

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MOUNTAIRE FARMS, INC.

Employer,

and

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.

Case 05-RD-256888

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE

CORRECTED COPY

Craig Becker
James B. Coppess
Maneesh Sharma
AFL-CIO
815 Sixteenth St. NW
Washington, DC 20006
(202) 637-5310
cbecker@aficio.org

TABLE OF CONTENTS

Table of Authorities	ii
Introduction	1
Argument	3
I. The Contract Bar Promotes the NLRA’s Policy of Contractual Stability and Repose	3
II. The Contract Bar Doctrine Developed to Provide Stability and Repose to the Typical Collective-Bargaining Agreement, While Properly Accommodating Employee Choice	12
Conclusion	20

TABLE OF AUTHORITIES

Cases

Page(s):

Appalachian Shale Prods Co.,
121 NLRB 1160 (1958)..... 1, 7

Auciello Iron Works, Inc. v. NLRB,
517 U.S. 781 (1996) 4, 5, 6, 8, 9

Auciello Iron Works, Inc.,
317 NLRB 364 (1995)..... 6

Bethlehem Steel Co.,
95 NLRB 1508 (1951)..... 16

Black Diamond Steamship Co.,
2 NLRB 241 (1936)..... 13

Bridgestone/Firestone, Inc.,
331 NLRB 205 (2000)..... 6

Brooks v. NLRB,
348 U.S. 96 (1954) 11

Crompton Co. Inc.,
260 NLRB 417 (1982)..... 19

Deluxe Metal Furniture Co.,
121 NLRB 995 (1958)..... 9, 17, 18

Dep't of Justice v. FLRA,
875 F.3d 667 (D.C. Cir. 2017) 4

Fall River Dyeing & Finishing Corp. v. NLRB,
482 U.S. 27 (1987) 6, 11

General Cable Co.,
139 NLRB 1123 (1962) 18, 19

General Motors Corp.
102 NLRB 1140 (1953)..... 9, 16, 17

H.J. Heinz Co. v. NLRB,
311 U.S. 514 (1941) 4

TABLE OF AUTHORITIES (CONTINUED)

Cases

	Page(s):
<i>Hershey Chocolate Corp.</i> , 121 NLRB 901 (1958).....	2
<i>Hexton Furniture Co.</i> , 111 NLRB 342 (1955).....	6, 7, 15
<i>J.I. Case Co. v. NLRB</i> , 321 U.S. 332 (1944)	4
<i>Johnson Controls, Inc.</i> , 368 NLRB No. 20 (2019).....	5, 6
<i>Leonard Wholesale Meats, Inc.</i> , 136 NLRB 1000 (1962).....	18
<i>Lincoln Mills</i> , 353 U.S. 448 (1957)	4, 5, 9
<i>Local 1298 (Roman Stone Construction Co.)</i> , 153 NLRB 659 (1965).....	7
<i>Local Lodge No. 1424, Int’l Ass’n of Machinists v. NLRB (Bryan Mfg. Co.)</i> , 362 U.S. 411 (1960)	11
<i>MV Transportation</i> , 368 NLRB No. 66 (2019).....	3, 5, 15, 20
<i>Nash-Kelvinator Corp</i> 110 NLRB 447, 448 (1954).....	15
<i>National Sugar Refining Co.</i> , 10 NLRB 1410 (1939).....	13
<i>New England Transportation Co.</i> , 1 NLRB 130 (1936).....	12
<i>NLRB v. Fin. Inst. Employees of Amer., Local 1182</i> , 475 U.S. 192 (1986)	11
<i>NLRB v. Ins. Agents’ Int’l Union, AFL-CIO</i> , 361 U.S. 477 (1960)	4
<i>Pacific Coast Ass’n of Pulp and Paper Mfrs.</i> , 121 NLRB 990 (1958).....	1, 17

TABLE OF AUTHORITIES (CONTINUED)

Cases

Page(s):

Paragon Prods Corp.,
134 NLRB 662 (1961)..... 1

RCA del Caribe,
262 NLRB 963 (1982).....10

Reed Roller Bit Co.,
72 NLRB 927 (1947).....13, 15

Superior Electrical Products Co.,
6 NLRB 19 (1938).....13

Teamsters Local 200 (Bachman Furniture Co.),
134 NLRB 670 (1961).....7

Textile Workers of Amer. v. Lincoln Mills of Al.,
353 U.S. 448 (1957)5

United Steelworkers of Amer. v. Warrior & Gulf Navigation Co.,
363 U.S. 574 (1960)4, 8

Statutes

29 U.S.C.

§ 8(b)(7)(A)7, 8

§ 8(f) 7

§ 10(b) 12

§ 157 11

§ 158(f) 7

TABLE OF AUTHORITIES (CONTINUED)

Page(s):

Other Authorities

H.R. Conf. Rep. 510,
80th Cong. 1st Sess. (1947).....7, 15

Role and Function of the FMCS, <https://www.fmcs.gov/wp-content/uploads/2020/02/FMCS-Role-and-Function-FY19-Update-Feb-2020.pdf> 26

S. Rep. No. 105, 80th Cong., 1st Sess., (1947).....5

Seventh Annual Report of the National Labor Relations Board (1942)19

UAW members approve labor deal to end strike with GM; union selects Ford,
next<https://www.cnbc.com/2019/10/25/uaw-members-approve-new-labor-contract-with-gm-ending-40-day-strike.html>..... 16

INTRODUCTION

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) submits this *amicus curiae* brief in response to the Board’s Notice and Invitation for Briefs. The Notice and Invitation for Briefs exhibits an intent by the Board to engage in a broad, open-ended review of its contract bar doctrine. Such an endeavor would, in the context of adjudication in a single case, be unlawful and misguided, and should be abandoned.

