

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

MOUNTAIRE FARMS, INC.
Employer,

Case No. 05-RD-256888

and

OSCAR CRUZ SOSA
Petitioner,

and

**UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL 27**
Incumbent Exclusive Representative.

**BRIEF OF CONGRESSMAN ROBERT C. “BOBBY” SCOTT, CHAIRMAN OF THE
COMMITTEE ON EDUCATION AND LABOR OF THE U.S. HOUSE OF
REPRESENTATIVES; CONGRESSWOMAN FREDERICA S. WILSON,
CHAIRWOMAN OF THE SUBCOMMITTEE ON HEALTH, EMPLOYMENT,
LABOR, AND PENSIONS OF THE COMMITTEE ON EDUCATION AND LABOR;
AND CONGRESSMAN ANDY LEVIN, VICE CHAIRMAN OF THE COMMITTEE ON
EDUCATION AND LABOR
*AS AMICI CURIAE***

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TABLE OF CONTENTS

Introduction.....	1
Statement of Interest	2
Argument	3
I. Congress Has Acquiesced to the Contract Bar Rule and Made that Explicit in Its Amendments to the Act	3
A. Congress Demonstrated Its Acquiescence to the Contract Bar Rule in the 1947 and 1959 Amendments to the Act	4
B. Title VII of the Civil Service Reform Act Provides Further Evidence Congress Acquiesced to the Contract Bar Rule	5
II. The Contract Bar Rule in Its Current Form Furthers the Policies of the Act, and Any Decision to Narrow the Rule Would Compromise Those Policies	6
III. The Board Refuses to Produce Information Necessary to Justify Departing from Settled Precedent.....	8
IV. The Board is Improperly Considering Issues Far Outside the Scope of This Case	12
Conclusion	16

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Allentown Mack Sales & Serv. v. NLRB</i> , 522 U.S. 359 (1998).....	8
<i>American Ship Building Co. v. NLRB</i> , 380 U.S. 300 (1980).....	3
<i>Andrus v. Glover Const. Co.</i> , 446 U.S. 608 (1980).....	5
<i>Auciello Iron Works v. NLRB</i> , 517 U.S. 781 (1996)	7, 8
<i>Bob Jones Univ. v. United States</i> , 461 U.S. 574 (1983).....	3, 6
<i>Bob’s Big Boy Family Restaurants v. NLRB</i> , 625 F.2d 850 (9th Cir. 1980)	8, 11
<i>Circus Circus Casinos, Inc. v. NLRB</i> , 961 F.3d 469 (D.C. Cir. 2020).....	8
<i>Continental Casualty Co. v. United States</i> , 314 U.S. 527 (1942).....	5
<i>Deluxe Metal Furniture Co.</i> , 121 NLRB 995 (1958)	7
<i>Dep’t of Justice v. FLRA</i> , 991 F.2d 285 (1993)	5
<i>Direct Press Modern Litho, Inc.</i> , 328 NLRB 860 (1999)	3
<i>Fall River Dyeing & Fishing Corp. v. NLRB</i> , 482 U.S. 27 (1987)	7
<i>Ford Motor Co. v. NLRB</i> , 441 U.S. 488 (1979)	3
<i>General Cable Corp.</i> , 139 NLRB 1123 (1962)	1, 7, 11

<i>Haig v. Agee</i> , 453 U.S. 280 (1981)	3
<i>Int'l Ladies' Garment Workers' Union v. NLRB</i> , 366 U.S. 731 (1961).....	7
<i>Leonard Wholesale Meats, Inc.</i> , 136 NLRB 1000 (1962)	7
<i>Mountaire Farms</i> , Case 05-RD-256888.....	1, 3, 8, 10, 13, 14
<i>National Sugar Refining Co.</i> , 10 NLRB 1410 (1939)	1, 3, 6
<i>NLRB v. Financial Institution Employees of America, Local 1182</i> , 475 U.S. 192 (1986)	7
<i>Pacific Coast Assoc.</i> , 121 NLRB 990 (1958).....	7, 11
<i>Paragon Products Corp.</i> , 134 NLRB 662 (1962)	8
<i>Reed Roller Bit Co.</i> , 72 NLRB 927 (1947)	4
<i>Solid Waste Agency v. United States Army Corps of Eng'rs</i> , 531 U.S. 159 (2001).....	3
<i>Zemel v. Rusk</i> , 381 U.S. 1 (2001).....	3

Statutes and Regulations

National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 1 (29 U.S.C. § 151)	1, 3, 6
Section 8(f) (29 U.S.C. § 158(f))	1, 5
Federal Service Labor-Management Relations Statute	
Section 7111 (5 U.S.C. § 7111(f)(3))	1, 3, 6
Section 7101 (5 U.S.C. §§ 7101-35).....	5
Labor-Management Reporting and Disclosure Act, Pub. L. 86-257, 73 Stat. 519 (1959).....	3, 4

