

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

MOUNTAIRE FARMS INC.,

Case Nos. 05-RD-256888

Employer,

**UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL 27,**

Incumbent Exclusive Representative,

and

OSCAR CRUZ SOSA,

Petitioner.

**BRIEF *AMICUS CURIAE* OF
LIUNA MID-ATLANTIC REGIONAL ORGANIZING COALITION**

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STATEMENT OF INTEREST OF THE *AMICUS*

Founded in 1903, the Laborers' International Union of North America (hereinafter, "LIUNA") is a general workers union representing over half a million employees in the construction industry and in public service in the United States and Canada. As the union of record in both Canada and the United States holding undisputed jurisdiction over the craft of construction laborer, LIUNA represents the men and women throughout North America who are responsible for constructing the buildings, roads, bridges, highways, energy and other critical infrastructure that makes life in the United States and Canada possible.

LIUNA MAROC is a coalition of Laborers' District Councils within the Mid-Atlantic Region of the LIUNA formed for the purpose of coordinating and leading LIUNA's organizing efforts in the Region. MAROC's jurisdiction consists of Pennsylvania, West Virginia, Virginia, Maryland, Washington DC, and North Carolina, and includes nearly 40,000 members.

INTRODUCTION

The Board invited briefs *amicus curie* on whether the Board should (1) rescind the contract-bar doctrine, (2) retain it as it currently exists, or (3) retain the doctrine with modifications.” The Board further advised that with respect to (3), the parties are invited to specifically address the following, “in addition to any other issues raised: the formal requirements for according bar quality to a contract, the circumstances in which an allegedly unlawful contract clause will prevent a contract from barring an election, 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.” Board Order, dated July 7, 2020.

The issues the Board listed for briefing stray far beyond the scope of the current case. Issues related to the duration of the contract bar, the length of the window period, the insulated period, or changed circumstances of the employer during the term of the contract appear nowhere in the present case. These issues, therefore, should not be deemed appropriate to be addressed by the Board through the adjudication of this matter.

Regarding the contract bar itself, the bar is integral to achieving industrial stability and labor peace, one of the most important statutory purposes of the Act, as expressly stated in Section 1 of the Act. *See* 29 U.S.C. § 151. Eliminating the contract bar would undermine labor peace, erode industrial stability, and problematize collective bargaining overall. Eliminating or

weakening the contract bar without an overwhelming jurisdiction, therefore, would be contrary to the Act.

The contract bar is essential to motivating bargaining parties to settle collective bargaining disputes and enter into contracts because the contract bar ensures stability and peace for the duration of the contract. In the absence of the contract bar, the parties would have no mechanism to ensure labor peace. Entering a contract would provide no reprieve from the conflict between pro-union and anti-union forces. Without the contract bar, labor peace would be unattainable, and a central purpose of the NLRA would be frustrated.

There is no evidence that favors disturbing the long-standing balance that the Board historically has struck between employee free-choice and industrial stability and labor peace. The Board's historical experience demonstrates that there has been no change in circumstances to support the conclusion that the contract bar is unduly suppressing employee freedom of choice. To the contrary, if anything employee interest in decertification or entertaining rival unions has slightly declined in recent years. A three-year contract bar that will apply with exceptions only for plainly illegal union-security clauses is an appropriate policy that has withstood the test of time. Accordingly, the Board's long-standing contract-bar doctrine should be reaffirmed.

I. THE ISSUES ABOUT WHICH THE BOARD SOUGHT BRIEFING FALL OUTSIDE THE SCOPE OF THIS LITIGATION.

Under the APA, the NLRB has two methods for promulgating new policies under the NLRA: The NLRB can implement new rules through adjudication, or it can use the Notice and Comment rulemaking procedure under the APA. *See* 29 U.S.C. § 156. What the Board cannot do, however, is to avoid the rulemaking provisions of the APA "by the process of making rules in the course of adjudicatory proceedings." *See NLRB v. Wyman-Gordon Co.*, 394 U.S.

759, 763-764 (1969) (plurality opinion of Fortas, J.). Instead, 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).

