

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON, D.C.**

**MOUNTAIRE FARMS, INC.  
Employer**

**And**

**Case 05-RD-256888**

**OSCAR CRUZ SOSA  
Petitioner  
And**

**UNITED FOOD AND COMMERCIAL WORKERS  
UNION, LOCAL 27, a/w UNITED FOOD AND  
COMMERCIAL WORKERS INTERNATIONAL  
UNION, AFL-CIO  
Union**

**THE GENERAL COUNSEL'S  
AMICUS BRIEF TO  
THE NATIONAL LABOR RELATIONS BOARD**

In response to the National Labor Relations Board's July 7, 2020<sup>1</sup> request for *amicus* briefs with respect to the above-captioned matter, the General Counsel of the National Labor Relations Board ("NLRB" or the "Agency") respectfully submits this *amicus* brief.

**I. PROCEDURAL HISTORY AND INTRODUCTION**

On February 25, Petitioner Oscar Cruz filed a decertification petition with the

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<sup>1</sup> All remaining dates are in 2020, unless otherwise noted.

National Labor Relations Board (the “Board”) under Section 9(c) of the Act, seeking to decertify the United Food and Commercial Workers Union, Local 27 (the “Union”) as the collective-bargaining representative of approximately 800 employees employed by Mountaire Farms, Inc. (the “Employer”) at its poultry processing plant in Selbyville, Delaware. The parties had a collective-bargaining agreement effective from December 22, 2018 until December 21, 2023. On April 8, Sean R. Marshall, Regional Director of the Board’s Region 5, issued a Decision and Direction of Election (DDE) finding that the parties’ contract did not bar an election, inasmuch as the collective-bargaining agreement contained an unlawful union-security clause. *See, e.g., Paragon Products Corp.*, 134 NLRB 662, 666 (1961).

On June 23, the Board granted the Union’s request for review of the Regional Director’s DDE. On July 7, the Board issued a Notice and Invitation to File Briefs, which instructed the parties and interested *amici* to address whether the Board’s contract-bar doctrine should be rescinded, retained without modification, or retained with modifications.

The General Counsel responds to this invitation, as discussed below, by requesting that the Board (1) retain the contract-bar doctrine with modifications to the window periods for filing a representation petition with the Board, as long as the Board’s current blocking charge rule remains in effect; and (2) rescind the contract-bar doctrine if the current blocking charge rule is rescinded or deemed unenforceable. Specifically, the Board should preserve the three-year contract bar doctrine, but expand the duration of the window periods for filing representation petitions from 30 days to 90 days, assuming that the new blocking charge rule remains in effect.

## **II. THE BOARD'S CONTRACT-BAR DOCTRINE SHOULD BE RETAINED WITH AN EXPANDED WINDOW PERIOD**

### **A. The Contract-Bar Doctrine**

The current contract bar doctrine provides that certain collective-bargaining agreements may bar the Board's holding of an election in an appropriate unit of employees based upon an otherwise properly-filed representation petition except for a narrow 30-day window period toward the end of the contract. This doctrine developed in a far different era and in response to a far different situation than what exists today. From the 1930s to the mid-1960s, the seminal decisions in this area of law resolved conflicts between or among rival unions seeking to become the exclusive bargaining agent of the same unit of employees. The contract-bar doctrine decisions mainly addressed situations that rarely occur today—petitions by unions seeking to displace another union as exclusive bargaining representative of an existing bargaining unit. During the 1930s and 1940s, many unions were new and unfamiliar with the new Act, bargaining relationships were immature and unions routinely vied for representation of employees. Indeed, before the American Federation of Labor (AFL) and the Congress of Industrial Organizations (CIO) merged in 1955, they frequently appeared before the Board as rivals in representation proceedings. Today, by contrast, many representation petitions are of the decertification variety--filed by employees seeking to de-certify unions in order to not be represented by a labor organization