Labor Management Relations Act, Pub. L. 80-101, 61 Stat. 136 (1947).....	3, 4
1974 Health Care Amendments, Pub. L. No. 93-360, 88 Stat. 395 (1974).....	4
Title 29 of the Code of Federal Regulations, (29 C.F.R. § 102 et seq.)	
29 C.F.R. § 102.67(c).....	13, 14
29 C.F.R. § 102.67(d)(4).....	12, 13
29 C.F.R. § 102.67(e).....	12, 13
29 C.F.R. § 102.67(h).....	12, 13
29 C.F.R. § 102.71(c).....	12

Legislative Materials

H.R. Rep. No. 80-510 (1947).....	1, 4
S. Rep. No. 80-105 (1947).....	4, 5

Congressional Oversight Materials

Letter from Robert C. “Bobby” Scott, Chairman, House of Representatives Committee on Education and Labor, et al. to John Ring, Chairman, National Labor Relations Board (Aug. 17, 2020).....	2, 9
Letter from Robert C. “Bobby” Scott, Chairman, House of Representatives Committee on Education and Labor, to John Ring, Chairman, National Labor Relations Board (Sept. 1, 2020).....	15
Letter from John Ring, Chairman, National Labor Relations Board, to Robert C. “Bobby” Scott, Chairman, House of Representatives Committee on Education and Labor, et al. (Sept. 22, 2020).....	2, 10, 11
(Oct. 5, 2020).....	2, 11
Email from Staff, National Labor Relations Board, to Staff, House of Representatives Committee on Education and Labor (Sept. 8, 2020, 3:52 PM).....	10, 11
(Sept. 10, 2020, 10:23 AM).....	10
Email from Staff, House of Representatives Committee on Education and Labor, to Staff, National Labor Relations Board (Sept. 8, 2020, 4:38 PM).....	10

Miscellaneous

Rules of the House of Representatives for the 116th Congress, Rule X2

Rules of the Committee on Education and Labor for the 116th Congress, Rule 2.....2

Memorandum from James Sherk (2017) 14

Secondary Sources

Jane Mayer, *How Trump Is Helping Tycoons Exploit the Pandemic*,
The New Yorker (June 13, 2020) 15

INTRODUCTION

For over 80 years, the National Labor Relations Board (“the Board” or “NLRB”) has carefully balanced its statutory missions of “encouraging the practice and procedure of collective bargaining” and “protecting the exercise by workers of full freedom of association”¹ by holding that a valid collective bargaining agreement bars election petitions.² Since 1962, that contract bar period has been three years, except during a limited window before the close of that period.³ Congress has repeatedly approved of this rule, and made that explicit in the text of amendments to the National Labor Relations Act (“the Act” or “NLRA”),⁴ the Congressional Record of the NLRA’s amendments,⁵ and in a parallel statute granting federal employees the right to organize unions and engage in collective bargaining in which Congress even extended the three-year contract bar.⁶

Despite decades of settled precedent and reliance on the contract bar rule from both Congress and the Supreme Court, the Board now invites interested parties to offer argument to support rescinding or modifying the contract bar rule.⁷ However, the Board has refused to produce information to Congress that would inform whether there is justification for even considering this massive overhaul, and the Board’s invitation for briefs on this issue is outside of the scope of the underlying case. Accordingly, the Board should retain its longstanding precedent as currently in effect.

¹ 29 U.S.C. § 151.

² *National Sugar Refining Co.*, 10 NLRB 1410 (1939).

³ *General Cable Corp.*, 139 NLRB 1123 (1962).

⁴ 29 U.S.C. § 158(f).

⁵ H.R. Rep. No. 80-510, at 554 (1947) (Conf. Rep.).

⁶ 5 U.S.C. § 7111 (f)(3)(A).

⁷ NLRB Notice and Invitation to File Briefs, *Mountaire Farms*, Case No. 05-RD-256888 (July 7, 2020).

STATEMENT OF INTEREST

Congressman Robert C. “Bobby” Scott is Chairman of the House of Representatives Committee on Education and Labor (“the Committee”); Congresswoman Frederica S. Wilson is Chairwoman of the Committee’s Subcommittee on Health, Employment, Labor, and Pensions (“the Subcommittee”); and Congressman Andy Levin is Vice Chairman of the Committee. The Rules of the House of Representatives and the Rules of the Committee provide the Committee and Subcommittee with jurisdiction over the NLRA.⁸

Consistent with its constitutional authority and duty to conduct oversight of the Board’s enforcement of the NLRA, the Committee submitted a letter to the Board on August 17, 2020, requesting information regarding the Board’s handling of cases affected by the contract bar rule.⁹ The Board responded to the Committee on September 22, but it did not provide any information responsive to the Committee’s requests.¹⁰ The Board responded to the Committee again on October 5, two days before the deadline for briefs.¹¹

⁸ Rule X(1)(e), Rules of the House of Representatives for the 116th Congress, <https://rules.house.gov/sites/democrats.rules.house.gov/files/documents/116-House-Rules-Clerk.pdf> (providing the Committee with jurisdiction over “labor generally”); Rule 2, Rules of the Committee on Education and Labor for the 116th Congress, https://edlabor.house.gov/imo/media/doc/116th_Ed_and_Labor_Committee_Rules.pdf (stating that the subcommittee retains jurisdiction over “[m]atters dealing with relationships between employers and employees, including but not limited to the *National Labor Relations Act*”).