In this case, the Board has requested briefs on issues that simply are not present in the underlying case. Issues like 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)” are not raised in the underlying case. Issues regarding “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” are not raised in the underlying case.

The issue that is fairly presented by the underlying case relates to the standard the Board should use to evaluate whether an allegedly unlawful union-security clause will preclude application of the contract bar. That is the only issue on which the Board can issue a new rule through this adjudicative proceeding.

II. ABANDONING OR WEAKENING THE CONTRACT BAR WOULD BE INCONSISTENT WITH THE ACT DUE TO HOW DRAMATICALLY IT WOULD UNDERMINE INDUSTRIAL STABILITY AND LABOR PEACE WHILE FAILING TO MEANINGFULLY ADVANCE EMPLOYEE FREE-CHOICE.

A. The Board’s History Shows that a One- or Two-Year Contract Bar Is Too Short, but that the Three-Year Bar Strikes the Right Balance Between Promoting Industrial Stability and Accommodating Employee Free Choice.

The contract bar is integral to achieving industrial stability and labor peace, one of the most important statutory purposes of the Act. *See* 29 U.S.C. § 151 (identifying reducing industrial strife as a central purpose of the Act). The contract bar is essential to motivating

bargaining parties to settle collective bargaining disputes and enter into contracts because the contract bar ensures stability and peace for the duration of the contract. This has been shown by the Board's experience administering the Act.

In the early days of the Board's administration of the NLRA, the Board had not yet created the contract bar. During this period, collective bargaining agreements tended to be short, with a duration of about a year. For this reason, in 1938, the Board initially recognized a reasonable period of one year as the period of time that the contract bar would apply.¹

Collective bargaining agreements of only a year, however, proved undesirable to employers and unions alike. Bargaining parties found that collective bargaining was too expensive to engage in annually.² Accordingly, the bargaining parties began entering into increasingly longer contracts. Reflecting this trend, the Board began recognizing increasingly longer periods of time as reasonable periods for applying the contract bar.³ The Board expanded the reasonable period initially from one year, to two years, and even to five years.⁴ Finally, however, the Board settled on the current policy of recognizing a reasonable period of three years for applying the contract bar.⁵

In announcing the rule that now has been in place nearly 60 years, the Board explicitly acknowledged that it was moved by the "overwhelming" consensus of employees and unions, writing:

¹ *Superior Electrical Products Co.*, 6 N.L.R.B. 19 (1938).

² See Kevin J. Murphy, *Determinants of Contract Duration in Collective Bargaining Agreements*, 45 INDUS. & LAB. REL. REV. 352, (v. 2, 1992).

³ William P. Lemmer, *The Reasonable Duration of Collective Bargaining Agreements and the Contract-Bar Rule*, 41 Marquette L. Rev. 172, 173-75 (1957).

⁴ *Id.* (citing *Uxbridge Worsted Co., Inc.*, 60 N.L.R.B. 1395, 16 L.R.R.M. 55 (1945) (two-year contract bar); *General Motors Corp., Detroit Transmission Division*, 102 N.L.R.B. 1140 (1953) (five-year contract bar).

⁵ *Gen. Cable Corp.*, 139 NLRB 1123, 1125 (1962) (announcing the three-year bar as standard).

In adopting a 3-year rule we have heeded the appeals for a more extended contract-bar period presented in oral arguments, letters, telegrams, memorandums, and briefs by the overwhelming majority of labor and management representatives. Indeed, this substantially unified stand of both labor and management has been a most important consideration in arriving at our decision.

Gen. Cable Corp., 139 NLRB at 1123, 1125 (1962).

Since that decision in 1962, the regulated parties essentially affirmed the Board's policy by making three years the effective standard length for collective bargaining agreements in virtually all sectors nationwide.⁶

In light of the Board's experience with the contract bar, there is no reason to expand or abridge the reasonable period for applying the contract bar. The Board's experience teaches that the absence of a contract bar is too chaotic and expensive for employers and unions and fails to provide sufficient stability and labor peace. Likewise, one- and two-year agreements have proven too short. That was the lesson of the Board's prior experiments with shorter bars. The Board's history shows that the Board arrived at the three-year contract bar due to the overwhelming consensus of the regulated parties. The Board should not ignore that history now.

