UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

AMICUS CURIE BRIEF

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STATEMENT OF INTEREST OF *AMICUS CURIE*

The University of Wisconsin-Madison's School for Workers, founded in 1926 to serve the needs of working people, is the nation's oldest university-run labor education program. The program's mission is to advance the empowerment of working people, labor organizations, and community partners through teaching, research, and service.

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As provided in the School for Workers' mission statement:

> Faculty at the School for Workers are personally and professionally committed to help workers solve problems and realize opportunities in the workplace. We support efforts to raise living standards, increase employment security, improve health care and retirement security, secure safe and healthy workplaces, achieve due process, respect and democracy in the workplace, and revitalize our economic and political institutions. We support unions and the collective bargaining process as essential means for the pursuit of these goals.

In furtherance of this mission, the School for Workers supports the intent and purpose of the National Labor Relations Act ("the NLRA" or "the Act"), including the promotion of collective bargaining and stability in labor-management relations. Changes to the contract bar doctrine would diminish these goals. As such, the authors object to changes to the doctrine.

I. History and Importance of the Contract Bar Doctrine

The Board's contract bar doctrine is a well-established board doctrine dating back to 1939.[1] The Board developed the doctrine to protect newly-formed union's contractual rights, encourage bargaining between existing unions and their employers, and to effectuate the objectives of the Act by encouraging and maintaining industrial stability.[2] Because it serves the same purpose today, the contract bar doctrine should not be modified or rescinded by the Board.

The contract bar doctrine, in its current form, prohibits elections until a valid collective bargaining agreement, effective for a period of no longer than three years, is close to expiring.[3] The Board established the contract bar doctrine in an effort to achieve "a finer balance between the statutory policies of stability in labor relations and the exercise of free choice in the selection or change of bargaining representatives."[4]

The contract bar doctrine has existed for almost sixty years, and though it has been changed multiple times to further fine-tune the balance between an employee's freedom of choice and contractual stability, it has remained largely unquestioned as a necessary doctrine for stable collective bargaining agreements and labor relations between employers and unions. By providing the parties a stable period to bargain and administer a collective bargaining agreement, employers and unions have been able to set clear terms and conditions of employment, which prevents disruption in the workplace and stable labor relations generally.

Early changes to the contract bar doctrine matched developing industry standards. In *Pacific Coast Ass'n of Pulp & Paper Manufacturers*, 121 N.L.R.B. 990, 42 L.R.R.M. (BNA)

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[1] *See National Sugar Ref. Co*., 10 N.L.R.B. 1410, 1415 (1939).
[2] *Pacific Coast Ass'n of Pulp & Paper Manufacturers*, 121 N.L.R.B. 990, 42 L.R.R.M. (BNA) 1477, 1958 WL 13517 (1958); *Paragon Products Corp*., 134 N.L.R.B. 662, 49 L.R.R.M. (BNA) 1160, 1961 NLRB Dec. (CCH) P 10657, 1961 WL 15400 (1961).
[3] *Triple Canopy, Inc.*, 210 L.R.R.M. (BNA) ¶ 1121 (N.L.R.B. Nov. 14, 2017)
[4] *Appalachian Shale Products*, 121 NLRB 1160, 1161 (1958)

1477, 1958 WL 13517 (1958), for example, the contract bar was established as a two-year bar. This would later be expanded to three-years to account for the average length of contracts in union-heavy industries such as construction and to achieve greater labor stability. *Gen. Cable Corp.*, 139 NLRB 1123, 1125 (1962) (announcing the three-year bar as standard). The deciding Board mentioned that in adopting a 3-year rule, they heeded appeals for a more extended contract bar from the overwhelming majority of labor and management representatives. *Id.* The Board made this change, like many of the modifications to the contract bar doctrine, to ensure that the doctrine was able to fulfill its purpose to protect valid collective bargaining agreements and promote industrial stability without impeding on employee free choice. These purposes never changed and were, according to fifty years of settled law, never absent.