⁹ Letter from Robert C. “Bobby” Scott, Chairman, House of Representatives Committee on Education and Labor, et al. to John Ring, Chairman, National Labor Relations Board (Aug. 17, 2020), [https://edlabor.house.gov/imo/media/doc/8.17.2020%20Scott%20Wilson%20Levin%20Letter%20to%20NLRB%20Contract%20Bar%20\(final\).pdf](https://edlabor.house.gov/imo/media/doc/8.17.2020%20Scott%20Wilson%20Levin%20Letter%20to%20NLRB%20Contract%20Bar%20(final).pdf).

¹⁰ Letter from John Ring, Chairman, National Labor Relations Board, to Robert C. “Bobby” Scott, Chairman, House of Representatives Committee on Education and Labor, et al. (Sept. 22, 2020), <https://edlabor.house.gov/imo/media/doc/Ring%20to%20Scott%20Wilson%20Contract%20Bar%20FINAL.pdf>.

¹¹ Letter from John Ring, Chairman, National Labor Relations Board, to Robert C. “Bobby” Scott, Chairman, House of Representatives Committee on Education and Labor, et al. (Oct. 5, 2020), <https://edlabor.house.gov/imo/media/doc/Ring%20to%20Scott%20Wilson%20Contract%20Bar%20SUPP%20FINAL.pdf>.

ARGUMENT

I. Congress Has Acquiesced to the Contract Bar Rule and Made that Explicit in Its Amendments to the Act

The Board cannot “rescind the contract-bar doctrine,”¹² as doing so would be “‘fundamentally inconsistent with the structure of the Act’ and [would be] an attempt to usurp ‘major policy decisions made by Congress.’”¹³ Congress has repeatedly affirmed the contract bar rule, and even built the rule into the text of amendments to the NLRA.¹⁴ It further codified the rule when it extended to federal employees the right to organize and collectively bargain.¹⁵ “[C]ongressional acquiescence may sometimes be found from nothing more than silence in the face of an administrative policy.”¹⁶ However, the strongest “evidence of congressional approval” is demonstrated by affirmative manifestations of congressional acquiescence.¹⁷

For over 80 years the Board has effectuated “the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce,”¹⁸ in significant part, through the creation and application of the contract bar rule.¹⁹ After the Board established the

¹² NLRB Notice and Invitation to File Briefs, *Mountaire Farms*, Case No. 05-RD-256888 (July 7, 2020).

¹³ *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979) (citing *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965)).

¹⁴ Labor-Management Reporting and Disclosure Act, Pub. L. 86-257, 73 Stat. 519 (1959); Labor Management Relations Act, Pub. L. 80-101, 61 Stat. 136 (1947).

¹⁵ Federal Service Labor-Management Relations Statute (“FSLMRS”), 5 U.S.C. § 7111(f)(3).

¹⁶ *Haig v. Agee*, 453 U.S. 280, 300 (1981) (citing *Zemel v. Rusk*, 381 U.S. 1, 11 (1965)); see also *Solid Waste Agency v. United States Army Corps of Eng’rs*, 531 U.S. 159, 170 (2001) (stating that the Supreme Court “recognizes congressional acquiescence to administrative interpretations of a statute with extreme care”).

¹⁷ See *Bob Jones Univ. v. United States*, 461 U.S. 574, 601 (1983).

¹⁸ 29 U.S.C. § 151.

¹⁹ See *National Sugar Refining Co.*, 10 NLRB 1410 (1939); see also *Direct Press Modern Litho, Inc.* 328 NLRB 860 (1999) (“[T]he basic policy of the Act is the protection of employees’ right to choose collective-bargaining representatives . . . in order to maintain industrial peace. Congress determined that this policy is instrumental to avoiding obstructions to the economic flow of interstate commerce . . . The contract-bar doctrine, of course, proceeds from this elemental view.”).

contract bar rule in 1939, Congress amended the NLRA three times without eliminating or altering the doctrine.²⁰

A. Congress Demonstrated Its Acquiescence to the Contract Bar Rule in the 1947 and 1959 Amendments to the Act

During the deliberation of its 1947 amendments to the NLRA, Congress explicitly considered the contract bar rule.²¹ As the House Conference Report on the 1947 amendments stated:

Under the House bill, in section 9(f)(8), it was provided that if a new representative were chosen while a collective bargaining agreement was in effect with another representative, certification of the new representative should not become effective unless such new representative became a party to such contract and agreed to be bound by its terms for the remainder of the contract period. Since the inclusion of such a provision might give rise to an inference that the practice of the Board, with respect to conducting representation elections while collective bargaining contracts are in effect, should not be continued, it is omitted from the conference agreement.²²