These differences in application of the doctrine, as well as other changes that have occurred in labor relationships over the past 85 years, warrant a review of the origins of the contract-bar doctrine, the issues it was developed to address and whether its current contours really respond to its current applications. Originally, the Board rejected the idea of a contract bar

in *New England Transp. Co.*, 1 NLRB 130, 136-39 (1936). In that case, the Board directed an election given the lack of clarity of majority status and whether the agreements were binding, stating: “The whole process of collective bargaining and unrestricted choice of representatives assumes the freedom of the employees to change their representatives, while at the same time continuing the existing agreements under which the representatives must function.” *Id.* at 138. The Board next addressed the issue in *Columbia Broadcasting System Inc.*, 8 NLRB 508 (1938), in which it directed an election where the petition had been filed after the first year of a five-year contract, finding that the “contract constitutes no bar to an investigation or certification of representatives.” Again, the Board found that where a question as to the representation of employees has arisen, it would be “contrary to the policies and purposes of the Act to refuse to order an election or certify representatives on the basis of a contract which has already been in effect for . . . more than a year.” *Id.* at 511-12. In 1939, the Board dismissed a representation petition filed during the pendency of a one-year contract subject to renewal of a filing “at a reasonable time before the expiration of the contract now existing.” *See National Sugar Ref. Co.*, 10 NLRB 1410 (1939). In so ruling, the Board first announced a one-year contract bar. *See* FOURTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD at 74-75 (1939) (in *National Sugar Ref. Co.*, Board pioneered contract bar in the “interest of the stabilization of industrial relations,” while also, in *Columbia Broadcasting System, Inc.*, 8 NLRB 508 (1938), holding that a bar longer than a year would place “undue restriction on the selection of representatives by employees”). The objective of the one-year collective-bargaining agreement bar to an election was to achieve a balance between industrial stability and employee freedom of choice.

As discussed above, the Board first announced a one-year contract-bar in *National Sugar Ref. Co.*, 10 NLRB 1410 (1939), but later expanded it to two years in *Reed Roller Bit Company*, 72 NLRB 927 (1947), and then further extended the contract bar to three years in *General Cable Corp.*, 139 NLRB 1123 (1962). In the decisions prior to *General Cable Corp.*, the Board first analyzed whether the contract duration was reasonable and then whether its length was customary to the industry to determine whether it should act as a bar to an election.<sup>2</sup> This balanced the sometimes conflicting interests of “[s]tabilizing labor relations for the duration of a contract secured through bona fide bargaining, and protecting the exercise by employees of full freedom of designation of representatives of their own choosing.” *General Motors Corporation Detroit Trans. Div.*, 102 NLRB 1140, 1142 (1953).

In *Pacific Coast Association of Pulp and Paper, Etc.*, 121 NLRB 990 (1958), the Board ultimately de-linked its contract-bar determination from an analysis of the reasonableness of contract duration based on industrial standards to a two-year contract-bar length even if the contract exceeded two years. In *General Cable Corp.*, the Board adopted the same reasoning as in *Pacific Coast*, but lengthened the contract bar duration to three years based on a U.S. Department of Labor report, stating that “[a contract] duration in excess of 2 years became, by 1961, the majority practice[]” as well as other factors, in its view, favoring “a greater adherence to already chosen bargaining representatives, reliance on the agreed-upon law of existing contracts and recourse to remedies proffered” within the existing collective bargaining

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<sup>2</sup> During 1953, the Board issued three decisions permitting a five-year contract-bar because a substantial segment of the industries concerned had five-year contract terms. See *General Motors Corporation Detroit Trans. Div.*, 102 NLRB 1140, 1143 (1953) (holding that “reasonableness of contract duration for contract-bar purposes [is determined] on the basis of whether a substantial part of the industry is covered by contracts of a similar term”); *Allis Chalmers Manufacturing Company*, 102 NLRB 1135 (1953); and *Bendix Products Division*, 102 NLRB 1137 (1953).

relationship. *General Cable Corp.*, 139 NLRB at 1126, 1127 n. 12. Among the factors cited by the Board in favor of a contract bar was the then recent passage by the AFL-CIO of a “no-raid” code at its December 1961 convention and “the desirability of discouraging raids among unions” and the recent passage of the Landrum-Griffin Act to counter undemocratic and corrupt union practices. The Board declined to expand the contract bar beyond three years because to do so would so heavily weight stability of industrial relations “against employee freedom of choice so as to create an inequitable imbalance.” *Id.* at 1125; *see also Reed Roller Bit Company*, 72 NLRB at 929 (“we have repeatedly held that employees are entitled to change their representatives, if they so desire, at reasonable intervals”); *Pacific Coast Ass’n. of Pulp & Paper, Etc.*, 121 NLRB at 991.