While the contract bar is not a statutory provision, it has received federal judicial approval[5] and has been approved by the Congress and the Supreme Court. Congress referenced the contract bar rule in 1959 when it amended the Act, excluding Section 8(f) construction industry agreements from application of the doctrine.[6] In 1986, the U.S. Supreme Court explicitly referred to the contract bar and its legitimacy, stating that "the basic purpose of the National Labor Relations Act is to preserve industrial peace" before citing to the contract bar doctrine as one such rule intended to encourage industrial peace and meaningful bargaining relationships.[7]

The contract bar doctrine is a mainstay of settled Board law and has existed for nearly sixty years. The system of collective bargaining and unionization relies on the doctrine, and the

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[5] *N. L. R. B. v. Local 3, Intern. Broth. of Elec. Workers*, AFL-CIO, 362 F.2d 232, 62 L.R.R.M. (BNA) 2384, 53 Lab. Cas. (CCH) P 11308 (2d Cir. 1966).
[6] The House Committee on Education and Labor Report No. 86-741 (1959).
[7] *N.L.R.B. v. Fin. Inst. Employees of Am., Local 1182, Chartered by United Food & Commercial Workers Int'l Union, AFL-CIO*, 475 U.S. 192, 208 (1986). *See also NLRB v. Financial Inst. Employees of America*, 474 U.S. 192 (1986).

current Board would be remiss to remove or modify the doctrine without a clear demonstration, not provided here, of the need to do so.

II. Statement of the Case

United Food and Commercial Workers Local 27 ("the Union") is the exclusive collective-bargaining representative of around 800 employees employed by Mountaire Farms, Inc. ("the Employer"), a poultry processing plant in Selbyville, Delaware.[8] On February 8, 2019, the Union and the Employer executed a collective bargaining agreement.[9] This collective bargaining agreement included a union-security clause that had remained unchanged in many successive contracts between the parties dating back to the 1970s.[10] The effective date of the collective bargaining agreement is December 22, 2018, and the Union and the Employer agreed that this collective bargaining agreement would remain in effect until December 21, 2023.[11] The agreement also provides a window period in which a challenge to the union's majority status may be made.

On February 22, 2020, Oscar Cruz Sosa ("the Petitioner") filed a petition with the National Labor Relations Board ("the Board") under Section 9(c) of the Act.[12] The Petitioner sought to decertify the Union as exclusive bargaining representative. The Regional Director for Region 5 conducted a hearing on March 10, 2020. On April 8, 2020, the Regional Director issued a Decision and Direction of Election, finding that the union-security clause was unlawful and therefore, the entirety of the contract did not bar the processing of the Petitioner's decertification petition.[13]

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[8] D&DE [June 10, 2020]
[9] Brief of United Food and Commercial Workers Local 27 [Aug. 21, 2020]
[10] Brief of Involved Party [Aug. 21, 2020]
[11] *Id.*
[12] *Id.*
[13] *Id.*

The Union filed a request for review with the Board on April 21, 2020, arguing that the Regional Director erred by finding that the collective bargaining agreement did not bar the petition. On June 23, 2020, the Board granted the Union's request for review, and on July 7, 2020, the Board issued a Notice and Invitation to File Briefs on the specific security clause issue in Mountaire Farms, Inc. as well as on the contract bar doctrine generally. On September 16, 2020, the Board extended the deadline for submitting *amicus* briefs.

III. ARGUMENT: The NLRB Should Retain the Contract Bar Doctrine as it Currently Exists as it Furthers the Purposes and Policies of the Act

A. The Contract Bar doctrine strikes the right balance between the goal of promoting labor relations stability and respecting employee choice as to representation.

The contract bar plays a key role in promoting private dispute resolution and preventing labor instability, which is one if not the most important statutory purposes of the Act. 29 U.S.C. § 151, which discusses the reasons for enacting the NLRA, states:

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce *by removing certain recognized sources of industrial strife and unrest*, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees." (emphasis added)

This purpose led to the creation of several doctrines, including that of the contract bar, which aided with establishing labor market stability and dispute resolution. Petitioner suggests that the Board should eliminate the contract bar doctrine because it is not mandated by statutory language. Yet, of course, as the Supreme Court recognized, the Board has the authority to interpret the Act through adjudication and has often developed doctrines and findings that clarify the statutory language.[14] *Am. Hosp. Ass'n v. N.L.R.B.*, 499 U.S. 606, 610 (1991).

