petition with the National Labor Relations Board (“NLRB” or “Board”) under Section 9(c) of the National Labor Relations

¹ All dates hereafter are in 2020 unless otherwise indicated.

Act (“NLRA” or “Act”) seeking to decertify the Union as exclusive bargaining representative. The Regional Director for Region 5 (“Regional Director” or “RD”) conducted a hearing, admitting no evidence beyond the collective-bargaining agreement, on March 10. The Regional Director solely focused on whether the collective-bargaining agreement barred the processing of the petition. On April 8, the Regional Director issued a Decision and Direction of Election, finding that one sentence in the union-security clause in the collective-bargaining agreement was unlawful and therefore the entire contract did not bar the processing of the Petitioner’s decertification petition.

The Union filed a request for review with the Board on April 21 arguing that the Regional Director erred by finding that the collective-bargaining agreement did not bar the petition. On June 23, the Board granted the Union’s request for review, and on July 7, the Board issued a Notice and Invitation to File Briefs. The Union filed a motion for reconsideration on July 15, arguing that the Board’s July 7 Notice solicited submissions on questions not related to the Petitioner’s decertification petition and the collective-bargaining agreement. Instead, the Notice unduly expanded the scope of review and thereby impermissibly conflated the Act’s separate procedures for rulemaking and adjudication. The Board denied the Union’s motion on July 21.

The Union asks the Board to address the narrow issue presented in its request for review and find that the Regional Director erred in finding that the union-security clause in the collective-bargaining agreement was facially unlawful. The Union also repeats the argument raised in its motion for reconsideration that the Board may not expand the scope of review and use this adjudicatory proceeding to undertake a general review of contract-bar doctrine principles.

ARGUMENT

1. The Regional Director erred in finding that the union-security clause is facially unlawful.

The Regional Director ruled that the collective-bargaining agreement between Local 27 and Mountaire Farms does not bar the Petition solely because the union-security clause in Article 3, Section 1 “is clearly unlawful on its face, as it does not afford nonmember incumbent employees the statutorily required 30-day grace period.” DDE 9. Contrary to the Regional Director, the most natural reading of Article 3, Section 1 gives incumbent nonmembers a full 30 days to become members. What is more, the Regional Director’s struggle to give the clause an illegal construction flies in the face of *Paragon Products Corp.*, 134 NLRB 662 (1961).

1. Under *Paragon Products*, “only those contracts containing a union-security provision which is clearly unlawful on its face . . . may not bar a representation election.” 134 NLRB at 666. “A clearly unlawful union-security provision for this purpose is one which by its express terms clearly and unequivocally goes beyond the limited form of union-security permitted by Section 8(a)(3).” *Ibid.* “Such unlawful provisions include . . . those which specifically withhold from incumbent nonmembers and/or new employees the statutory 30-day grace period.” *Ibid.*

Far from “specifically withhold[ing] from incumbent nonmembers . . . the 30-day grace period,” *ibid.*, Article 3, Section 1 specifically includes such a grace period by providing:

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 days are not consecutive, shall become and remain members in good standing in the Union.”

Despite the express inclusion of a 30-day grace period, the Regional Director hypothesized

that incumbent unit employees who were nonmembers on February 8, 2019, when the contract was executed, would not receive the requisite thirty days to become members. DDE 5 & 7-8. The Regional Director does not deny that the agreement provides employees hired after the execution date the full 30-day grace period. And, the Regional Director acknowledges that incumbents who were already union members at the time of the agreement's execution need not receive a grace period. DDE 7.

Whether the agreement can be read to provide a full 30-day grace period to employees who were hired before the execution date of the agreement depends on what is meant by the phrase "beginning of such employment." There is no dispute that "such employment" means employment "covered by the agreement." See DDE 7-8. The Union's position is that employment "begin[s]" to be "covered by the agreement" once the agreement is executed. The Regional Director found, to the contrary, that employment before the execution date could be "covered by the agreement." *Ibid.*

The Regional Director's interpretation of when employment "begin[s]" to be "covered by the agreement" assumes an intent on the part of Mountaire and the Union to retroactively require membership at a time before the agreement was executed. On this reading, "by the time the contract was executed, the mandated 30-day grace period [may have] already expired" for an employee hired before February 8, 2019. DDE 5. That is obviously not what the parties intended. The clause states employees "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 . . . become and remain members." Article 3, Section 1 (emphasis added). "The futurity of this language . . . evidence[s] the clear intent of the parties to write an agreement which complied with all lawful requirements." *Standard Brands, Inc.*, 97 NLRB 737, 739 (1951). The Regional Director assumed the union-

security agreement to have illogical and illegal effect despite the bedrock preference expressed in prior Board opinions, namely that “the proper presumption is one of legality, namely, that the obligation to discharge extends only to situations recognized as valid by statute.” *Humboldt Lumber Handlers*, 108 NLRB 393, 395 (1954).