Although the Board frequently discusses those dual policy objectives with respect to the bar, there are also less discussed unintended, deleterious consequences of the doctrine. The doctrine also protects the retention of unions that may have lost the support of unit employees or which have agreed to terms and conditions of employment that do not reflect the desires of a majority of unit employees. For example, a union may accept less valuable contract terms in order to secure the protection the contract bar would provide against decertification and rival union petitions.<sup>3</sup> Thus, the very structure of the contract bar doctrine lends itself to placing union institutional interests over the interests of the employees they represent—employees who have little control over the parties’ bargaining strategy and whose rights are largely left in the trust of the Board.

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<sup>3</sup> This, of course, excludes those situations involving a premature extension, where the contract would not serve as a bar. *See AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES* at 105 (2017).

In creating the contract-bar doctrine and in expanding the bar period to its current duration, the Board does not appear to have relied on empirical evidence of actual labor relations stability resulting from the bar or its length. The current bar's length of three years represents a somewhat arbitrary number that was formulated to conform to a non-empirically based notion that the duration of a typical collective-bargaining agreement in the early 1960s was three years, and thus such a bar length would protect virtually the entire contract period.

In most of its decisions fashioning this particular doctrine, the Board was faced with a representation case petition filed by a labor organization seeking to displace another labor organization. The Board was thus reacting to and attempting to minimize the industrial instability caused by the frequent filing of petitions by unions attempting to displace other unions. The Board thus admittedly lengthened the bar to give greater protection to incumbent unions in the name of industrial stability over the interests of employee free choice. However, the Board has not considered that this same contract bar doctrine developed between the 1930s to 1960s to address union raiding situations is currently being applied primarily to employee-filed decertification election petitions. In fact, the union raiding situation has become a rarity. NLRB records reveal that in the previous 10 years, just 13 representation petitions were held in abeyance by Regional Directors pending the outcome of Article XX of the AFL-CIO "no-raid" proceedings. Thus, in the current context, the original need for the bar no longer exists.

In this context, a three-year bar is more likely to create "an inequitable imbalance" against employee freedom of choice especially where petitions have been subject to blocking charges that have prevented the direction of an election, sometimes for years. The combination of the contract bar doctrine and the Board's past blocking charge practices have had the effect of delaying substantially the direction of election petitions for much longer than the three-year

period contemplated by the contract bar. The Board's current blocking charge rule ameliorates this problem by allowing the direction of an election notwithstanding the filing of a blocking charge. Thus, to the extent that the current blocking charge rule remains in effect, the three-year contract bar need not be rescinded as it would not unduly impact employee free choice.

However, if the current Board blocking charge rule is rescinded or struck down and a blocking charge can prevent the direction of an election, then the contract bar should be rescinded because employee free choice in the selection of a collective-bargaining representative is severely and inequitably impacted by the delay caused both by the application of a contract bar and a blocking charge. In such case, the contract bar should be eliminated.

Given the absence of empirical evidence concerning the contract bar doctrine, it is also unknown whether rescinding the doctrine would diminish industrial stability and increase employee free choice. Notwithstanding the questionable empirical efficacy of the contract bar, and its sometimes negative effects, the doctrine has been in place for more than 50 years and is relied on by employers and unions which have fashioned their labor relations strategies on it. Thus, even if the doctrine intrinsically did not create industrial stability, the fact of having this bright line rule in and of itself has created its own industrial stability, by providing the interested parties legal guidelines and expectations on the duration of the protected contract period so that they may formulate their actions accordingly. Thus, in the absence of evidence that the applicable policy considerations would be better served by rescission of the bar doctrine, the General Counsel recommends retaining the three-year contract bar rule, though it is not a perfect one, because of its familiarity and the public's reliance on it, only if the Board's current blocking charge rule remains law. If the current blocking charge rule is eliminated, the Board should

conclude that the contract bar rule should be rescinded as unnecessarily delaying the ability of employees to exercise their rights of free choice through a Board directed election.

### **B. Window Periods and Duration**

Due to the labor-management community's longstanding reliance on the contract bar, the Board should retain the bar, but with modifications to the window periods. As set forth more fully below, the Board should expand the current 90-60 day window period (120-90 for healthcare units) and return to the 150-60 day period during which petitions will be entertained for non-healthcare units. Similarly, the window would be 180-90 for healthcare units. Critically, two key features of the contract bar doctrine are the 30-day window period toward the end of the contract during which a representation case or decertification petition will be entertained and the duration any given contract will serve as a bar to processing a petition. The General Counsel urges the Board to expand the window period.