[14] See NLRA Section 3, 29 U.S.C.§ 153.

The doctrine, in its initial development, was modified to further tweak the twin, and competing, considerations of the Act from which it is derived. For example, over time the Board has required that, to serve as a bar, the collective bargaining agreement "must contain substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship," and be signed by the parties before a petition is filed, "even though the parties consider it properly concluded and put into effect some or all of its provisions." *Appalachian Shale Products, Co.*, 121 N.L.R.B. at 1162–63.

The petitioner's depiction of the contract bar as something that not only does not serve the statutory purpose of the Act, but only serves to undermine employee choice, is false. The contract bar doctrine's purpose has always been to maintain labor peace and to encourage unions and employers to create a collective bargaining agreement that stabilizes relations between the parties. In addition, the Board has always been concerned with the contract bar's ability to limit employee choice, and the Board, early on, moved to modify it accordingly based on feedback from both employees and management. After such modifications were made, however, the contract bar doctrine became well-settled law for both employees and employers, and both parties rely on the contract bar doctrine when negotiating and creating meaningful bargaining relationships. To rescind the doctrine or to modify it needlessly would do away with years of careful consideration from the Board and the employees and employers who benefit from the balance between labor stability and choice.

In formulating the contract bar doctrine, and re-affirming it over the decades since, the Board has always been clear that it is statutorily charged with balancing employee freedom to choose representatives and the stability of labor relations that serves the overall purposes of the Act. *General Cable Corp.*, 139 NLRB 1123, 51 LRRM 1444 (1962). Having clear time frames in

which to challenge representation allows employees to do so in a way that does not disrupt new and burgeoning bargaining relationships between unions and employers. Having the ability to bargain free from threat and constant challenge permits unions to represent the bargaining unit members and negotiate the best terms and conditions that it can with the employer. This has throughout the last 58 years provided the best balance for all interests involved, and there is no reason to now conclude otherwise and change settled law.

B. The Contract Bar is well-established and its rescission would cause increase instability in labor relations.

Since the contract rule is so well established, it known and relied upon by employers, union and employees. In working with employees and employee representatives for decades, this brief's authors can assure the Board that employees are familiar with the open period and understand its limitations. Union and employers have relied upon the bar. Three years is the most common duration in collective bargaining agreements because of this rule. Changing policy now would unnecessarily inject uncertainty into the vast majority of bargaining relationships throughout the United States. Since this is of course the exact opposite of the intention of the NLRA, doing so would conflict with rather than further the purposes of the Act.

C. Retaining the contract bar doctrine protects employee choice.

The NLRA supports employees' free choice of collective bargaining representatives to promote the full flow of commerce, promote industrial peace and encourage peaceful dispute resolutions through collective bargaining. [15] Allowing for the free choice concerning their bargaining representative by a majority of bargaining unit employees is central to the national policy to "encourage the practice and procedure of collective bargaining."[16] Once the majority of

[15] NLRA Section 1, 29 U.S.C. § 151, LRMA amendments Section 1, 29 U.S.C. § 141.
[16] 29 U.S.C. § 151.

bargaining unit employees have exercised their choice, it must be respected for some period of time to allow the process of collective bargaining an opportunity to succeed.[17] The Board has long recognized that collective bargaining takes time and requires both commitment and compromise. The contract bar ensures that the majority's desire for collective bargaining is respected for a period of time that gives the parties a reasonable opportunity to reach an agreement. *See, e.g., Corally v Merrick Cent. Carburetor, Inc.,* 733 F.2d 248 (2d Cir. 1984), *Keller Plastics Eastern, Inc.,* 157 N.L.R.B. 583 (1966)(context of recognition bar). To eliminate that respect for negotiated agreement fails to honor the choice of the majority of the bargaining unit.