First, as the Union correctly details in its briefing, the Board may not engage in a wide-ranging review of its contract bar doctrine that is divorced from the facts presented in the case. That is why the Board has historically addressed changes to the contract bar doctrine in cases that present facts relevant to those changes. *See, e.g., Pacific Coast Ass’n of Pulp and Paper Mfrs.*, 121 NLRB 990, 991-92 (1958) (“the Board has reexamined those phases of the contract bar rules which are related to the facts presented in the instant case”); *Appalachian Shale Prods Co.*, 121 NLRB 1160, 1161 (1958) (“the instant case furnishes an appropriate vehicle for the relatively minor revisions [to the contract bar doctrine] in the field of adequacy of contract”). Rather than engaging in an unprecedented plenary review of the contract bar doctrine unrelated to the case before it, the Board should limit its analysis to the issue raised by the Union in its request for review – whether the parties’ collective-bargaining agreement is no bar to the instant petition because its union-security clause “clearly and unequivocally goes beyond the limited form of union-security permitted by Section 8(a)(3) of the Act and is therefore incapable of a lawful interpretation.” *Paragon Prods Corp.*, 134 NLRB 662, 662 (1961).

Second, the Notice and Invitations for Briefs provides virtually no guidance as to how the Board may be considering altering its contract bar doctrine, and thus provides the interested parties no opportunity to adequately address the matter. The Notice and Invitations for Briefs

essentially asks whether the Board should rescind the doctrine altogether, retain it as is, or do anything else with the doctrine. As to the last category, the Board invites potential *amici* to “specifically address” a vague list of topics – “formal requirements,” “duration,” “changed circumstances” – “in addition [to] any other issues raised.” Not only are none of these areas relevant to deciding the case before the Board, but it is impossible to tell why the Board identified these issues or what it is thinking of doing in any one of these regards. If the Board intends to engage in a review of its contract bar doctrine, it should follow its past precedent and await cases that properly put specific issues before it, and provide a Notice and Invitation for Briefs that include specific proposals or considerations for comment related to the particular issue(s) under review. *See, e.g., Hershey Chocolate Corp.*, 121 NLRB 901, 901 (1958) (Board issued a notice and invitation to submit briefs or comment advising that it was “considering possible revisions” of the contract bar policies related to union schisms and inviting comment with respect to “certain enumerated policy considerations” related to the contract bar and union schisms).

The AFL-CIO limits its comments in this brief to the one identifiable proposed change to the contract bar doctrine set forth in the Notice and Invitation for Briefs – to rescind the doctrine altogether. The Board should not do so. As shown below, for over eighty years, the contract bar has served the statutory policy of industrial peace fostered by contractual stability and repose. Indeed, the contract bar is now such a fundamental pillar of industrial peace that it would not be an exaggeration to say that its elimination would be the most significant, and de-stabilizing, labor-management development in recent times. Rescission of the doctrine would allow employers and employees to easily escape their contractual obligations, subjecting collective-bargaining agreements to instability contrary to Congress’s intent.

The Board, over decades of development, has properly balanced the need for contractual stability and repose with employees' free choice in the selection, or rejection, of union representation by extending the contract bar to the typical collective-bargaining agreement. Developments in the Board's doctrine have largely tracked real-world developments in collective-bargaining. There are no such recent developments that support the elimination of the doctrine.

Accordingly, the Board should abandon its unprecedented and unwarranted open-ended review of the contract bar doctrine. There is simply no justification for the Board to engage in such a destabilizing exercise. Instead, the Board should decide the instant matter solely on the union-security clause issue raised in the Union's request for review.

Argument

I. The Contract Bar Promotes the NLRA's Policy of Contractual Stability and Repose

In its recent *MV Transportation, Inc.* decision, the Board affirmed the centrality of "the values of contractual stability and repose" to the National Labor Relations Act ("NLRA" or "Act"). 368 NLRB No. 66, sl. op. 5 (2019). There, the Board adopted the contract coverage test in place of the clear and unmistakable waiver standard to evaluate an employer's contractual defense to a unilateral change allegation, stating that clear and unmistakable waiver "results in perpetual bargaining at the expense of contractual stability and repose." *Ibid* (emphasis omitted).