In *Deluxe Metal Furniture Company*, 121 NLRB 995 (1958), the Board first imposed a window period, 150-60 days prior to a contract's expiration, during which an employee or rival union could file a decertification or representation petition. The Board reasoned that the "establishment of a specific period" for filing a petition was "desirable because it will preserve as much time as possible during the life of a contract free from the disruption caused by organizational activities." *Id.* at 999. By retaining a 60-day insulated period during which petitions would not be entertained immediately prior to contract expiration, the Board hoped to "prevent the threat of overhanging rivalry and uncertainty during the bargaining period." *Id.* at 1001. In forming the "window" and "insulated" periods, the Board was again mindful of the "oftentimes conflicting policy considerations of fostering stability in labor relations while assuring conditions conducive to the exercise of free choice by employees." *Id.* at 997.

In *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000 (1962), the Board drastically reduced the window period from 150-60 days to 90-60 days.<sup>4</sup> In doing so, the Board relied entirely on the more expedited nature of its elections at that time, stemming from its decision in 1961 to delegate its election powers under Section 9 to Regional Directors. *Id.* at 1001. Thus, the Board stated, when petitions were filed early in the 150-60 day period, “a valid, existing bargaining relationship may be unduly disturbed by a change in representatives ... well in advance of the terminal date of such existing contract.” *Id.* The Board did not cite to any evidence in support of this statement and did not evaluate, at all, the impact of a shorter window period on the employees’ freedom to choose a collective-bargaining representative. Indeed, shortening the window period for filing a petition to a 30-day period from a 90-day period can have only one effect—to deter such filings.

Prioritizing the Board’s efficiency over the important public policy of employee free choice was misplaced, and also itself undermines labor stability. There can be no labor stability in retaining as a certified representative a labor organization that has lost majority support, due to a missed filing deadline created by an unduly short window period. While the General Counsel would not modify the current 60-day insulated period, as it provides critical time just before contract expiration for parties, free from uncertainty, to bargain over a new contract, he would urge the Board to overrule *Leonard Wholesale Meats, Inc.*, and return to the 150-60 day window period announced in *Deluxe Metal Furniture Company*. Similarly, the 90-day period would also be available for employees in healthcare facilities, simply expanded to 180-90 rather than the current 120-90.

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<sup>4</sup> Interestingly, this was a case involving a decertification petition filed by an employee rather than a labor organization.

Prior to *Leonard*, the Board had repeatedly stressed the importance of accommodating both labor relations stability and employee free choice, and treated the two as equally important objectives. However, *Leonard's* reduction of the window length did not account for shortening the time period during which employees could exercise free choice and was entirely premised on the greater speed with which the Board was supposed to be able to conduct elections. However, as discussed below, this greater speed of elections never came to pass.

The Board in *Leonard* failed to account for its then-existent blocking charge policy (which was changed as of July 31, 2020, *see* Section 103.20 of the Board's Rules and Regulations), that allowed elections to be indefinitely delayed by the filing of an unfair labor practice charge. *See Bishop v. NLRB*, 502 F.2d 1024, 1028 (5th Cir. 1974) (the Board's "blocking charge" rule was established by *U.S. Coal & Coke*, 3 NLRB 398 (1937)). The greater efficiency of Board elections intended by the delegation of Section 9 authority to Regional Directors was frequently frustrated by unions' ability to delay elections through blocking charges. Clearly any perceived advantage of Regional Directors being able to facilitate elections quickly after the petition is filed in a small window period—to the extent that existed at all—was effectively eviscerated by a charge blocking the election, especially considering the necessary time it takes the Regional office to perform a complete investigation of that blocking charge and facilitate a resolution. Instead, relegating petitioners to a small 30-day window period premised on the stated objective of not wanting to unduly disturb an existing bargaining relationship, substantially affected the careful balance and resulted in undue interference with employees' Section 7 rights to change their bargaining representative or eliminate it entirely—a careful balance only the Board is in a position to make. Yet no apparent consideration was given to this issue when the Board shrank the window period.