Petitioner suggests that allowing for election at any time would provide employees the greatest level of choice. This argument fails to recognize that the election and contract bars are intended to protect choices made by a majority of bargaining unit employees and protect employee choice. As the Board has stated "by that doctrine, the board seeks to afford the contracting parties and the employees a reasonable period of stability in their relationship without interruption and at the same time to afford the employees the opportunity, at reasonable times, to change or eliminate their bargaining representative if they wish to do so." *Montgomery Ward & Co.,* 137 N.L.R.B., 348 (1962).

Moreover, legislative intent in drafting the NLRA was to promote stability in the labor-management relationship to eliminate obstructions to the free flow of commerce.[18] Towards that end, Congress intended the NLRA to provide "orderly and peaceful procedures" to avoid interference with all parties' rights.[19] As the Board has articulated in the context of the election

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[17] *MGM Grand Hotel, Inc.* 329 NLRB 464, 466 (1999), *Keller Plastics,* 157 N.L.R.B 583 (1966).
[18] NLRA Section, 1 29 U.S.C. § 151.
[19] *Id.*

bar doctrine, baring elections more often than the one-year rule is intended to foster collective bargaining and industrial stability. *Chelsea Indus.*, 331 N.L.R.B. 1648 (2000). The Supreme Court has explained the Board and courts' enforcement of this rule in part by acknowledging that "in the political and business spheres, the choice of the voters in an election binds them for a fixed time. This promotes a sense of responsibility in the electorate and needed coherence in administration. These considerations are equally relevant to healthy labor relations." *Brooks v. NLRB*, 348 U.S. 96, 99 (1954).

D. Eliminating the contract bar would harm workers.

There is little question that income inequality is a serious problem at this time in the United States,[20] and the circumstances of COVID-19 has made workers more vulnerable than ever. According to the Pew Research Center, over the past 50 years, the highest-earning 20% of U.S. household earns over half of all U.S. income. The wealth gap between America's richest and poorer families more than doubled between 1989 and 2016, with the top 1% of earnings growing 15 times faster than others.[21] Workers' income has stagnated and inequality has increased as the percentage of employees covered by collective bargaining agreements has decreased.[22] Overall, workers covered by collective bargaining agreements earn 13.2% more

[20] *See, e.g.*, Income Inequality in American Continues its Inexorable Rise, Forbes (January 7, 2020), https://www.forbes.com/sites/andrewdepietro/2020/01/07/income-inequality-rise/#54adcecf22a8; Semega, *et. al.*, Income and Poverty in the United States: 2019 (September 15, 2020), https://www.census.gov/library/publications/2020/demo/p60-270.html.

[21] Katherine Schaffer, *6 Facts about Income Inequality in the U.S.*, Fact Tank, Pew Research Center (February 7, 2020), https://www.pewresearch.org/fact-tank/2020/02/07/6-facts-about-economic-inequality-in-the-u-s/#:~:text=Among%20the%20top%205%25%20of,for%20Economic%20Cooperation%20and%2, Elise Gould, *State of Working America*, Economic Policy Institute (February 20, 2020), https://www.epi.org/publication/swa-wages-2019/.

[22] Pedro Nicolaci da Costa, *U.S. Inequality, Wage Stagnation Tied to Falling Union Membership in the Private Sector*, Forbes (August 29, 2019), https://www.forbes.com/sites/pedrodacosta/2019/08/29/u-s-inequality-wage-stagnation-tied-to-falling-union-membership-in-the-private-sector/#34f0de0e7ff7

than non-union peers with similar education, occupation and experience.[23] Thus, it is abundantly clear that workers benefit economically through coverage by a collective bargaining agreement.

Yet eliminating or increasing the requirements needed for application of the contract bar increases the likelihood that workers will operate without the protections of a collective bargaining agreement. Without the certainty of an enforceable contract in place for some period of time, neither employers not unions will be as likely to enter into such agreements. Employers are likely to feel that entering into a contract provides no protection from continued labor instability, and unions will doubt that they have the ability to enforce adequately the terms and conditions of employment on behalf of their members. This decreases the union's negotiating power and destabilizes the relationship.