The Regional Director concluded that only employees hired on or after February 7, 2019 could have a 30-day grace period to satisfy their membership obligation to the union. Under the Regional Director’s reading of the clause, employees hired between late December 2018 and January 8, 2019, which is 31 days prior to the execution date of the collective-bargaining agreement, would be subject to immediate discharge if they had not become members by the execution date. The Regional Director offered no rationale as to why that hypothetical group of employees should be subject to immediate discharge, while the clause grants new hires up to 31 days to become members.

The Union’s reading of the phrase “beginning of such employment” avoids the absurd result reached by the Regional Director. Under the Union’s reading the “beginning of such employment” would occur when an employee’s employment first becomes “covered by this Agreement,” as determined by when the agreement was executed. By making the execution date the pivotal moment in defining when the union-security obligation became effective for incumbents, the clause clearly contemplates that the obligation will operate only prospectively and apply to “such employment” as is “covered by” the new agreement rather than to earlier points in the incumbents’ employment history.

The Regional Director tacitly accepts that the Union’s reading is plausible within the terms of Article 3, Section 1. To avoid that more logical result, the Regional Director asserts that a contract provision speaking to an entirely different employment issue, Article 5, Section 2,

precludes the Union's reading of Article 3, Section 1. DDE 8. Article 5, Section 2 provides:

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.

Based solely on this provision, the Regional Director stated, "I cannot then, as the Union suggests, view employees' employment with the Employer as that which exists only on and after the Agreement's execution date, because the Employer and the Union plainly considered the terms and conditions of Unit employees as they existed prior to execution of the Agreement." DDE 8.

The simple fact that the Regional Director had to rely on Article 5, Section 2 to refute the Union's position shows, in itself, that the Union's reading of Article 3, Section 1 is far more than merely plausible. Article 5, Section 2 does not define "the beginning of such employment," which is the operative phrase for triggering the 31-day grace period in Article 3, Section 1. Beyond that, by focusing on an incumbent employee's rate of pay "at the time of the signing of this Agreement," Article 5, Section 2 supports the Union's position that employment "begin[s]" to be "covered by this agreement" only "at the time of signing."

In short, the more natural reading of Article 3, Section 1 is to provide all covered nonmembers with the full 30-day grace period required by the Act. The contract language does not obviously deny a non-incumbent employee protection under Section 8(a)(3) of the Act.

2. Even if one were to accept the Regional Director's strained construction of Article 3, Section 1, that alone is not sufficient to render the clause unlawful for contract bar purposes. The guiding rule is that extrinsic evidence is not to be accepted in contract bar proceedings. There is no evidence here that any new employees were hired between the effective date and the execution date of the agreement. There is nothing in the record to indicate that any employee was actually denied the 30-day grace period.

In *Paragon Products*, the union-security clause at issue granted a 30-day grace period to “[n]ew employees,” while requiring “[a]ll present employees” to become members immediately. 134 NLRB at 662 n. 3. The Board declined to find the clause facially unlawful on this basis, because “in order to determine whether there were any nonmember ‘present employees’ who were denied a 30-day period in which to join the Union, it would be necessary to look to extrinsic evidence.” *Id.* at 667. Likewise, in order to determine whether there were any employees hired between the effective date and the execution date of the agreement here, it would be necessary to look to extrinsic evidence, plainly contrary to *Paragon*.

The Regional Director’s efforts to construe the union-security clause as unlawful are particularly misplaced in the context of a representation proceeding. Under the Act, “an unfair labor practice proceeding is the proper method of enforcing the statutory proscription against discriminatory practices, such as an unlawful union-security clause[.]” *Jet-Pak Corp.*, 231 NLRB 552, 552 (1977).² By contrast, the Board has explained that “a representation proceeding which is investigatory in character is not the proper forum for entertaining matters properly left to an adversary proceeding.” *Ibid.*

It is obvious that Local 27 and Mountaire Farms intended to provide all employees with the full statutory 30-day grace period. And, there is no indication that the union-security clause was ever applied to deny an employee the full 30-day grace period. Indeed, there is no evidence that there were any employees to whom the Regional Director’s strained reading could have been applied. All that being so, the union-security clause is not facially unlawful even if it could be

² On April 22, 2020, the National Right to Work Legal Defense Foundation filed an unfair labor practice charge alleging that the union-security clause is unlawful. *See United Food & Commercial Workers Local 27 (Mountaire Farms, Inc.)*, 05-CB-259415. The unfair labor practice charge remains pending.

read as the Regional Director did.

* * *

In sum, under *Paragon Products*, the union-security clause in the collective-bargaining agreement does not justify lifting the contract bar on the election in this case.

