

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

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.

MOTION FOR PERMISSION TO FILE A BRIEF AS *AMICUS CURIAE* and BRIEF OF
AMICUS CURIAE HR POLICY ASSOCIATION IN RESPONSE TO BOARD INVITATION
TO FILE

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The HR Policy Association is submitting this amicus brief in response to the National Labor Relations Board's ("NLRB" or "Board") invitation to file amicus briefs regarding *Mountaire Farms Inc.*, 05-RD-256888, which is presently pending before the Board.

STATEMENT OF INTEREST

The HR Policy Association ("Association" or "HRPA") is a public policy advocacy organization that represents the chief human resources officers of more than 380 of the largest corporations doing business in the United States and globally. Collectively, their companies employ more than 10 million employees in the United States, nearly 9 percent of the private sector workforce. Since its founding, one of HRPA's principle missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to labor and employment issues arising in the workplace.

Association members regularly have matters before the NLRB, and HR Policy has consistently advocated on behalf of its members on issues related to collective bargaining and the National Labor Relations Act. HR Policy therefore has a general interest in ensuring that the standards articulated by the Board are consistent with the language and purposes of the Act, while, at the same time, are sound, practical, and responsive policies meeting the realities of today's workplace. Additionally, and more specifically, a substantial number of Association members have operations involving unionized workers covered by collective bargaining agreements, which necessarily implicate contract bar issues. The Association thus has a vested interest in the Board's approach to contract bar doctrine and accordingly submits this amicus brief representing such an interest.

I. SUMMARY OF ARGUMENT

In its invitation for *amicus curiae* briefs in the present case, the Board specifically asked *amici* whether the Board should (1) rescind the contract-bar doctrine; (2) retain it as it currently exists, or (3) retain the doctrine with modifications. For the latter, the Board further requested *amici* to address whether modifications should be made to the formal requirements for according bar quality to a contract and the duration of the bar period during which no question of representation can be raised.

The Association recommends that the Board should not rescind the contract bar in its entirety. The contract bar doctrine, while not in the text of the National Labor Relations Act (“NLRA” or “Act”) itself, is certainly supported by its enacting purpose, including the objective of establishing labor relations stability in the workplace. Specifically, the contract bar doctrine strikes a necessary balance between employee free choice and the stability of labor relations. The contract bar provides employers and its employees and their elected representation necessary stability and consistency with regards to the terms and conditions of employment. Substantial curtailment or modification of the doctrine could potentially have a detrimental effect on industrial peace and the stability of the collective bargaining process and be harmful to all stakeholders. Finally, since its implementation, the contract bar has enjoyed a broad consensus of support among employers, unions, and employees alike.

While the Association supports retaining the contract bar doctrine in principle, certain modifications should be made to ensure clarity and consistency and properly account for the interests of employee free choice. These modifications include the following:

- For a contract to be afforded bar quality, it must be a written agreement, signed by all parties, and properly ratified by all parties.

- The window period in which a petition for decertification may be filed during a contract term should be expanded from the present 30 days to 90 calendar days.¹ Such window period would begin 180 calendar days before the contract expiration date and end 90 calendar days before the contract expiration. The window would be the same for non-healthcare and healthcare employers.²
- An insulation period should be retained. Such insulation period would begin when the 90-day window closes and be in place for the final 90 calendar days prior to contract expiration.
- The “window” would reopen 3 years after the beginning date of the contract if no agreement had been reached and stay open thereafter unless or until a written agreement (if any) is ratified by all parties.
- A bar would be terminated if the incumbent union fails to make available, preferably by electronic means, to all members of the bargaining unit, the final written contract agreement between the parties no later than 180 days after the beginning date of the new contract term. Such “transparency” requirement would include not only the basic labor agreement but also include all applicable memoranda of understanding, side letters, or other documents ancillary to the agreement but essential for its implementation and interpretation.
- The bar would be terminated if at any point during the contract term the incumbent union is acquired, merged, or becomes formally affiliated with an entirely different union. Stated alternatively, a new union has replaced the

¹ All references to “days” in the instant brief are “calendar days.”

² As noted in more detail below, current Board precedent provides for different window periods for non-healthcare and healthcare employers.

incumbent union. Affiliations or mergers of local unions within the incumbent union would not terminate the bar.