As iterated by the Supreme Court in the context of an employer successor case, the presumption of continued majority status enables the union to obtain and fairly administer an agreement without constant worry of losing support and being decertified. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38-39 (1987). This also removes incentive for employers to avoid good-faith bargaining. *Id.* Rather, the contract bar permits all parties to develop stable relationships and allows unions to pursue beneficial working conditions for its members in furtherance of industrial peace. *Id.* The bar promotes industrial peace by stabilizing for a reasonable term, the contractual relationship between employer and union. *See, e.g., NLRB v. Rock Bottom Stores*, 51 F.3d 366, 370 (2d Cir. 1995), *El Torito-La Fiesta Restaurant, Inc. v. NLRB*, 929 F.3d 490 (9th Cir. 1991). The Court of Appeals for the D.C. Circuit has emphasized that applying the contract bar when the contract is signed and only for a period of 3 years balances the goals of stabilizing the bargaining relationship and effectuating the employees'

[23] Heidi Shierholz, *Weakened Labor Movement Leads to Rising Economic Inequality*, Economic Policy Institute January 27, 2020), https://www.epi.org/blog/weakened-labor-movement-leads-to-rising-economic-inequality/

choice. *See Terrace Gardens Plaza v. NLRB*, 91 F.3d 222 (1996). It thus follows that without these protections, stability is lost and less agreements will be reached that protects employees' terms and conditions of employment.

Thus, the impact of eliminating or modifying the contract bar will harm workers. Workers have higher incomes and have greater access to health insurance and paid sick days than those not working pursuant to the terms of a collective bargaining agreement.[24] In other words, workers do better when working under the terms and conditions of a collective bargaining agreement. Current federal labor policy encourages "friendly" adjustment of industrial disputes, upon "a plane of equality of bargaining power between employers and employees," and thus provides collective bargaining agreements a stable and secure place in the U.S economy. *See NDK Corporation and UFCW Local 1150*, 278 NLRB 1035 (1986), *citing Gatliff Coal Co. v. Cox*, 152 F.2d 52 (6th Cir. 1945). Removing this stability is likely to decrease employees' access to improved conditions.

IV. Any of the Proposed Modifications Defeat the Purposes of the Contract Bar Doctrine and Would Destabilize Labor-Management Relations and the Bargaining Relationship.

The Board should only review well-established Board policies when there are compelling reasons to grant review."[25] The NLRB is not at liberty to ignore prior decisions and the policies established in said decisions without offering a reasoned justification for any departure from prior policies or practices. *51A C.J.S. Labor Relations § 820*. When the NLRB acts arbitrarily

[24] *See* Celine McNicolas, Lynn Rhinehard, Margaet Poydock, Heidi Shireholz, and Daniel Perez, *Why unions are good for workers – especially in a crisis like COVID-19*, Economic Policy Institute (August 25, 2020), https://www.epi.org/publication/why-unions-are-good-for-workers-especially-in-a-crisis-like-covid-19-12-policies-that-would-boost-worker-rights-safety-and-wages/

[25] NLRB Rules and Regulations, § 102.67 (c).

and departs from its own precedent without reasonable explanation it exceeds its authority and warrants a reversal of its decision. *Id.*

Nothing in the Regional Director's Decision and Direction of Election, nor the Board's decisions in the instant case suggest any compelling reasons to review and consider changes to the well-established contract bar doctrine. Neither the Regional Director nor the Board has alleged any problems with the current contract bar doctrine or cited to any evidence to suggest that a change is needed.[26] Without such evidence, the Board should not consider any modifications to the contract bar doctrine.

As explained above, the current contract bar doctrine, developed over a fifty-year time period, strikes the proper balance between promoting industrial stability and employee choice. *East Manufacturing Corporation,* 242 N.L.R.B. 5, 6 (1979). Without a reasonable period of time in which to bargain on behalf of bargaining unit members, the Union and the Employer will be unable to execute the employees' wishes by reaching agreement as to terms and conditions of employment. *See Fall River Dyeing,* 482 U.S. at 38-39.

A. The current contract requirements for application of the bar protect employee choice and provide stability in the labor relations.