In 1947, the “practice of the Board, with respect to conducting representation elections,”²³ was to ensure the “stability of industrial relations” by “refusing to interfere with bargaining relations secured by collective agreements of 2 years’ duration.”²⁴ Congress was aware of that application of the contract bar rule and explicitly communicated its acquiescence to it when it adopted the conference report on the first amendments to the NLRA.²⁵

The 1947 Senate Report on the Labor Management Relations Act, 1947,²⁶ also demonstrates Congress’ support for the contract bar doctrine.²⁷ In discussing how Section

²⁰ See the 1974 Health Care Amendments, Pub. L. No. 93-360, 88 Stat. 395 (1974); Labor-Management Reporting and Disclosure Act of 1959, Pub. L. 86-257, 73 Stat. 519 (1959); and Labor Management Relations Act, 1947, Pub. L. 80-101, 61 Stat. 136 (1947).

²¹ H.R. Rep. No. 80-510, at 554 (1947) (Conf. Rep.).

²² *Id.*

²³ *Id.*

²⁴ *Reed Roller Bit Co.*, 72 NLRB 927, 930 (1947).

²⁵ H.R. Rep. No. 80-510, at 554 (1947) (Conf. Rep.).

²⁶ Pub. L. 80-101, 61 Stat. 136 (1947).

²⁷ S. Rep. No. 80-105, at 25 (1947).

9(c)(1) of the NLRA operates, the Senate Report states that neither of the amendments made to the election or decertification process “affects the present Board’s rules of decisions with respect to dismissal of petitions by reason of . . . the existence of an outstanding collective agreement as a bar to an election.”²⁸

Congress’ explicit support for the contract bar rule was also made clear by its affirmation of the doctrine in the text of the NLRA in its 1959 amendments. In permitting pre-hire agreements in the building and construction industry, Section 8(f) of the NLRA distinguishes such agreements by noting that they “shall not be a bar to a [representation] petition.”²⁹ “Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent.”³⁰ The inclusion of this exception in the text of Section 8(f) necessarily requires that other agreements between labor organizations and employers act as a bar to representation petitions.

B. Title VII of the Civil Service Reform Act Provides Further Evidence Congress Acquiesced to the Contract Bar Rule

Congress further embraced the contract bar rule as a norm when it passed Title VII of the Civil Service Reform Act (“FSLMRS”)³¹ and “modeled” those provisions after the NLRA.³² The FSLMRS, which codified the right of federal workers to organize and collectively bargain, contains an express contract bar provision that states:

(f) Exclusive recognition shall not be accorded to a labor organization—

(3) if there is then in effect a lawful written collective bargaining agreement between the agency involved and an exclusive representative (other than the labor

²⁸ *Id.*

²⁹ 29 U.S.C. § 158(f).

³⁰ *Andrus v. Glover Const. Co.*, 446 U.S. 608, 616–17 (1980) (citing *Continental Casualty Co. v. United States*, 314 U.S. 527, 533 (1942)).

³¹ 5 U.S.C. §§ 7101–35.

³² *Dep’t of Justice v. FLRA*, 991 F.2d 285, 289 (5th Cir. 1993) (“The FSLMRS is modeled after the National Labor Relations Act[.]”).

organization seeking exclusive recognition) covering any employees included in the unit specified in the petition, unless—

(A) the collective bargaining agreement has been in effect for more than 3 years [.]³³

There, Congress indicated that it was aware of the Board’s contract bar rule in the private sector and recognized the centrality of the rule to the maintenance of industrial peace. By codifying the contract bar rule in the FSLMRS, Congress demonstrated affirmative approval of the Board’s administrative policy.³⁴

For over 80 years, Congress has acquiesced and approved of an organizing and collective bargaining framework that promotes industrial peace through the use of the contract bar. If that intent changes, only Congress may express that modification through the legislative process, and any administrative attempt to narrow or overturn the rule would inappropriately conflict with congressional intent.

II. The Contract Bar Rule in Its Current Form Furthers the Policies of the Act, and Any Decision to Narrow the Rule Would Compromise Those Policies

The NLRA explicitly states that its purpose is to “encourag[e] the practice and procedure of collective bargaining” and “protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing.”³⁵ The Board has consistently balanced these two statutory principles in its application of the contract bar throughout Board’s history.

In the Board’s first decision that recognized a contract bar in 1939, the Board held that the one year duration of a contract was “not for such a long period as to be contrary to the purposes and policies of the Act.”³⁶ In applying the NLRA’s statutory goals, the Board’s

³³ 5 U.S.C. § 7111(f)(3)(A).

³⁴ See *Bob Jones Univ.*, 461 U.S. at 600–01 (1983).

³⁵ 29 U.S.C. § 151.