The Board explained that

collective bargaining is a means to an end, not an end in itself. Section 1 of the Act provides that it is the policy of the United States to encourage collective bargaining "for the purpose of negotiating the terms and conditions of [employees'] employment." In other words, the purpose of collective bargaining is to reach a collective-bargaining *agreement*. Moreover, Section 8(d) of the Act demonstrates Congress' intent to stabilize such agreements by imposing multiple requirements on any party that seeks to modify or terminate them.

Ibid (emphasis and alterations in original); *see also id.* at sl. op. 6, quoting *Dep't of Justice v. FLRA*, 875 F.3d 667, 674 (D.C. Cir. 2017) (“what matters [in the contract coverage analysis] is whether the policy falls within the scope of the collective bargaining agreement in light of the [statutory] policy of encouraging such agreements by fostering their stability and repose.”).

As the Board recognized, the need for contractual stability and repose stems from “the collective bargaining process[,]” the “history of [which] shows that its object has long been an agreement between employer and employees as to wages, hours and working conditions evidenced by a signed contract or statement in writing[.]” *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 523 (1941). That is because, “[c]ontrasted with the unilateral statement by the employer of his labor policy, the signed agreement has been regarded as the effective instrument of stabilizing labor relations and preventing, through collective bargaining, strikes and industrial strife.” *Id.* at 524.

The Supreme Court has declared that “[t]he object of the [NLRA] is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employees.” *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996); *see also United Steelworkers of Amer. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960) (“The present federal policy is to promote industrial stabilization through the collective bargaining agreement”). Indeed, “the sort of recognition that Congress, in the [NLRA], wanted extended to labor unions” was “recognition as the bargaining agent of the employees in a process that looked to the ordering of the parties’ industrial relationship through the formation of a contract.” *NLRB v. Ins. Agents’ Int’l Union, AFL-CIO*, 361 U.S. 477, 485 (1960); *see also J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944) (Congress “provid[ed] by statute for the collective agreement” for “the very purpose” of “supersed[ing] the terms of

separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group.”).

When Congress amended the NLRA in 1947, it sought to “promot[e] collective bargaining that ended in agreements not to strike.” *Textile Workers of Amer. v. Lincoln Mills of Al.*, 353 U.S. 448, 453 (1957). As Congress stated,

If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.

Id. at 454, *quoting* S. Rep. No. 105, 80th Cong., 1st Sess., p. 16 (1947); *ibid* (inclusion of § 301 intended to “encourage the making of agreements and to promote industrial peace through faithful performance by the parties”); *see also* S. Rep. No. 105, 80th Cong. at 17 (“Statutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace.”). It is clear then that Congressional policy embraces contractual stability and repose to achieve industrial peace.

“To [promote] such ends, the Board has adopted various presumptions about the existence of majority support for a union within a bargaining unit[.]” *Auciello Iron Works, Inc.*, 517 U.S. at 785. One of those presumptions is that a union is “entitled under Board precedent to a conclusive presumption of majority status during the term of any collective-bargaining agreement, up to three years” – *i.e.*, the contract bar. *Id.* at 786 (internal footnote omitted); *Johnson Controls, Inc.*, 368 NLRB No. 20, sl. op. 4 (2019) (“under the ‘contract bar’ doctrine, a union is entitled to a conclusive presumption of majority status during the term of a collective-

bargaining agreement, up to 3 years”).¹ The Supreme Court explained the purpose of the contract bar is “to achieve stability in collective-bargaining relationships” “by enabling a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying about the immediate risk of decertification and by removing any temptation on the part of the employer to avoid good-faith bargaining in an effort to undermine union support.” *Auciello Iron Works*, 517 U.S. at 786 (internal quotation marks and brackets omitted), *citing Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987). As the Board recently observed, “[t]he[] presumption[] [is] based not so much on an absolute certainty that the union’s majority status will not erode as on the need to achieve stability in collective-bargaining relationships.” *Johnson Controls*, *supra* at sl. op. 4, *quoting Auciello Iron Works*, 517 U.S. at 786. Thus, it was a “need for repose that first prompted the Board to adopt the rule presuming the union’s majority status during the term of a collective-bargaining agreement[.]” *Id.* at 787. Accordingly, the contract bar doctrine furthers contractual stability and repose and thereby serves the statutory policy in favor of industrial peace.

Recognizing the contract bar’s value to that statutory policy, Congress has endorsed the doctrine. The legislative history of the Taft-Hartley Act shows that Congress was aware of the Board’s contract bar doctrine, approved of it, and intended for the Board to continue its application. S. Rep. 105, 80th Cong. at p. 25 (explaining that amendments adding decertification and RM petitions to § 9(c)(1) do not “affect[] the present Board’s rules of decisions with respect

¹ While *Auciello Iron Works* and *Johnson Controls* were unfair labor practice cases involving the withdrawal of recognition rather than representation cases raising contract bar issues, other than a few differences in application, the Board generally views the conclusive presumption of majority support during the term of an agreement and the contract bar in the same manner in unfair labor practice and representation cases. *See Auciello Iron Works, Inc.*, 317 NLRB 364, 367 n. 26 (1995); *see also, e.g., Hexton Furniture Co.*, 111 NLRB 342, 344 (1955), *Bridgestone/Firestone, Inc.*, 331 NLRB 205, 207-08 (2000).