Like much of the contract bar doctrine elements, the formal contractual requirements for application of the contract bar doctrine have been developed and applied for a period of several decades and accomplishes the necessary balance between stability and choice. The Board requires that a contract be in writing and signed by the parties to bar an election. As the Board stated, "these rules are simple, easily understood." In addition, the Board stated that "after more than 20 years of contract bar policy, the parties should be expected to adhere to this relatively

[26] Order dated June 23, 2020 Case No. 05-RD-256888; Notice and Invitation to File Briefs, Case No. 05-256888, dated July 7, 2020.

simple requirement." *Appalachian Shale Products Co.,* 121 NLRB 1160, 1162 (1958). This represents the Board's preference for a bright-line rule in representation cases to avoid prolonged litigation and resulting delays in realizing the employees' choice. *Hawaii Tribune-Herald & Pacific Media Workers Guild, Local 39521,* 2013 NLRB LEXIS 403, n. 7 (2013). Changing the formal requirements will create litigation where the Board policy has been to determine the employees' choice as efficiently as possible. As stated in *Appalachian Shale,* parties over the decades are familiar with the requirement of a written, signed agreement, and this has served to promote the twin policies of the bar doctrine and the Act itself.

B. Only contract clauses that clearly and unmistakably restrain employees' choice of bargaining representative should prevent application of the contract bar doctrine.

This case involves the union security clause agreed to by the parties. Without evidence or rationale, the Board expands the case to consider which allegedly unlawful contract clauses will prevent application of the contract bar doctrine. When the Board changes policy through adjudication, it must do so with "attention to the specific" circumstances in the case. *NLRB v. Bell Aerospace Co.,* 416 U.S. 256, 294 (1974). The Board exceeds its authority by proposing changes beyond the question at issue in the instant case.

Moreover, it is very well-established that only unlawful contract clauses that clearly act as a restraint on employees' choice of bargaining representative can prevent the application of the contract bar doctrine to prevent an election. *See Paragon Products Corp.,* 134 NLRB 662, 49 LRRM 1160 (1961). *See also Food Haulers, Inc.,* 136 NLRB 394 (1962)(unlawful hot cargo provision does not bar election because is it not a restraint on employee choice). "In every case in which the Board has found that a contract forfeited its bar status," the "illegality has been of a character to constrain employee freedom of choice in the selection of a bargaining

representation." *In re Four Seasons*, 332 N.L.R.B. 67, 70, 165 LRRM 1177 (2000) (dismissing allegation that an alleged unlawful super-seniority clause or 45-day probationary period could negate application of the bar doctrine). The contract bar doctrine has never required an entire review of the legality of collective bargaining provisions, nor should it. Unless the contract specifically denies the 30-day grace period for employees to join the union, absent here, the contract will not be held to be unlawful and should not bar an election. *Four Seasons Solar Products*, 332 NLRB 67, 165 LRRM 1177 (2000).[27]

C. The contract bar duration of three-years and current bar periods, including the window period and the insulation period serve to permit the employees' chosen representative the opportunity to bargaining on the employees' behalf.

The intention behind the open period and the insulation period is to permit employees who wish to raise objection to their current bargaining representative to do so, but also provide certainty around when and how this is done. In considering the contract bar period, decades ago the Board considered opinions from labor and employer representatives, to determine that a three-year duration reaches the best balance employee freedom and labor stability. *General Cable Corporation*, 139 NLRB 1123, 51 LRRM 1444 (1962). In that case, the Board emphasized the need for clarity on the rule, and labor, management and employees have had that clarity ever since. There has been no suggestion as to the need for a change.

Once the open period for challenge ends, the insulation period begins, permitting the union to then move on and negotiate with the employer on behalf of the bargaining unit members without threat of challenge and litigation. The key is that there must be a stable rule and process so that stability allows for the parties to reach agreement and have stable labor relations.[28] In the

[27] The Board has held that an unlawful provision that discriminates against employees because of their race would not operate as a bar to an election. *Pioneer Bus. Co.*, 140 NLRB 54, 51 LRRM 1546 (1962).
[28] Higgins, *The Developing Labor Law*, 10-49 (7th Ed. 2017).

case of the contract bar, the well-settled law for 58 years has provided both the opportunity for employee choice and stability in labor relations. *See General Cable Corp.,* 139 NLRB 1123 (1962), *Appalachian Shale*, 121 NLRB 1160, 1161 (1958). Contrary to being an overly legal process as suggested by Petitioner, union members need only review the terms of their collective bargaining agreement to understand the time frame in which they can file a petition to challenge the current bargaining representative.