2. The Board may not go beyond the issues necessary to decide this case and should not go beyond the single issue decided by the Regional Director.

As the Union argued in its July 15, 2020 motion for reconsideration, the Board’s Notice and Invitation to File Briefs invites submissions that go beyond the narrow issue presented in the Union’s request for review and improperly attempts to transform this adjudicatory proceeding into a rulemaking proceeding. The Board’s Notice asks interested parties to address several issues “[i]n addition to the specific contract-bar issue presented in this case[.]” These issues include “whether the Board should (1) rescind the contract-bar doctrine, (2) retain it as it currently exists, or (3) retain the doctrine with modifications.” In their oppositions to the Union’s motion for reconsideration, the Employer and the Petitioner concede that this is an adjudicatory proceeding and that the Board may only decide those issues that affect the outcome of this case and bear on the rights and obligations of the parties. The Board invited the Union to raise its procedural arguments in this brief in its July 21 order denying the Union’s motion for reconsideration. Accordingly, the Union repeats that the Board is precluded from addressing the broad range of topics identified in its Notice in the context of the present adjudication. Instead, the Board should limit its review to the narrow issue identified in the Union’s request for review: whether an allegedly unlawful union-security clause will bar an election.

1. As set forth more fully in the Union’s motion for reconsideration, the purpose of a representation proceeding under Section 9 of the Act is to determine whether “a question of representation affecting commerce exists.” 29 U.S.C. § 159(c)(1)(B). When an individual files a

decertification petition, the Act provides that the Regional Director “shall investigate such petition,” and “provide for an appropriate hearing” if there is “reasonable cause to believe that a question of representation affecting commerce exists” warranting an election. *Id.* § 159(c)(1)(A)(ii) & (B). Representation proceedings are investigatory and intended to generate “a full and complete record upon which the Board or the Regional Director may discharge their duties under Section 9(c) of the Act.” 29 C.F.R. § 102.64(b).

Separately, Section 6 of the Act provides that the “Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.” 29 U.S.C. § 156. Because the APA “prescribes radically different procedures for rule making and adjudication . . . the proper classification of agency proceedings as rule making or adjudication is of fundamental importance.” *Attorney General’s Manual on the Administrative Procedure Act* 12 (1947).

In *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 763-764 (1969) (plurality opinion of Fortas, J.), the Court explained that the Board may not avoid the rulemaking provisions of the APA “by the process of making rules in the course of adjudicatory proceedings.” *Id.* at 764. While “the Board is not precluded from announcing new principles in an adjudicative proceeding and . . . the choice between rulemaking and adjudication lies in the first instance within the Board’s discretion,” it may not engage in rulemaking under the guise of adjudication, because when the Board chooses to “develop[] its standards in a case-by-case manner” through adjudication, it must do so “with attention to the specific [circumstances] . . . in each [case].” *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). *See also Wyman-Gordon*, 394 U.S. at 764 (“There is no warrant

in law for the Board to replace the statutory scheme with a rule-making procedure of its own invention.”).

Because a decertification proceeding under Section 9 affects a union’s certification as the exclusive bargaining representative for a unit of employees, it fits comfortably within the category of “adjudication” for purposes of the APA.³ See, e.g., *NLRB v. Delaware Valley Armaments, Inc.*, 431 F.2d 494, 498 (3d Cir. 1970) (“The critical essence of [*NLRB v. Wyman-Gordon Co.*] is that a representation election proceeding is an ‘adjudicatory proceeding.’”). In addition, representation proceedings, like other adjudicatory proceedings, are “concerned with the determination of past and present rights and liabilities” and “involve the determination of . . . right[s] to benefits under existing law[.]” *Attorney General’s Manual*, at 14-15.

2. Under item 3 in the Board’s Notice, the Board invites briefing on a range of subjects that are highly attenuated from the facts before the Board in this case, including:

the formal requirements for according bar quality to a contract, . . . the duration of the bar period during which no question of representation can be raised (including the operation of the current ‘window’ and ‘insulated’ periods), and how changed circumstances during the term of a contract (including changes in the employer’s operation, organizational changes within the labor organization, and conduct by and between the parties) may affect its bar quality.

³ Under the APA, a “rule” is “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy[.]” 5 U.S.C. § 551(4). By contrast, the APA defines “adjudication” to include “agency process for the formulation of an order,” and it defines an “order” to include “the whole or a part of a final disposition . . . of an agency in a matter other than rulemaking but including licensing.” *Id.* §§ 551(6) & (7). For APA purposes, “licensing” refers to “agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license,” and a “license” includes “the whole or part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.” *Id.* §§ 551(8) & (9).