to dismissal of petitions by reason of ... the existence of an outstanding collective agreement as a bar to an election. In other words, the Board could still dismiss an employee or employer petition if a valid contract were still in effect.”); H.R. Conf. Rep. 510, 80th Cong. 1st Sess., p. 50 (1947) (provision in House Bill requiring that certification of new union during the term of an existing contract not become effective unless the new union assumed the contract was dropped from the final bill to avoid any “inference that the practice of the Board, with respect to conducting representation elections while collective bargaining contracts are in effect, should not be continued”). The Board understood Congress’s enactment of the Taft-Hartley amendments as endorsing the contract bar doctrine. *Hexton Furniture Co.*, 111 NLRB 342, 344 (1955) (“The[] so-called contract-bar rules have become an established part of the law of labor relations. They received the approval of Congress when it amended the Act in 1947, and have been as it were, written into the statute.” (internal quotation marks and citation omitted)).

Congress further endorsed the contract bar through the Labor-Management Reporting and Disclosure Act. In adding § 8(f), Congress made clear that an agreement under that subsection “shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).” 29 U.S.C. § 158(f). This provision assumes that a contract not formed under § 8(f) *would* serve as a bar to a petition. Additionally, § 8(b)(7)(A)’s proscription of recognitional picketing where a “question concerning representation may not appropriately be raised under section 9(c)” includes situations where a contract bars such a petition. *See Teamsters Local 200 (Bachman Furniture Co.)*, 134 NLRB 670, 683 (1961) (reviewing legislative history suggesting that § 8(b)(7)(A) encompasses contract bar scenarios), *Local 1298 (Roman Stone Construction Co.)*, 153 NLRB 659, 659 n. 3 (1965) (discussing relationship between contract bar and § 8(b)(7)(A), which both “promote stability in established bargaining relationships”).

Thus, Congress, and the Board, have repeatedly recognized the importance of the contract bar in fostering contractual stability and repose. Extensive labor-management experience further illustrates the value of that contractual stability and repose provided by the contract bar. A union and employer often engage in contentious and difficult negotiations prior to successfully reaching accord concerning the terms and conditions of employment that will govern the workplace for the term of the new agreement. With that agreement, any strike or lockout activity ends and labor peace is likely to prevail for the term of the contract, given the almost universal inclusion of dispute resolution mechanisms and mutual no-strike/no-lockout promises in such agreements. The union is then in a position to turn its attention, and the attention of the employees it represents, from the contentious process of reaching agreement to cooperative “industrial self-government” under the negotiated agreement. *United Steelworkers of Amer. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960). Employers are able to make investment decisions, operational plans, and commitments to customers based on predictable employment relations for the duration of the parties’ agreement.

Due to the “need for repose,” contract bar principles prevent an employer in this situation from petitioning for an election after having “s[a]t” on any doubt of a union’s majority support until after entering into the collective-bargaining agreement. *Auciello Iron Works, Inc.*, 517 U.S. at 787. This is necessary in order to prevent employers from rejecting contracts when, in hindsight, they decide the agreed-to contract is not to their advantage. The contract bar likewise prevents employees from rejecting collective-bargaining agreements immediately after they take effect and looking to a rival union, or no representation, in the hopes of securing a better deal.

The contract bar doctrine also aids in the achievement of agreements in the first place, and in their stable administration. The 60-day insulated period “eliminate[s] the possibility for

employees to wait and see how bargaining is proceeding and use another union as a threat to force their current representative into unreasonable demands.” *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1001 (1958). During the term of the agreement, the contract bar allows the union to administer the contract without fear of decertification solely for refusing to indulge bargaining unit members’ most extreme demands, or for reminding members of the need to honor the deal that was struck.

Elimination of the contract bar, thereby subjecting all collective-bargaining agreements to what the Supreme Court referred to as “our fickle nature,” *Auciello Iron Works, Inc.*, 517 U.S. at 786, would encourage employees, in the heat of the moment, to reject agreements bargained by their chosen representative, even where the agreements are negotiated consistent with bargaining aims set by the unit employees and ratified by those employees. That ability would upend the settled expectations, discussed above, that employers, unions, and employees gain upon entering into collective-bargaining agreements. It would also undermine the “chief advantage which an employer can reasonably expect from a collective bargaining agreement” – “uninterrupted operation during the term of the agreement.” *Lincoln Mills*, 353 U.S. at 453.

An example helps illuminate just how disruptive the elimination of the contract bar would be. On September 15, 2019, nearly 50,000 UAW-represented workers went on strike during negotiations with General Motors Corporation. The strike lasted 40 days, the longest strike between the UAW and GM in half a century, and both the workers and the company incurred considerable costs. The strike ended when the union and company reached a four-year collective-bargaining agreement that provided significant job security to the UAW-represented workers, and four years of labor peace for GM. The agreement was ratified by 57% of the

bargaining unit employees who voted. <https://www.cnbc.com/2019/10/25/uaw-members-approve-new-labor-contract-with-gm-ending-40-day-strike.html>.