Although the Board has a mandate to protect employee free choice, it has a contrary mandate to promote industrial stability and labor peace. The Board's history shows that a shorter contract bar period provides too little stability, which is why the three-year period now prevails.

⁶ Lance A. Compa, *An overview of collective bargaining in the United States*, from *EL DERECHO A LA NEGOCIACIÓN COLECTIVA: MONOGRAFÍAS DE TEMAS LABORALES*, 91-98 (J. G. Hernández, Ed., 2014).

B. The Board's History Shows That There Is No Increased Demand from Employees for Greater Opportunity for Rival Union Petitions or Decertification Elections That Would Justify a Disruption to Industrial Stability by Weakening the Contract Bar.

Because eliminating or weakening the contract bar would erode industrial stability, it is critical to see whether this action would materially advance any other major purposes of the Act. In adopting the three-year contract bar, the Board considered the impact on employee free-choice, but it found that those considerations were minimal, writing:

We are mindful that the 3-year rule will delay for 1 year the time when specific groups of employees desiring an election will be afforded an opportunity to exercise their right under the Act freely to choose bargaining representatives. And if, as some have urged, we were at present to cause further delay by expanding the bar period to more than 3 years, stability of industrial relations would in our judgment be so heavily weighted against employee freedom of choice as to create an inequitable imbalance. We think, however, that an added delay of but 1 year is relatively slight and fully warranted when viewed in the light of countervailing considerations, including the necessity to introduce insofar as our contract-bar rules may do so, a greater measure of stability of labor relations into our industrial communities as a whole to help stabilize in turn our present American economy.

Gen. Cable Corp., 139 NLRB at 1125.

The only statutory benefit to eliminating or weakening the contract bar would be to increase employee freedom of choice by removing an obstacle to employees requesting an election either to decertify the current representative or to select a rival union as a representative. So the critical question is whether the Board's historic experience suggests that the contract bar is depressing a desire by employees either to run decertification elections or elections with more than one union.

A review of the Board's historic experience strongly supports the conclusion that the three-year contract bar is not acting to suppress unmet employee desire either to decertify their unions or to elect a rival union. As shown by the Table below, the rate of decertification elections has been extremely stable for the past 40 years.

TABLE 1⁷

Frequency of RD Petitions				
Fiscal Year	Elections	RD Elections	Percentage	
1980	8350	1190	14%	
1990	4289	587	14%	
2000	3474	390	11%	
2010	1440	197	14%	
2011	1595	240	15%	
2012	1468	211	14%	
2013	1447	197	14%	
2014	1453	180	12%	
2015	1687	175	10%	
2016	1496	172	11%	
2017	1391	172	12%	
2018	1250	173	14%	
2019	1225	157	13%	

If anything, the Board’s historic experience shows a slight decline in interest in decertification elections in the most recent five years. In the past 40 years, there is no evidence of a significant unmet demand justifying greater policy accommodation.

Likewise, as shown in Table 2 below, multiple-union elections have been relatively rare for the past forty years. Since 1980, the percentage of NLRB elections involving more than one union has hovered around 5% of elections.

TABLE 2⁸

Frequency of Multi-Union Elections				
Fiscal Year	Elections	>1 Union Elec.	Percentage	
1980	8358	411	5%	

⁷ The data in Table 1 was pulled from the NLRB’s Annual Election Reports for Fiscal Years 2010-2019, and from Table 11 of its Annual Reports for years 1980-2009.

⁸ The data in Table 2 was pulled from the NLRB’s Annual Election Reports for Fiscal Years 2010-2019, and from Table 13 of its Annual Reports for years 1980-2009.

1990	4289	138	3%
2000	3474	163	5%
2010	1839	117	6%
2019	1225	49	4%

Again, as with decertification elections, there is nothing in the Board’s historic experience supporting the contention that the contract bar is suppressing a desire by U.S. employees for elections involving rival unions. Nor is there any evidence of a change in circumstances that would justify a change in the Board’s nearly 60-year policy.