These questions have no bearing whatsoever on whether the Petitioner’s decertification petition raises a question concerning representation. They are not necessary for the Board to discharge its duties under Section 9 of the Act. The issues the Board identifies in item 3 are entirely unrelated to “adjudicat[ing] disputed facts in [the] particular case[.]” before the Board. *United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 245 (1973). Evidence and arguments regarding “the duration of the bar period during which no question of representation can be raised” and about “changed circumstances during the term of a contract (including changes in the employer’s operation, organizational changes within the organization, and conduct by and between the parties)” go beyond the limited record developed during the hearing in this case and are therefore immaterial to resolving whether a question concerning representation exists in this matter.

3. In their oppositions to the Union’s motion for reconsideration, the Petitioner and the Employer concede that representation proceedings are adjudicatory. Specifically, the Petitioner explains that “[i]n granting the Union’s Request for Review, the Board has every right to decide th[e] specific point [regarding the union-security clause] while assessing the contract bar itself. Any decision on these issues will affect *the outcome of this case and the viability of Petitioner’s decertification petition.*” Petitioner’s Opposition, at 2 (emphasis added). And, as the Petitioner argues, “whether the Board chooses to keep the current ‘contract bar’ doctrine, overrule the doctrine, or amend the doctrine, it will be *applying that policy to the parties in the form of an ‘order[.]’*” *Id.* at 4 (emphasis added). Likewise, the Employer argues that the Board’s July 7 Notice is appropriate because “[r]escinding or narrowing the contract bar doctrine will directly affect the outcome of *this* matter.” Employer’s Opposition, at 2 (emphasis in original).

As they concede that the focus of a representation proceeding is on matters that will affect the outcome of the case and the rights and obligations of the participating parties, the Employer

and the Petitioner squarely admit that the additional issues included in item 3 of the Board's July 7 Notice unduly enlarge the scope of the present dispute, and cannot lawfully be considered in the context of the present request for review.

The Petitioner attempts to enlarge the scope of the Board's review by arguing that it raised the issues addressed in item 3 of the Board's Notice in its eleventh hour opposition to the Union's request for review and by suggesting that there may be yet additional factual issues for the Board to consider as to which facts were not even offered to the Regional Director. Both of these arguments fall short. First, once the Board grants a party's request for review, the guiding rule is that the Board "generally only considers those issues raised in the request for review[.]" and will not address issues that the party requesting review did not identify. *Service America Corp.*, 307 NLRB 57, 61 fn. 6 (1992). Second, if the Petitioner believed there are facts related to the duration of the contract bar period, the effect of changed circumstances on the operation of the contract bar, or bearing on the other issues raised in item 3 of the Board's notice, it could have offered evidence or called witnesses to testify, or placed in the record a proffer during the hearing. Alternatively, Petitioner could have filed his own request for review of the Regional Director's Decision and Direction of Election. By failing to take any of these steps, the Petitioner waived all argument regarding facts neither presented nor proffered during the hearing. He is precluded from now asserting that the Regional Director's decision failed to address issues which he neither sought to educate or argue. *See* Section 102.67(g) of the Board's Rules and Regulations ("The Regional Director's actions are final unless a request for review is granted. The parties may, at any time, waive their right to request review.").

The Act contemplates that the Board can resolve policy questions using either rulemaking or adjudication. If the Board wished to undertake a general review of the contract-bar doctrine, it was obligated to adhere to the APA's rulemaking requirements.⁴ However, the Board has not initiated a rulemaking proceeding, and all the parties to this proceeding acknowledge that it is adjudicatory. Accordingly, the Board should limit its review to the narrow issue presented by the Union and not opine on issues unrelated to the rights and obligations of the parties to this proceeding.

CONCLUSION

The Union requests that the Board reverse the Regional Director's finding that the union-security clause was unlawful and instead find that the collective-bargaining agreement barred the instant decertification petition.

Dated: August 21, 2020

Respectfully submitted,

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⁴ The Board recently chose to exercise its rulemaking authority to undertake a more general review of other election bar doctrines. See 29 U.S.C. § 156; *Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships*, 85 Fed. Reg. 18366, 18366 (Apr. 1, 2020).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 21, 2020, a copy of the foregoing paper was sent by email to Sean Marshall, *Regional Director*, Andrea Vaughn, *Field Attorney*, National Labor Relations Board, Region 5, Bank of America Center, Tower II, 100 S. Charles Street, Ste. 600, Baltimore, MD 21201; Barry Willoughby, Esq., Adria Martinelli, Esq., and Lauren Russell, Esq., YOUNG CONAWAY, Rodney Square, 1000 North King Street, Wilmington, Delaware, 19801, *Counsel to the Employer*; and Glenn M. Taubman, Esq. and Angel J. Valencia, Esq., National Right to Work Legal Defense Foundation, Inc., 8001 Braddock Road, Ste. 600, Springfield, VA 22160, *Counsel to the Petitioner*.

/s/ Christopher R. Ryon

Christopher R. Ryon