If the Board were to rescind the contract bar, immediately after entering into the collective-bargaining agreement, UAW-represented workers who believed that the agreement did not sufficiently achieve their bargaining goals considering their sacrifices could collect signatures seeking representation by a rival union from the 43% of bargaining unit employees who voted against ratification. They could then petition the Board for an election to change bargaining representative from the UAW to the rival union, and campaign for election of that union on the promise that it would bargain a better deal than the UAW did. The bargaining unit employees would then be able to choose between retaining the UAW, and the gains locked in by the collective-bargaining agreement, or the rival union, and the opportunity to renegotiate that agreement with the strike threat back in hand. *See RCA del Caribe*, 262 NLRB 963, 966 (1982) (“If the incumbent prevails in the election held, any contract executed with the incumbent will be valid and binding. If the challenging union prevails, however, any contract executed with the incumbent will be null and void.”).

Even if the bargaining unit members elected the rival union, that would not settle labor relations. A year following the election, the workers may go through the entire process again, with both unions campaigning for support throughout that period. Collective bargaining between the rival union and GM would likely be tainted by an uncompromising union attempting to deliver on its promise of a better deal in order to win future elections, and even possibly by GM, who, at a minimum, will seek an agreement that hews closely to the expectations set in its agreement with the UAW, but may also look to bargain through the election bar in the hopes of potentially dealing with a more willing partner in the UAW, or no union at all.

That state of affairs would not promote the declared “object of the [NLRA] [of] industrial peace and stability, fostered by collective-bargaining agreements,” but would, in fact, be “inimical to it.” *Auciello Iron Works*, 517 U.S. at 790, quoting *Brooks v. NLRB*, 348 U.S. 96, 103 (1954).²

The contract bar doctrine does require a balancing of industrial peace and stability with the employees’ statutory “right to” “bargain collectively through representatives of their own choosing,” or to “refrain” from such representation. 29 U.S.C. § 157. However, the Supreme Court confirmed that the Board’s presumptions of majority support operate “without impairing the free choice of employees.” *Fall River Dyeing*, 482 U.S. at 38.

The Supreme Court further endorsed the balance embodied in the contract bar doctrine in *Local Lodge No. 1424, Int’l Ass’n of Machinists v. NLRB (Bryan Mfg. Co.)*, 362 U.S. 411 (1960). There, the Court rejected the Board’s application of a continuing violation theory that allowed the Board to find an unfair labor practice where an employer and union entered into a collective-bargaining agreement more than six months prior to the filing of a charge and at a time when the union lacked majority support. The Court explained the Board’s approach would undermine the “repose sought to be assured by § 10(b)” of the Act, by “withdraw[ing] virtually

² This example also illustrates how elimination of the contract bar would undermine the industrial stability promoted by other bars, such as the one-year statutory election bar. As the Supreme Court has described, the election bar is “designed to encourage stable bargaining relationships,” which serves “[t]he basic purpose of the National Labor Relations Act [–] to preserve industrial peace.” *NLRB v. Fin. Inst. Employees of Amer., Local 1182*, 475 U.S. 192, 208 (1986). By removing the contractual stability and repose gained by the product of the stable bargaining relationship – the collective-bargaining agreement – the Board would undermine the very reason that Congress codified the election bar.

This example additionally only provides an illustration of the de-stabilized labor relations environment caused by elimination of the contract bar. It does not attempt to demonstrate the many unexpected complications caused by mid-term termination of collective-bargaining agreements, including the potential triggering of multi-employer plan withdrawal liability.

all limitations protections from collective-bargaining agreements[.]” *Id.* at 425. In addressing the countervailing concern of employee free choice, the Court declared that “[i]t may be asserted, without fear of contradiction, that the interest in employee freedom of choice is one of those given large recognition by the Act as amended. But neither can one disregard the interest in industrial peace which it is the overall purpose of the Act to secure.” *Id.* at 428 (internal quotation marks and citation omitted).

II. The Contract Bar Doctrine Developed to Provide Stability and Repose to the Typical Collective-Bargaining Agreement, While Properly Accommodating Employee Choice

A brief review of the development of the contract bar doctrine shows that the Board was always guided by the interest of contractual stability and repose and shaped the doctrine to fit the typical collective-bargaining agreement, all the while properly accommodating employee free choice. Given the doctrine’s successful accommodation of the dual interests of bargaining stability and employee free choice, there is no need to upset the long-standing equipoise the Board has achieved

The Board addressed the effect of an existing agreement on a representation petition in one of its earliest cases, *New England Transportation Co.*, 1 NLRB 130 (1936). There, the Board found no bar to a representation petition based on an agreement between the employer and some employees, negotiated by a union (though the union was not party to the agreement), because the “whole process of collective bargaining and unrestricted choice of representatives assumes the freedom of the employees to change their representatives, while at the same time continuing the existing agreements under which the representatives must function.” *Id.* at 138-39. Thus, the Board adopted the approach of the National Mediation Board at the time – employees were free to petition for an election to change their representative despite the existence of an agreement, but any existing agreement would continue and would be

administered (or re-negotiated) by the prevailing union.³ *Id.* at 139; *see also Black Diamond Steamship Co.*, 2 NLRB 241, 245 (1936) (“The mere holding of the election will in no way affect the rights and duties, if any, arising out of the [existing one-year] contract”).