³⁶ *National Sugar Refining Co.*, 10 NLRB at 1415.

subsequent modifications to the contract bar rule paid careful attention to the effect of the rule on unions and employers both at the bargaining table and in litigating before the Board.³⁷ In 1962, when the Board settled on a three-year contract bar in *General Cable Corp.*, it considered economic and legal developments that highlighted “the imperative for long-range planning responsive to the public interest and free from any unnecessary threat of disruption.”³⁸

The contract bar rule has not faced any significant changes in the past 58 years, and has consistently advanced the NLRA’s statutory purposes. As the Supreme Court has found, the rule “achieve[s] ‘stability in collective-bargaining relationships’ . . . by ‘enabling a union to concentrate on obtaining and fairly administering a collective-bargaining agreement’ and by ‘removing any temptation on the part of the employer to avoid good-faith bargaining’ in an effort to undermine union support.”³⁹ In fact, the Supreme Court has relied on the Board’s contract bar rule in its own interpretation of labor law.⁴⁰ To give proper weight to protecting employees’ free choice, the Board created exceptions to the contract bar rule, such as the window period to allow a petition for representation between 60 and 90 days prior to the close of the three years⁴¹ and the

³⁷ See, e.g., *Pacific Coast Assoc.*, 121 NLRB 990, 992 (1958) (extending the contract bar to two years, across industries, because making the test industry-specific “proved administratively burdensome and . . . introduced an undue degree of uncertainty into the determination of whether a particular long-term contract will be a bar for its duration.”); *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1000–01 (1958) (establishing an insulated period 60 days before the end of a contract so “the parties may negotiate and execute a new or amended agreement without the intrusion of a rival petition” and so “employees will know when to seek a change in representatives if they so desire”).

³⁸ *General Cable Corp.*, 139 NLRB at 1125–26 (citing the development of the AFL-CIO’s Internal Disputes Plan, the enactment of the Landrum-Griffin Act, and Supreme Court decisions that have “fortified the labor agreement and the arbitral process in particular”). Notably, the developments cited by *General Cable Corp.* continue to be relevant to the practice of labor law at the present time.

³⁹ *Auciello Iron Works v. NLRB*, 517 U.S. 781, 786 (1996) (quoting *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987)); see also *NLRB v. Financial Institution Employees of America, Local 1182*, 475 U.S. 192, 196 n.3 (1986) (noting the contract bar rule is an example of an NLRB rule “designed to maintain stable bargaining relationships”).

⁴⁰ *Financial Institution Employees of America, Local 1182*, 475 U.S. at 196–97 n.3, 208 (identifying the contract bar rule as one of the ways the NLRB “preserve[s] industrial peace” in order to find that an NLRB rule permitting non-union employees to vote on affiliation questions contravened this goal); *Int’l Ladies’ Garment Workers’ Union v. NLRB*, 366 U.S. 731, 736–37 n.8 (1961) (noting that the existence of the contract bar rule supported interpreting the Act to prevent bargaining with a minority union).

⁴¹ *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000 (1962).

requirement that the contract may not bar a petition if its union security provision is “clearly unlawful on its face.”⁴² Accordingly, the contract bar rule has successfully balanced the NLRA’s statutory goals for the vast majority of the statute’s history.

In its Notice and Invitation to File Briefs, the Board noted that the contract bar rule was developed in order “to balance the statutory goal of promoting labor relations stability against its statutory responsibility to give effect to employees’ wishes concerning representation.”⁴³

However, the Board must view with great skepticism any claims by employers that the contract bar rule has undermined the free choice of employees. As the Supreme Court cautioned in its 1996 *Auciello* decision:

To allow employers to rely on employees’ rights in refusing to bargain with the formally designated union is not conducive to industrial peace, it is inimical to it. The Board is accordingly entitled to suspicion when faced with an employer’s benevolence as its workers’ champion against their certified union, which is subject to a decertification petition from the workers if they want to file one.⁴⁴

III. The Board Refuses to Produce Information Necessary to Justify Departing from Settled Precedent

In setting a new precedent through adjudication, the Board “must meet the same standard of reasonableness as notice and comment rulemaking.”⁴⁵ In doing so, the Board is “required to explain departures from agency policies or rules so that a reviewing court is able to determine if the agency was acting in a reasoned, deliberate manner.”⁴⁶ However, in the Board’s rush to overhaul a longstanding doctrine, it has not demonstrated that its reconsideration of the contract bar is either reasoned or deliberate.

⁴² *Paragon Products Corp.*, 134 NLRB 662, 666 (1962).

⁴³ NLRB Notice and Invitation to File Briefs, *Mountaire Farms*, Case No. 05-RD-256888 (July 7, 2020).

⁴⁴ *Auciello Iron Works*, 517 U.S. at 790 (internal quotations omitted).

⁴⁵ *Circus Circus Casinos, Inc. v. NLRB*, 961 F.3d 469, 476 (D.C. Cir. 2020) (citing *Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359, 374 (1998)).

⁴⁶ *Bob’s Big Boy Family Restaurants v. NLRB*, 625 F.2d 850, 852 (9th Cir. 1980) (internal citations omitted).