- The bar would be terminated if an Article III federal court issues a decision concluding that the contract in question was entered into as a result of violations of federal or applicable state law. The date at which the bar would be terminated would be the date of the court decision.
- The bar would terminate if an Article III federal court held that bargaining unit employees were intentionally provided with misinformation or lack of complete information by the incumbent union as to the substantive terms of the new agreement. Administrative and clerical errors and minor mistakes having minimal or no impact on terms and conditions of employment would not be reason to terminate the bar. Stated alternatively, if bargaining unit employees could establish that the union in a contract formation and ratification process did not meet their “duty of fair representation” the bar would terminate.
- For any international union or an affiliate of such union that is placed in trusteeship by court order, a window of one year in which decertification petitions can be filed would be available. This “window” year would start on the date of the beginning of the trusteeship. After this one-year period the contract bar doctrine as modified by the recommendations of this brief would be applicable.

II. THE CONTRACT BAR SHOULD NOT BE RESCINDED IN ITS ENTIRETY

The contract bar doctrine in its current form (a three-year bar) has existed as Board precedent for nearly six decades. The petitioner is asking for the Board to overturn nearly 60 years of precedent and in essence eliminate the contract bar doctrine. The Association does not

believe the contract bar doctrine should be eliminated in its entirety. Further, as outlined below, if the doctrine were eliminated, such a change could have significant adverse impact on employers, unions, and employees. The contract bar is consistent with the objectives of the NLRA and has been consistently accepted and applied by the Board and the courts, and has enjoyed broad support among employers, employees, and their representatives in the nearly 60 years since it was established in its current form.³

A. The Contract Bar is Supported by the Text of the NLRA

While the contract bar doctrine is not explicitly mentioned in National Labor Relations Act (“NLRA” or “the Act”), it is nonetheless strongly supported by the text of the Act. More specifically, the contract bar doctrine is consistent with and essential to the statutory guiding principles as articulated in the text of the NLRA: the elimination of industrial strife and promotion of labor stability through “encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization...”⁴ The contract bar doctrine strikes a necessary balance between promoting labor stability and collective bargaining on the one hand and employee choice on the other, thereby furthering the guiding principles of the NLRA.⁵

The petitioner focuses primarily on employee free choice as the main guiding principle of the NLRA and argues that the contract bar contradicts this principle. As articulated above, however, employee free choice, while very important, must be balanced with labor relations stability and promoting collective bargaining for the benefit of employees and employers alike.

³ The Association agrees with the Employer Mountaire Farms and *amicus* Coalition for a Democratic Workplace that the Board does have the authority to rescind or modify the contract bar. The Association also commends the Board for its approach in reexamining the contract bar doctrine, including the request for *amicus* participation.

⁴ 29 U.S. § 151.

⁵ Editors, *Enforcing the Existing Agreement after the NLRB Waives the Contract-Bar Rule*, 131 U. PA. L. REV. 457, 458. (1982).

Indeed, as pointed out by other *amici*, in establishing the contract bar doctrine as currently in place, the Board was appropriately following the “overwhelming majority of labor and management representatives” position that a 3-year contract bar rule was appropriate.⁶

Further, when Congress amended the NLRA in years subsequent to already established Board contract bar precedent – as it did with the Labor Management Reporting and Disclosure Act of 1959 – it made no mention of any disapproval of the contract bar doctrine, or suggested that it is in any way contrary to Congressional intent in passing the NLRA. Simply put, the contract bar doctrine has not been criticized or questioned by Congress, or the courts, and has enjoyed broad support among employers, employees, and unions in the nearly 60 years since it was established.

B. The Contract Bar Promotes Labor Stability

As mentioned above, eliminating industrial strife and promoting labor stability are two core pillars of the NLRA. The contract bar doctrine furthers these key goals, and thus conversely, its substantial elimination would be contrary to the Act’s purposes. The contract bar doctrine inherently maintains stability in collective bargaining relationships. Both an employer and the union that represents its employees are assured that they will not have to return to the bargaining table (unless by choice) for a definite period of time, nor will they have to undergo the often expensive and time consuming representation election process during this same period. This consistency and stability is beneficial for employers, employees, and their union representatives alike, and further ensures that the decision to organize and select an appropriate union is undertaken seriously.