The Board quickly adopted a different approach, and began to bar petitions based on an existing agreements of one-year duration. *See, e.g., Superior Electrical Products Co.*, 6 NLRB 19, 22 (1938); *National Sugar Refining Co.*, 10 NLRB 1410, 1415 (1939). By 1942, the contract bar was sufficiently defined that the Board reported that it “has normally refused to proceed to an election, in the presence of a collective bargaining contract, where the contract granted exclusive recognition, is to be effective only for a reasonable period (ordinarily 1 year) and was negotiated by a union representing at the time a majority of the employees, prior to any claim by a rival labor organization.” SEVENTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD, p. 55 (1942).

In *Reed Roller Bit Co.*, the Board held that a two-year collective-bargaining agreement barred a petition. 72 NLRB 927 (1947). The Board acknowledged that the contract bar required a balancing of interests: “the interest in such stability as is essential to encourage effective collective bargaining, and the sometimes conflicting interest in the freedom of employees to select and change their representatives.” *Id.* at 929. After reviewing its development of the contract bar, which by that point in time had been extended from applying only to one-year agreements to presumptively applying to two-year agreements unless that term was contrary to industry custom, the Board held that “[i]n the light of [its] experience in administering the Act, [it] believe[d] that a contract for a term of 2 years cannot be said to be of unreasonable duration.”

³ Prior to passage of the Taft-Hartley Act, contract bar questions only arose in the context of representation petitions filed by rival unions.

Ibid. In so holding, the Board noted that it “ha[d] not discovered any compelling conditions which indicate that such agreements unduly limit the right of employees to change their representatives.” *Ibid.* In contrast,

in entertaining rival petitions several months before the expiration of the numerous 1-year contracts which are made, we have found that in many instances the contracting parties, having composed their differences and executed collective bargaining contracts after the expenditure of much time, effort and money, can feel truly secure in their respective positions only for the brief period of approximately 8 or 9 months.

Id. at 929-30.

Importantly, the Board explained that, in its early years, it had emphasized the interest of employee free choice due to the nascent nature of collective bargaining at the time.

For large masses of employees collective bargaining has but recently emerged from a stage of trial and error, during which its techniques and full potentialities were being slowly developed under the encouragement and protection of the Act. To have insisted in the past upon prolonged adherence to a bargaining agent, once chosen, would have been wholly incompatible with this experimental and transitional period. It was especially necessary, therefore, to lay emphasis upon the right of workers to select and *change* their representatives.

Id. at 930 (emphasis in original). But times had changed: “Now, however, the emphasis can better be placed elsewhere. We think that the time has come when stability of industrial relations can be better served, without unreasonably restricting employees in their right to change representatives, by refusing to interfere with bargaining relations secured by collective agreements of 2 years’ duration.” *Ibid.* Accordingly, by early 1947, collective bargaining under the Act had matured to the point that industrial peace was best served by fostering contractual stability and repose.⁴

⁴ At the time, the Board continued to consider industry custom to show that a contract longer than two years should bar a petition for the full term of the agreement. *Reed Roller Bit Co.*, 72 NLRB at 930 n. 8.

Thus, the contract bar was well-established by the time Congress debated the Taft-Hartley Act. As the Board recognized in *MV Transportation*, a goal of the Taft-Hartley Act was to stabilize collective-bargaining agreements. 368 NLRB No. 66 at sl. op. 5 (“Section 8(d) of the Act demonstrates Congress’ intent to stabilize such agreements by imposing multiple requirements on any party that seeks to modify or terminate them”); *see also* H.R. Conf. Rep. 510, 80th Cong. at p. 35 (discussing the “important” “inclusion” of the provision in 8(d) providing that “the duty to bargain is not to be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract”). In this context, as indicated *supra*, Congress approved the contract bar doctrine during its Taft-Hartley debates. *Hexton Furniture Co.*, 111 NLRB at 344 (the contract bar “received the approval of Congress when it amended the Act in 1947, and ha[s] been as it were, written into the statute.” (internal quotation marks and citation omitted)).

Following passage of Taft-Hartley, the Board continued to tailor the contract bar doctrine to ensure contractual stability and repose. For instance, during this period, the Board clarified that contracts must sufficiently detail terms and conditions of employment in order to bar a petition. In *Nash-Kelvinator Corp.*, the Board explained that

[i]n determining whether a collective-bargaining agreement should be held a bar to a representation proceeding the Board must determine, among other things, whether it imparts to the relationship of the parties a degree of stability which outweighs the right of the employees to a redetermination of bargaining representatives at that particular time.