In response to the Board’s Notice and Invitation to File Briefs, the Committee wrote to the Board on August 17, 2020, to request that the Board produce information regarding its application of the contract bar rule in representation cases and unfair labor practice cases. As the Committee’s letter explained: “The contract bar has remained settled for over 80 years, and is almost as old as the [NLRA] itself We are concerned that the NLRB is considering overturning this longstanding precedent without providing any data or analysis sufficient to justify considering such a dramatic departure.”⁴⁷

The letter sought lists of representation cases and unfair labor practice cases in the past 10 years where the contract bar has been asserted; it requested that the list of representation cases identify how the parties disputed the application of the rule and provide briefs and decisions regarding those arguments.⁴⁸ The letter also sought a list of cases where the Board modified, overturned, or invited briefs on whether to modify or overturn existing precedent in instances where no party requested a change in precedent.⁴⁹ In addition, the letter requested all advice memos applying the contract bar rule; public statements by the Chairman, any Member, or the General Counsel regarding the contract bar rule; and any communications or documents proposing a modification or overturning of the contract bar rule that was reviewed by any Board Member.⁵⁰

The Board has refused to provide information responsive to these requests. On September 8, the date on which the Committee expected a response, Board staff emailed the

⁴⁷ Letter from Robert C. “Bobby” Scott, Chairman, House of Representatives Committee on Education and Labor, et al. to John Ring, Chairman, National Labor Relations Board (Aug. 17, 2020), [https://edlabor.house.gov/imo/media/doc/8.17.2020%20Scott%20Wilson%20Levin%20Letter%20to%20NLRB%20Contract%20Bar%20\(final\).pdf](https://edlabor.house.gov/imo/media/doc/8.17.2020%20Scott%20Wilson%20Levin%20Letter%20to%20NLRB%20Contract%20Bar%20(final).pdf).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

Committee to request “an additional two weeks to ensure we can respond fully.”⁵¹ The Committee responded that it would be willing to grant the two week extension provided the Board extend the filing deadline for briefs by *amici* in this case by 14 days.⁵² The Board agreed to the extension on September 10⁵³ and issued notice of such deadline extension on September 16.⁵⁴

The Board’s response on September 22 failed to “respond fully” to the Committee’s request, let alone provide any information responsive to the request.⁵⁵ Instead of providing lists of cases where the contract bar had been asserted, the Board provided a list of “[r]epresentation cases containing Board Decision, Decision and Direction of Election, and/or Decision and Order documents with the term ‘contract bar’” and a list of “[u]nfair labor practice cases containing position statement documents with the term ‘contract bar.’”⁵⁶ Although the Board developed the lists by conducting searches of relevant documents, the Board did not even produce those documents, despite the request in the Committee’s August 17 letter.⁵⁷ The Board’s response also stated that its staff was still developing the lists of cases regarding the Board’s change in

⁵¹ Email from Staff, National Labor Relations Board, to Staff, House of Representatives Committee on Education and Labor (Sept. 8, 2020, 3:52 PM) (on file with author).

⁵² Email from Staff, House of Representatives Committee on Education and Labor, to Staff, National Labor Relations Board (Sept. 8, 2020, 4:38 PM) (on file with author).

⁵³ Email from Staff, National Labor Relations Board, to Staff, House of Representatives Committee on Education and Labor (Sept. 10, 2020, 10:23 AM) (on file with author) (adding “As always, we are happy to accommodate” the Committee).

⁵⁴ Further Extension of Time Request to File Briefs In Response to Notice and Invitation, *Mountaire Farms*, Case No. 05-RD-256888 (Sept. 16, 2020).

⁵⁵ Email from Staff, National Labor Relations Board, to Staff, House of Representatives Committee on Education and Labor (Sept. 8, 2020, 3:52 PM) (on file with author).

⁵⁶ Letter from John Ring, Chairman, National Labor Relations Board, to Robert C. “Bobby” Scott, Chairman, House of Representatives Committee on Education and Labor, et al. (Sept. 22, 2020),

<https://edlabor.house.gov/imo/media/doc/Ring%20to%20Scott%20Wilson%20Contract%20Bar%20FINAL.pdf>.

See also id., Response to Request No. 1

<https://edlabor.house.gov/imo/media/doc/Ring%20to%20Scott%20et%20al%20Contract%20Bar%20Att%201.pdf>;

id., Response to Request No. 2

<https://edlabor.house.gov/imo/media/doc/Ring%20to%20Scott%20et%20al%20Contract%20Bar%20Att%202.pdf>.

⁵⁷ *See id.*

precedent, but it did not indicate when those would be produced.⁵⁸ The Board produced no other responsive information.