⁶ Gen. Cable Corp., 139 NLRB 1123, 1125 (1962).

Further, frequent changes in bargaining representatives and labor contract terms can present a host of challenges to both employers, unions, and represented employees. For example, employers need considerable lead time to incorporate labor costs in their long-range planning process for production of products and the furnishing the services. Labor costs are an important element for all employers in establishing budgets and submitting request for loans and other financial assistance. Stock prices of publicly held companies can be adversely impacted if labor relations stability is not established. Indeed, the process of running a business in an economical and successful manner is often predicated on the cost of labor, and the need for long range projections of labor costs are critical. Additionally, other unions or employee interest groups could undercut an incumbent representative and the negotiation process by promising different terms and conditions to employees. Such interference in the bargaining process, particularly during the insulation period, as explained below, could significantly disrupt labor relations.

These examples are among the many in which the absence of a contract bar creates chaos and instability in labor relations and the collective bargaining process. The period of stability the contract bar affords provides employers and unions the opportunity to negotiate an agreement that is in the best interest of all stakeholders.

III. THE BOARD SHOULD MODIFY THE CONTRACT BAR DOCTRINE IN THE INTEREST OF CLARITY, CONSISTENCY, AND EMPLOYEE FREE CHOICE

In response to the Board's request to address the formal requirements for according bar quality to a contract, and the duration of the bar period during which no question of representation can be raised, the Association recommends the following modifications:

A. Formal Requirements for Affording Bar Quality to a Contract

Current Board rules for affording bar quality to a contract have merit but should be strengthened. Accordingly, to be afforded bar quality, contracts should be a signed written document ratified by all parties containing all substantial terms or conditions for employment, and should not be able to be unilaterally terminated by either party or contain illegal union security clauses.

Under current Board precedent, if a contract contains no express provision for prior ratification, such ratification is not required as a condition precedent for the contract to be afforded bar quality.⁷ However, where ratification is a condition precedent to contractual validity by express contractual provision, the contract will be ineffectual as a bar unless it is ratified prior to the filing of a petition.⁸ In the interest of clarity and consistency, the latter approach should encompass all collective bargaining agreements, whether they contain “express contractual provisions” on ratification or not. It is illogical that a contract could serve as a bar when it has not yet been ratified by all interested parties, whether the contract itself requires such ratification or not. Accordingly, for any contract to be afforded bar quality, it must be ratified by the employer, the union, and employees in a signed written agreement. For an employer, this should include a vote or sign off by the board of directors or at the executive level, while ratification by the union and its represented employees should include an appropriate voting process by employees in the represented unit.

This uniform requirement will eliminate the inconsistency of the Board’s current approach, and is a simple and clear way to ensure that a collective bargaining agreement has been agreed to and is in effect – in other words, the agreement has become a contract that should be afforded bar quality.

⁷ Appalachian Shale Products Co., 121 NLRB 1160, 1162 (1958).

⁸ *Id.*

B. The Bar Period, Window, and Insulated Period⁹

Under current Board rules and precedent, during a contract bar period, petitions for election (for a non-healthcare employer) can only be filed in a 30-day period between 90 and 60 days before the expiration of the contract.¹⁰ The last 60 days of the contract bar period are reserved for the existing parties to negotiate a new agreement, and petitions cannot be filed during this “insulated period.” This 30-day window in which employees must file petitions for new representation is too narrow in practice, and tips the balance too far towards the incumbent union and away from employee free choice.

In practice, obtaining the necessary signatures and complying with Board procedural requirements to file a petition can be a labor-intensive and time-consuming process. Requiring that such a process be undertaken within an exact 30-day window is an undue burden on employee free choice. Employees should have more time to properly consider the costs and benefits of a potential decertification, and be able to retain counsel or seek other forms of advice to aid in such decision-making. Indeed, given the legal complexities associated with filing a decertification petition, the present 30-day window is far too short. This is particularly true in today’s climate, in which the COVID-19 pandemic in many cases has scattered employees away from their primary worksites and across different locations, making the logistics of engaging group discussion and decision-making, let alone compliance with the actual procedural requirements of a decertification petition, all the more difficult.