This evidence is critical because the only statutory purpose that could support an effort by the Board to erode industrial stability and labor peace would be a need to increase employee choice. The Board’s historic experience supports the conclusion that there is no unmet employee demand for greater opportunity to file decertification petitions or to consider rival unions.

Weakening or eliminating the contract bar, therefore, would not materially advance the Board’s interest in prompting employee free choice, although it would do significant damage to industrial stability and labor peace. Based upon this record, the three-year contract bar should be retained, and the contract bar should not be weakened.

III. IN EVALUATING THE IMPACT ON INDUSTRIAL STABILITY OF CHANGING THE LENGTH OF THE CONTRACT BAR, ONLY INPUT IS FROM UNIONIZED EMPLOYERS, UNIONIZED EMPLOYEES, AND UNIONS IS RELEVANT, AND NOT FROM NON-UNION COMPANIES OR EMPLOYEES WHO ARE NOT AFFECTED BY AND HAVE NO INTEREST IN THE LENGTH OF THE CONTRACT BAR.

In 1962, when the Board established three-years as the maximum duration of the contract bar, the Board relied heavily on input from the regulated parties, i.e., from employers, employees and unions. In determining whether to retain or change the current length of the contract bar, the Board should again rely on input from the regulated parties, but it is critical to correctly identify who the regulated parties are. In the context of contract bar policy, the regulated parties are

unionized employers, unionized employees, and unions. Non-union firms and their employees are not affected by the contract bar, no matter its length, so their input on the appropriate length of the contract bar should not be given significant weight.

The conclusion that input from non-union firms and employees should not be given weight applies both to the consideration of the impact of the contract bar on industrial stability and its impact upon employee free-choice. The contract bar, by definition, only impacts unionized firms and employees. Only unionized firms must consider the costs of collective bargaining negotiations and how often they want to undertake these costs. Only unionized firms must consider the risks of locking in employment expenses through a longer contract versus maintaining flexibility through shorter contracts. Only unionized firms must evaluate their own need to lock in guaranteed labor peace for a certain period of time, and what they are willing to pay to obtain that benefit.

Non-union firms and trade associations that primarily represent non-union firms have no stake in these issues. They simply are not impacted by them. They do not engage in collective bargaining negotiations, so they do not have to consider how often they are willing to accept the costs of negotiating such agreements. They do not lock in employment costs for years into the future through such agreements, so they do not need to consider what length of an agreement would be prudent in light of current economic trends. The views of non-union firms and employees are not informed by real experience, and they are not motivated by real stakes. At best, their views are speculative and academic, but they are not likely to reflect the true impact of a change in the contract bar upon industrial stability, especially to the degree that they diverge from the views of the truly regulated parties, i.e., unionized firms and unions. As a result, their

views should not be given significant weight as compared to those of unionized firms, employees, and unions with respect to industrial stability.

Likewise, the contract bar affects employee freedom-of-choice only for unionized employees, but not for employees at non-union firms. Employees of non-union firms are not subject to the contract bar. While these employees theoretically could organize and arrive at a collective bargaining agreement with their employers, those events would occur in the future. Consequently, the views of employees of non-union firms regarding the contract bar would be based upon speculation and are not informed by real experience. These considerations counsel for not giving the views of employees of non-union firms significant weight in determining the length of the contract bar.

When considering the views of the regulated parties, i.e., unionized employers, unions, and employees of unionized employers, it is clear that the regulated parties overwhelmingly endorse the three-year contract bar. This is demonstrated most powerfully by the fact that most collective bargaining agreements have a duration of three-years. Each collective bargaining agreement is a voluntary choice made by the bargaining parties. The fact that three-year agreements predominate nationally is the clearest sign that it is the appropriate duration for collective bargaining agreements as determined by the regulated parties.

IV. BECAUSE THE BOARD LACKS AUTHORITY TO INTERPRET A CBA OUTSIDE OF AN UNFAIR LABOR PRACTICE PROCEDURE, IT SHOULD FIND A UNION-SECURITY CLAUSE UNLAWFUL IN A REPRESENTATION PROCEEDING ONLY WHERE THE CLAUSE IS CLEARLY AND UNMISTAKABLY UNLAWFUL.