On the other hand, expanding the window period would increase the likelihood that unfair labor practice charges, like decertification or rival union petitions, will be filed and resolved well in advance of the 60-day insulated period, thus ensuring unhindered bargaining during that critical time. Critical bargaining between parties to an expiring contract often occurs during the 60-day insulated period preceding contract expiration (which is consistent with Section 8(d)(1)'s 60-day notice requirement for a party desiring to modify a contract). Therefore, decertification or rival union petitions filed well before the 60-day insulated period would give the parties more certainty during bargaining just before contract expiration, resulting in more efficient and successful bargaining, by resolving any question concerning representation well in advance of the critical bargaining period. Conversely, petitions filed closer to the 60-day insulated period could prolong the question concerning representation, possibly even resulting in an election occurring during the insulated period itself, thus placing the parties in a state of uncertainty at an otherwise crucial time intended for bargaining.

Additionally, as a practical matter, allowing employees, who cannot be presumed to have detailed knowledge of the contract bar rules, only one 30-day period every three years when they may attempt decertification or to select a different union to represent them is scant opportunity to exercise these important rights, guaranteed to them by Section 7, of choosing whether or not to be represented by a labor union or to change their representation. By tripling the length of the window period and returning to *Deluxe Metal*, employees will have a far greater opportunity to exercise those rights. Moreover, there is little reason to believe that an expanded 90-day window period will greatly disrupt labor relations stability. Rather, retention of a window period merely ensures that most organizing activity will occur during that period. Additionally, retaining the

60-day insulated period will safeguard the ability of the parties to bargain for a new contract if a decertification or rival petition is defeated.

### C. Contract Bar Quality

In order for a collective bargaining agreement to bar an election, it must meet certain requirements.<sup>5</sup> The General Counsel does not propose making any modifications to doctrinal law pursuant to which contracts may lose their bar quality. Indeed, in this very case, the contract bar doctrine would have barred an election but for the Regional Director's correct finding that the contract lost its bar quality by virtue of containing an unlawful union security clause. Requiring contracts to conform to the various requirements set forth above in note 5, serves to ensure the doctrine's present limitations to contracts the Board would not otherwise wish to stand in the way of an election.

While it is true that there is much detail and nuance as to whether a particular contract retains or loses bar quality, again, such only underscores the critical role the Board plays in deciphering difficult issues -- certainly not limited to these -- where the delineations are often more "nice than obvious." *Electrical Workers Local 761 v NLRB*, 366 U.S. 667, 674 (1961).

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<sup>5</sup> See, e.g., *Corrections Corp. of Am.*, 327 NLRB 577, 577 (1999) (no bar quality for a contract covering an inappropriate unit, for example one covering a mixed guard/non-guard unit); *Empire Screen Printing, Inc.*, 249 NLRB 718, 718 (1980) (no bar quality for oral agreements not reduced to writing, in part, because they do not satisfy requirement that agreement be signed by all parties); *Bob's Big Boy Family Restaurants*, 235 NLRB 1227, 1228 (1978) (no bar quality for "members only" contracts which limit their application exclusively to union members); *Paragon Products Corp.*, 134 NLRB 662, 666-67 (1961) (no bar quality for contracts containing a union security clause clearly unlawful on its face or found to be unlawful in an unfair labor practice proceeding); *Hershey Chocolate Corp.*, 121 NLRB 901, 905-06, 911 (1958) (no bar quality for contract in effect at the time the union suffers a schism or becomes defunct); *American Broadcasting Co.*, 114 NLRB 7, 8 (1956) (no bar quality for contracts not ratified where ratification is made a condition precedent to contractual validity by express contractual provision); *Tri State Transportation Co.*, 179 NLRB 310 (1969) (no bar quality where employer has not applied the contract to employees covered and the union has not sought to administer it to them).

### III. CONCLUSION

Accordingly, the General Counsel urges the Board to retain the three-year contract bar rule only if the Board's blocking charge rule remains law, rescind the contract-bar doctrine if the blocking charge rule is struck down, overrule *Leonard Wholesale Meats, Inc.*, and return to the 90-day window period originally announced in *Deluxe Metal Furniture Company* if the contract bar doctrine is retained. This 90-day period would apply to both industrial units as well as those in healthcare institutions (180-90 applicable in the latter situation). The 90-day period most appropriately balances the dual policy objectives of labor stability and employee free choice. The General Counsel does not otherwise recommend modifying the contract bar doctrine.

Respectfully submitted,

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Dated: October 7, 2020

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Brief of the General Counsel in Case 05-RD-256888 was electronically filed via NLRB E-Filing System with the National Labor Relations Board and served in the manner indicated to the parties listed below on this 7th of October, 2020.

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