To remove this undue burden on employee free choice, the window period should be increased to 90 calendar days. The window period should begin 180 calendar days before the

⁹ The Association agrees with the assertions put forth by fellow *amicus* Coalition for a Democratic Workplace insofar as the window period needs to be expanded (as stated below), and ambiguity to the extent that it exists should be removed as much as possible.

¹⁰ For healthcare institutions, this period is between 120 and 90 days.

contract expiration and end 90 calendar days before contract expiration. The window would reopen after the expiration of 3 years from the beginning of the agreement in question if an agreement has not been reached, and stay open unless or until a new written agreement is ratified by all parties and pursuant to the bar quality terms outlined above. This window should be the same for both non-healthcare and healthcare settings. These modifications will allow employees the time to engage in fully-formed decision-making on a matter that has a direct impact on the terms and conditions of their employment, but also permit an orderly process of collective bargaining to continue. This revision of the contract bar doctrine properly balances the NLRA's guiding principles of employee free choice and industrial peace.

Pursuant to this approach, an insulation period should be in place for 90 calendar days before the contract termination date and permit the parties to finalize an agreement if no decertification petition has been filed during the window. As a practical matter, parties that have negotiated collective bargaining agreements understand that such insulation period is often a critical period for the parties to reach an agreement, and the threat of potential decertification petitions being filed during such period could substantially destabilize this critical bargaining period. Further, other unions who may wish to replace the incumbent union could force substantial disruptions in the bargaining process during this critical period and force the incumbent union to insist upon unreasonable terms and conditions of employment in an effort to retain its status as the representative of the employees in question. If an incumbent union takes unreasonable or extreme positions during such a critical bargaining period, the likelihood of strikes and other disruptions increases significantly. Such disruptions would not only interfere with employer operations but also place bargaining unit employees in confrontational situations with their employer.

C. Grounds for Bar Termination

In the interest of fairness, transparency, and employee free choice, the contract bar doctrine should be further modified to include grounds for termination of the bar. Accordingly, a bar should be terminated if the incumbent union fails to make available – preferably by electronic means – the final written agreement between the parties no later than 180 days after the beginning date of the new contract term. This requirement would include all applicable documents that might be ancillary to the agreement but essential for its implementation and interpretation and would include memoranda of understanding, side letters, and all other relevant documents. This requirement would provide employees of the bargaining unit in question necessary transparency of the terms and conditions of their employment.

Additionally, a bar should be terminated if at any point during the contract term the incumbent union is acquired, merged, or affiliated with an entirely different union. Affiliations or mergers of local unions within the incumbent union would not terminate the bar. This condition properly protects employees of the bargaining unit in question from being forced into representation they did not initially agree to, and offers them the chance to seek representation elsewhere if desired.

Finally, a bar should also be terminated if an Article III federal court issues a decision concluding that the contract in question was entered into as a result of violations of federal or applicable state law. The date at which the bar would be terminated would be the date of the court decision. This condition provides clear protections against fraud and misrepresentation, among other common law contract law defenses against contract formation. Unions should not

enjoy exclusive representation as a result of illegally entered into contracts. Similarly, a bar should be terminated where bargaining unit employees could establish that the union in the contract formation and ratification process did not meet their “duty of fair representation.” Thus, where an Article III federal court held that bargaining unit employees were intentionally provided with misinformation or lack of complete information as to the substantive parts of the new agreement, the bar would terminate. Administrative and clerical errors, and minor mistakes having minimal or no impact on terms and conditions of employment, however, would not be reason to terminate the bar. This condition again protects employees from unfair or inadequate representation, and appropriately empowers them to change representation in the event of such. Relatedly, and for the same reasons, for any international union or affiliate that is placed in trusteeship by court order, the bar should be removed to create a window of one year in which decertification petitions may be filed. This one-year window would start on the date the trusteeship went into effect, and the trusteeship exception would supersede any other contract bar provisions during the one-year window. Once the one-year window has been concluded, the contract bar doctrine as modified by the above recommendations would be applicable.

CONCLUSION

For the foregoing reasons, the Board should retain the current three-year contract bar with modifications as outlined above.

Respectfully submitted,

Sincerely,

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