D. Only where the union has disclaimed interest in the unit or is defunct should the contract bar doctrine be waived to allow a new election of representative.

The Board also seeks comment on the changed circumstances that could affect bar quality and therefore not bar an election. To ensure the protection of employee choice in determining their bargaining representative and permit bargaining to occur, changed circumstances should be considered by the Board in permitting an election very sparingly. Current Board law explains that if the union is defunct and thus cannot administer the contract, or the union disclaims interest in representing the unit, the Board will not use the contract bar doctrine to prevent an election.[29] In light of the goal or promoting stability, and favoring private resolution of disputes, the Board should continue to uphold current Board law, and not expand the circumstances in which elections can be held despite the contract bar doctrine.

V. ARGUMENT: The Union Security-Clause in the Union's Collective Bargaining Agreement in *Mountaire Farms, Inc.* Should Not Have Prevented Application of the Contract Bar Doctrine because it is Not Unlawful on its Face.

The union security provision at issue is not unlawful on its face and the Regional Director erred in directing an election. Early in the development of the contract bar doctrine, the Supreme

[29] *Bennett & Bennett*, 139 NLRB 1422, 51 LLRM 1518 (1962), *American Sunroof Corp*., 243 NRLB 1128 (1979). The Board has also referred to a "schism," which is so rare as to not require changes or discussion here. *See Hershey Chocolate Corp*., 121 NLRB 901, 1460 (1958), *Swift & Co*., 145 NLRB 756 (1963).

Court cautioned the Board not to assume that unions and employers will intentionally violate federal labor law. *NLRB v. News Syndicate Co.,* 365 NLRB 695 (1961). Following this case, the law has been very well-established that only those contracts that are clearly unlawful on their face will fail to bar a representation election. *Paragon Products Corp.* 134 NLRB 662, 49 LRRM 1160 (1961). Unless the contract specifically denies the 30-day grace period for employees to join the union, absent here, the contract will not be held to be unlawful and should not bar an election. *Four Seasons Solar Products*, 332 NLRB 67, 165 LRRM 1177 (2000). Here, while the contract may be poorly written, it does not specifically deny employees their rights and the Regional Director erred in ruling that the Union's collective bargaining agreement did not bar the Petition for election.

Paragon Products describes a clearly unlawful security-clause provision as one that by its express terms "clearly and unequivocally goes beyond the limited form of union-security permitted by Section 8(a)(3)." *Id.* An example of such an unlawful provision would include one which specifically withheld from incumbent nonmembers or new employees the statutory 30-day grace period. *Id.*

The union security-clause in this case specifically included a grace period by stating, "… 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." The provision does not explicitly deny any employees the 30-day grace period.

Moreover, there is no evidence that any employees were denied the 30-day grace period, or that anything limiting said grace period was enforced in between the effective date and the execution date of the collective bargaining agreement. Extrinsic evidence of such denials would

in fact go against *Paragon Products*, in which extrinsic evidence is explicitly disallowed in determining whether union security-clause provisions are facially unlawful. *Paragon Products Corp.*, 134 NLRB 667 (1961).

It is likely, based on the facial construction of the security-clause, that the Union and Mountaire Farms intended to provide all employees with the required 30-day grace period. More importantly, the clause does not explicitly deny any employee the grace period and there is no evidence that this was not provided to every employee. Therefore, the union-security clause in the Union and employer's collective bargaining agreement does not justify lifting the contract bar, and the Regional Director's ruling should be reversed.

Conclusion

For all of the reasons set forth above, *amicus* strongly recommends that the Board maintain the contract bar doctrine without modifications and reverse the decision and direction of election by the Regional Director. The doctrine has operated for nearly 60 years to balance labor stability and employee choice and left as is, will continue to do so.

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