When the Committee permitted the Board’s extension of time to respond to its letter in exchange for an extension of the briefing deadline, it did so with an understanding that the Board would “respond fully” to the Committee’s request as the Board claimed it would. Committee staff contacted the Board on September 25, October 1, and October 2 seeking to resolve these concerns. On October 5, the Board provided a list of cases regarding changes in precedent but refused to provide a further extension of the filing deadline to permit the Committee enough time to analyze the information.⁵⁹

The Board’s decision to renege on its commitment to “respond fully”⁶⁰ to Committee oversight and provide *amici* sufficient time to analyze its response indicates that any departure from longstanding precedent is not “acting in a reasoned, deliberate manner.”⁶¹ When the Board extended the contract bar to three years in *General Cable Corp.*, it carefully considered “recent developments in the labor movement, in Federal labor legislation, and in the labor law handed down by the Supreme Court,”⁶² and it viewed the actual practices of unions and employers at the bargaining table as having the “greatest significance.”⁶³ In reconsidering long established Board law, one obvious step for the Board should be to examine recent developments and explore

⁵⁸ *Id.*

⁵⁹ Letter from John Ring, Chairman, National Labor Relations Board, to Robert C. “Bobby” Scott, Chairman, House of Representatives Committee on Education and Labor, et al. (Oct. 5, 2020), <https://edlabor.house.gov/imo/media/doc/Ring%20to%20Scott%20Wilson%20Contract%20Bar%20SUPP%20FINA%20L.pdf>.

⁶⁰ Email from Staff, National Labor Relations Board, to Staff, House of Representatives Committee on Education and Labor (Sept. 8, 2020, 3:52 PM) (on file with author).

⁶¹ *Bob’s Big Boy Family Restaurants*, 625 F.2d at 852.

⁶² *General Cable Corp.*, 139 NLRB at 1125–26; see also *Pacific Coast Assoc.*, 121 NLRB at 992 (modifying the contract bar rule to apply uniformly across industries because of the effect previous iterations of the rule had on litigation before the Board).

⁶³ *Id.* at 1127.

trends in what unions, employers, and employees have argued in representation cases and unfair labor cases, as well as how the Board has responded to those arguments. But the Board refuses to make that information accessible.

IV. The Board Is Improperly Considering Issues Far Outside the Scope of This Case

The Board improperly granted a request for review of the contract bar rule, an issue that was not properly raised for consideration. The Board must adhere to the relevant regulations that structure its ability to review decisions and directions of elections issued by Regional Directors. As set forth in the federal regulations, “[a] request for review must be a self-contained document enabling the Board to rule on the basis of *its* contents without the necessity of recourse to the record [.]”⁶⁴ The request must “contain a complete statement setting forth facts and reasons upon which the request is based.”⁶⁵ When the Board grants a request, federal regulations stipulate the grounds that may serve as a basis for review, which include “compelling reasons for reconsideration of an important Board rule or policy.”⁶⁶ Furthermore, the regulations dictate that “[t]he Board will consider the entire record in the light of the grounds relied on for review and shall make disposition of the matter as it deems appropriate.”⁶⁷

Here, the incumbent exclusive representative, the United Food and Commercial Workers Union, Local 27 (“UFCW”), filed a motion for reconsideration seeking Board review of a narrow contract bar issue regarding the “Regional Director’s finding that the union-security clause in the collective bargaining agreement [was] unlawful.”⁶⁸ In considering UFCW’s request, federal regulations limit the Board’s consideration of UFCW’s motion to “*its* contents.”⁶⁹ However, in

⁶⁴ 29 C.F.R. § 102.67(e) (emphasis added).

⁶⁵ 29 C.F.R. § 102.71(c).

⁶⁶ 29 C.F.R. § 102.67(d)(4).

⁶⁷ 29 C.F.R. § 102.67(h).

⁶⁸ Involved Party’s (UFCW) Request for Review of Regional Director’s Decision and of Election and Motion to Defer RD Election Pending Disposition of Request for Review at 5, filed April 21, 2020.

⁶⁹ 29 C.F.R. § 102.67(e) (emphasis added).

the matter at hand, the Board has inappropriately looked beyond “the self-contained document” to which its ruling on the request for review is limited.⁷⁰ The plain language of the regulations even limits the Board’s consideration of the related record to “the grounds relied on for review.”⁷¹ The Board may grant review in an effort to reconsider an important Board rule or policy,⁷² but taken in context it is clear that the Board may only reconsider an important policy using this procedural process when the issue is properly raised in a request for review. These regulations unambiguously connect the Board’s consideration to the confines of the request for review.

Despite these straightforward mandates, the Board “found merit in the Petitioner’s contention that it is appropriate for the Board to undertake in this case a general review of its contract bar doctrine.”⁷³ Notably, Petitioner never filed a request for review even though they had the opportunity to do so. Petitioner could have raised issues related to the validity of the contract bar rule providing the Board with an opportunity to consider that request in accordance with proper procedure. In fact, the regulations state that “any interested person” may file a request for review,⁷⁴ but that was not the course of action pursued by Petitioner. Instead, Petitioner filed an opposition to the request for review where it asked the Board to “use this case to overrule or greatly narrow the existence of such a bar.”⁷⁵

The relevant federal regulations do not provide for Board review through opposition motions. In fact, Petitioner, like UFCW, had the opportunity to file “a request for a review of a

⁷⁰ *Id.*

⁷¹ 29 C.F.R. § 102.67(h).

⁷² *Id.* at § 102.67(d)(4).