110 NLRB 447, 448 (1954). While “[n]ot every aspect of employment need be fixed by such a contract[,]” “the contract must contain terms and conditions of employment of sufficient substance to reasonably justify the conclusion that in the light of the surrounding circumstances the contract is likely to preserve, undisturbed by serious differences and disruptions, the working

relationship of the parties to it.” *Id.* at 448-49. *See also Bethlehem Steel Co.*, 95 NLRB 1508, 1509-10 (1951) (short-term agreement that simply continued “the terms and conditions of employment presently in effect” did not bar petition because such an agreement did not “achieve[] the desired stability in labor relations” as it is not written in the “customary way in which labor unions and employers crystallize their understandings[,]” and “[i]n fact,” “has virtually all the defects and uncertainty of an oral agreement.”).

Also at this time, the Board, in *General Motors Corp.*, began evaluating the reasonable duration of a contract for bar purposes by considering whether a “substantial part of the industry is covered by contracts of a similar term.” 102 NLRB 1140, 1143 (1953). There, the Board had to determine whether the seminal five-year agreement between GM and the UAW, reached in 1950, would serve as a bar. In that agreement, often referred to as the Treaty of Detroit, the UAW exchanged five years of labor peace for, among other things, ground-breaking healthcare and pension benefits and cost-of-living increases. *See id.* at 1142 n. 8. The Board reported that, following the GM-UAW agreement, every major automotive manufacturer had entered into a long-term collective-bargaining agreement. *Id.* at 1141-42. Due to the “salutary and stabilizing effect” of these long-term contractual relationships, the Board held that it would accord bar quality to agreements with terms similar to those of agreements that a substantial part of the industry is similarly covered by. *Id.* at 1143. In the Board’s opinion, that test “is more practicable, is in keeping with present-day normal economic developments, and will better effectuate the policies of the Act.” *Ibid.*

The Board later determined it had been mistaken about its *General Motors* test being more practicable. In *Pacific Coast Ass’n of Pulp and Paper Mfrs.*, the Board abandoned the *General Motors* test as “administratively burdensome.” 121 NLRB at 992 (describing the

complexity of applying the substantial part of the industry test in relation to any particular bargaining unit). In its place, the Board adopted the rule that a fixed-term contract would serve as a bar for up to two years. *Id.* at 992. In adopting the two-year rule, the Board recognized that “the majority of the contracts are of a duration of 2 years or less.” *Ibid.* Additionally, the Board determined that contracts with no fixed terms, such as contracts terminable at will, would be accorded no bar quality. *Id.* at 993. The Board explained that “encouraging and protecting industrial stability” was served “where contracting parties have entered into mutual and binding commitments thereby reasonably insuring that for the duration of the agreement neither party will disrupt the bargaining relationship by unilaterally attempting to force changes in the conditions of employment upon the other.” *Id.* at 994. Extending bar quality to contracts terminable at will, where parties “have not so committed themselves” impairs employee free choice “without concomitant statutory justification.” *Ibid.*

In *Deluxe Metal Furniture Co.*, *supra*, a companion case to *Pacific Coast Ass’n*, the Board made further changes to its contract bar doctrine with the intent of promoting contractual stability and repose. For instance, the Board declared that petitions filed more than 150 days prior to an existing contract’s termination date generally would be dismissed as premature, in order to “preserve as much time as possible during the life of a contract free from the disruption caused by organizational activities.” *Deluxe Metal Furniture Co.*, 121 NLRB at 999.⁵ The Board

⁵ The Board allowed the processing of petitions filed more than 150 days prior to the contract’s termination date only if, prior to the ninetieth day before contract termination, the Region held a pre-election hearing and issued a Decision and Direction of Election, and the Board issued a decision on any request for review. *Deluxe Metal Furniture Co.*, 121 NLRB at 995. Following the Board’s delegation to Regional Directors of its powers under § 9 in 1961, the Board studied the time between petition and election, and found that the time had been so considerably reduced that “a valid, existing bargaining relationship may be unduly disturbed by a change in representatives through a Board election conducted well in advance of the terminal date of [an] existing contract.” *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000, 1001 (1962).

also adopted its “insulated period” rule, requiring that any petition filed less than 60 days prior to the contractual termination date be dismissed. *Id.* at 1000. The Board explained that the insulated period would “give rival unions a definite timeguide as to when to organize, and employees will know when to seek a change in representatives if they so desire” while “avoid[ing] as much disruption of labor relations as possible during a contract term.” *Ibid.* Moreover, the Board extended bar quality to contracts containing midterm modification clauses, even if the parties exercised rights under the clause short of termination, as “[s]uch a contract is as effective in stabilizing labor relations, until the parties actually elect to terminate, as any other contract.” *Id.* at 1004.

Finally, in *General Cable Co.*, the Board extended the contract bar from two years to three. 139 NLRB 1123, 1125 (1962). The Board’s extension of its contract bar doctrine to three years was based on several changed circumstances, with “[p]erhaps of greatest significance” being “the continuing trend ... toward agreements of more than 2 years' duration,” such that, by 1961, “a majority of the contracts covering more than 1,000 employees in one or more separate units were for terms longer than 2 years; and of that majority, furthermore, the greater number of agreements were of 3 years' duration.” *Id.* at 1127.⁶ At the same time, the Board rejected the urging of some *amici* to extend the bar beyond three years, stating that such an extension would be too “heavily weighted against employee freedom of choice[.]” *Id.* at 1125.