As the DC Circuit has written, “under federal labor laws, arbitrators and the courts, rather than the Board, are the primary sources of contract interpretation.” *N.L.R.B. v. U.S. Postal Serv.*, 8 F.3d 832, 837 (D.C. Cir. 1993). The exception is that “[t]he Board ... has the authority to interpret collective bargaining agreements in order to resolve unfair labor practice cases. *Id.*

(citing *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 427–30, 87 S.Ct. 559, 563–65, 17 L.Ed.2d 486 (1967)).

This limit on the Board’s role in interpreting CBAs is further reflected in its deferral doctrines under which it will defer processing charges that centrally involve contract interpretation to the arbitration process contained in a CBA, *see Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971), and then defer to the results of arbitration. *See Hammontree v. NLRB*, 925 F.2d 1486, 1490–91 (D.C.Cir.1991) (en banc) (discussing Board’s deference policies).

For these reasons, the Board has very limited authority to interpret a CBA in the context of a representation case. The Board’s reason for caution should be amplified by the fact that, in a representation case, the Board usually will be operating *without a factual record* to assist the Board in ascertaining the intent of the parties as reflected by the CBA’s terms.

Another consideration is that the allegation that the parties have entered into an unlawful union-security clause is an unfair labor practice. The Board traditionally has sought to avoid addressing the merits of a potential unfair labor practice in the context of a representation case. For this reason, it is best that, in a representation case, the Board only find a union-security unlawful if it is beyond doubt or peradventure that the clause will be found unlawful in an unfair labor practice proceeding. If there are any grounds for doubting the unlawfulness of the union-security clause, then the Board should not venture to make a determination in the representation case, where it lacks a record and is not able to afford due process to the bargaining parties.

These considerations have supported and continue to support the Board’s policy of not making a finding that a union-security clause is unlawful in the context of a representation

proceeding unless the unlawfulness of the clause is plain and unmistakable on the face of the agreement.⁹ The Board should adhere to this policy.

V. THE REGIONAL DIRECTOR’S FINDING THAT THE UNION-SECURITY CLAUSE WAS UNLAWFUL WAS TENDENTIOUS, IT DID NOT MEET THE BOARD’S STANDARD FOR WITHHOLDING THE CONTRACT BAR, AND IT SHOULD BE REVERSED.

In the present case, the Regional Director strayed far afield of the Board’s policy from *Paragon Products* by straining to interpret the union-security clause so as to find it unlawful. The fact that the Regional Director had to rely on a provision outside of the union-security clause itself in order to arrive at the unlawful interpretation by itself is evidence that the clause is not plainly or unmistakably unlawful. Rather than being unmistakable, the Regional Director’s interpretation instead was improbable. For instance, it is hard to discern a realistic motivation for why the employer and the union would agree to a union-security provision that retroactively put current employees in violation of the clause and could subject those employees to large retroactive liabilities. A provision like the one that resulted from the Regional Director’s interpretation would be harmful both to the employer’s workforce and would be obnoxious to the Union’s bargaining unit members. Moreover, because enforcing the union-security provision as interpreted by the Regional Director would have been punitive to the employees by subjecting them to retroactive liabilities, the likelihood is that the parties did not understand, nor implement or enforce the clause in this manner that the Regional Director interpreted it, which would tend to undermine the Regional Director’s interpretation of the clause. Problematically, however,

⁹ *Paragon Products Corp.*, 134 NLRB 662, 666 (1962) (“[O]nly those contracts containing a union-security provision which is clearly unlawful on its face . . . may not bar a representation election. . . . 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).”)

because this issue was determined in the absence of a factual record, evidence such as the way that the parties understood and enforced the clause was not before the Regional Director.

In sum, the Regional Director's decision misapplied the *Paragon Products* standard and should be reversed.

CONCLUSION

Based upon the foregoing, the Board should retain the three-year contract bar that has served employers, employees, and unions well for nearly 60 years. The Board also should reverse the Regional Director's tendentious interpretation of the union-security clause under which he found that the employer and union agreed to make incumbent employees retroactively liable for dues payments to the union.

Dated: September 23, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the foregoing BRIEF AMICUS CURIAE was served on the parties identified below by Regular Mail:

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