⁷³ NLRB Order, *Mountaire Farms, Inc.*, 05-RD-256888, at 1 (June 23, 2020).

⁷⁴ 29 C.F.R. § 102.67(c).

⁷⁵ Petitioner’s Opposition to Union’s Request for Review of Regional Directors Decision and Direction of Election; And Petitioner’s Opposition to Union’s Motion to Defer RD Election Pending Disposition of Request for Review at 3 (April 28, 2020).

decision and direction of election more than 10 business days after the decision issue[d.]”⁷⁶ Petitioner filed for the decertification election petition but did not raise any issues related to the general legitimacy of the contract bar doctrine.⁷⁷ Petitioner had the opportunity to file a post-hearing brief to the Regional Director prior to the order and direction of election and again failed to submit a brief, thus passing on another opportunity to raise the issue of the general legitimacy of the contract bar rule.⁷⁸ Despite several opportunities, Petitioner chose not to raise the issue at the appropriate times and in the appropriate manners, and therefore Petitioner waived the opportunity to seek Board consideration. The Petitioner is now foreclosed from trying to raise the waived issue under the guise of an opposition motion.

The Board’s decision to hastily consider this issue reveals an agenda to force consideration on a policy prioritized by the Trump Administration by any means necessary. An internal White House memorandum from 2017 indicates that the Trump Administration wants the “Trump Board” to “eliminate the ‘contract bar’ to new elections.”⁷⁹ Notably, the Board, ostensibly an independent agency, has implemented the vast majority of proposals advocated by this memorandum.⁸⁰ As a *New Yorker* article noted, Mountaire’s CEO is a major donor to the

⁷⁶ 29 C.F.R. § 102.67(c).

⁷⁷ See Regional Director’s Decision and Direction of Election at 1 (April 8, 2020) (stating the Petitioner “filed the petition herein with the National Labor Relations Board . . . seeking to decertify the United Food and Commercial Workers Union, AFL-CIO (Union) . . . the sole issue in this proceeding is whether the instant petition is barred by the in-force collective bargaining agreement that applies to the bargaining unit involved herein”).

⁷⁸ *Case Search Results: Mountaire Farms Inc.*, National Labor Relations Board, <https://www.nlr.gov/case/05-RD-256888> (last visited, Oct. 5, 2020) (The docket activity shows that the employer and the involved party (UFCW) filed post-hearing briefs to the Regional Director. No post-hearing brief to the Regional Director submitted by the Petitioner is reflected on the docket activity.).

⁷⁹ Memorandum from James Sherk 5–6 (2017), <https://assets.documentcloud.org/documents/6948593/Sherk-White-House-document.pdf>.

⁸⁰ *Id.* (calling on the Board to “overturn[] the *Browning-Ferris Industries* decision changing the joint employer standard,” “withdraw the joint employer charges against McDonalds,” “repeal[] the *Specialty Healthcare* case and its progeny,” “reverse” the 2014 Election Rule, and “implement administrative changes that would make it much harder for unions to bypass secret ballot elections”).

President and to at least one of the National Right to Work Committee’s funders.⁸¹ In light of the procedural irregularities, it is legitimate for Congress to inquire about the Board’s motivations for hurriedly manufacturing an opportunity to rule on this issue.⁸² The irregularities reflected throughout this adjudication underscore Congress’s concern that the plan to reverse the contract bar occurred at the behest of or in coordination with the White House, other agencies, or other entities.

Ultimately, in the Board’s rush to reconsider the contract bar rule, it has failed to take sufficient account of the governing processes and procedures. In this case, it is improper for the Board to expand the scope of its review beyond that which was articulated by UFCW in its motion.⁸³ While the Board is not prohibited in all circumstances from considering the contract bar rule in its entirety, the facts and procedural history of this case establish various insurmountable barriers.

⁸¹ Jane Mayer, *How Trump Is Helping Tycoons Exploit the Pandemic*, The New Yorker (June 13, 2020), <https://www.newyorker.com/magazine/2020/07/20/how-trump-is-helping-tycoons-exploit-the-pandemic>.

⁸² See Letter from Robert C. “Bobby” Scott, Chairman, House of Representatives Committee on Education and Labor, to John Ring, Chairman, National Labor Relations Board (Sept. 1, 2020) (threatening subpoena) <https://edlabor.house.gov/imo/media/doc/NLRB%20Subpoena.pdf>.

⁸³ Involved Party’s (UFCW) Request for Review of Regional Director’s Decision and of Election and Motion to Defer RD Election Pending Disposition of Request for Review at 5, filed April 21, 2020.

CONCLUSION

For the foregoing reasons, the Board should adhere to the contract bar rule in a manner consistent with current longstanding precedent.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2020, I caused a true and correct copy of the Brief of Amici Curiae Chairman Robert C. "Bobby" Scott, Chairwoman Frederica Wilson, and Vice Chairman Andy Levin in Case No. 05-RD-256888 to be filed electronically using the National Labor Relations Board's Electronic Filing System and served via email on the following:

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