Accordingly, the Board reduced the time for considering a petition as timely from 150 days to 90. *Ibid.*

⁶ The Board found further support for the extension of the bar to three years in the AFL-CIO’s adoption of an internal disputes plan to adjudicate organizational disputes between affiliates, the passage of the Landrum-Griffin Act and its establishment of the right, *inter alia*, to elect new union officials at least every three years, and the Supreme Court’s recent decisions “fortif[y]ing the labor agreement and the arbitral process.” *General Cable Co.*, 139 NLRB at 1125-26 n. 9-11.

This brief historical review shows that the Board has consistently used the contract bar doctrine to foster industrial peace by providing contractual stability and repose during the term of the typical collective-bargaining agreement. As collective bargaining and the resulting collective-bargaining agreements matured, the contract bar doctrine developed to ensure that contractual stability and repose occurred through the life of the majority of agreements. *See Crompton Co. Inc.*, 260 NLRB 417, 418 (1982) (contracts of less than 90 days are no bar to a petition as “they provide little in the way of industrial stability”). At the same time, the Board, by carefully calibrating the contract bar doctrine to extend to the typical agreement, ensured that employee free choice was properly accommodated.

In contrast to the context in which the cases reviewed *supra* were decided, there are no recent real-world developments in labor-management relations or in collective-bargaining agreements that would support elimination of the contract bar doctrine, and thereby subject every collective-bargaining agreement to rejection at any time. Collective bargaining remains as mature as ever, as do resulting collective-bargaining agreements. Indeed, the typical collective-bargaining agreement continues to sufficiently detail terms and conditions of employment such that stability of labor relations is to be expected. Furthermore, the typical collective-bargaining agreement remains three-years in duration. FMCS presentation, p. 30, available at <https://www.fmcs.gov/wp-content/uploads/2020/02/FMCS-Role-and-Function-FY19-Update-Feb-2020.pdf> (average length of collective-bargaining agreements in 2018 was 38 months). This Board recently affirmed the continued importance of contractual stability and repose to the purpose of the Act. *MV Transportation*, 368 NLRB No. 66 at sl. op. 5.⁷ The current stability

⁷ Following the Board’s adoption of the contract coverage test in *MV Transportation*, parties are likely to expend more energy and resources to reach more detailed agreements, which further supports the need for contractual stability and repose.

offered by collective-bargaining agreements, which promotes the industrial peace that is the purpose of the Act to secure, was fostered by the contract bar doctrine. Changes to the contract bar doctrine, especially where (as here) the changes are not in response to any real-world developments, risk undermining the industrial stability the contract bar has fostered.

There is simply no justification for such a drastic shift in Board law as the elimination of the contract bar doctrine. Certainly nothing in the Board's Notice and Invitation to File Briefs, or in the briefing by the parties in this case, suggests otherwise. Indeed, as mentioned above, the contract bar is now such a fundamental pillar of industrial peace that its elimination itself would be the most significant, and de-stabilizing, labor-management development in recent times.

Conclusion

For the reasons stated above, there is no justification for eliminating the contract bar doctrine, the only identifiable proposal for changing the doctrine contained in the Notice and Invitation to File Briefs. As such, the AFL-CIO urges the Board to abandon its present open-ended review of the contract bar doctrine, and instead restrict its instant decision-making to the union-security clause issue raised in the Union's request for review.

Respectfully submitted,

/s/ Craig Becker

Craig Becker
James B. Coppess
Maneesh Sharma
AFL-CIO
815 Sixteenth St. NW
Washington, DC 20006
(202) 637-5310
cbecker@aficio.org

Date: October 7, 2020

CERTIFICATE OF SERVICE

I, Maneesh Sharma, hereby certify that on October 8, 2020, a true and correct copy of the foregoing Corrected Copy of the Brief on behalf of the American Federation of Labor and Congress of Industrial Organizations (originally filed on October 7, 2020) was e-filed with the NLRB's Executive Secretary and served via e-mail on the following parties or counsel:

Sean R. Marshall, Regional Director
National Labor Relations Board, Region 5
Bank of America Center, Tower II
100 S. Charles Street, Ste. 600
Baltimore, MD 21201
Sean.marshall@nlrb.gov

Barry Willoughby, Esq.
Adria Martinelli, Esq.
Young Conaway Stargatt & Taylor, LLP
Rodney Square, 1000 North King Street
Wilmington, DE 19801
bwilloughby@ycst.com
amartinelli@ycst.com

Joel A. Smith, Esq.
Christopher R. Ryon, Esq.
Kahn, Smith & Collins, P.A.
201 N. Charles Street, 10th Floor
Baltimore, MD 21201
smith@kahnsmith.com
ryon@kahsmith.com

Glenn M. Taubman, Esq.
Angel J. Valencia, Esq.
c/o National Right to Work Legal Foundation
8001 Braddock Road, Suite 600
Springfield, VA 22160
gmt@nrtw.org
ajv@nrtw.org

/s/ Maneesh Sharma