

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

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

**EMPLOYER MOUNTAIRE FARMS, INC.’S RESPONSIVE BRIEF IN
SUPPORT OF THE REGIONAL DIRECTOR’S DECISION AND
DIRECTION OF ELECTION**

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INTRODUCTION AND STATEMENT OF THE CASE

The Employer's Brief submitted on August 21, 2020 set forth the background information on this matter and will not be repeated here. On August 21, 2020, the Employer, the Petitioner, and the Union filed their respective briefs in support of their positions in this matter. In addition, a number of *amici* briefs were filed with the National Labor Relations Board (the "Board" or "NLRB") in accordance with its Notice and Invitation to file briefs used on July 23, 2020 and September 16, 2020, and later amended by modifications to the briefing schedule.

This is Employer's Responsive brief in support of the DDE and its position that the contract-bar doctrine should be rescinded or substantially modified.

QUESTIONS INVOLVED

1. Did the Regional Director correctly determine that the collective bargaining agreement in this case contained an unlawful union-security clause and therefore the contract-bar doctrine could not be applied?
2. Should the contract-bar doctrine be abolished because it undermines employee free choice and has no statutory basis?
3. If the contract bar is retained, should it be substantially modified?

ANALYSIS

I. THE REGIONAL DIRECTOR CORRECTLY DETERMINED THAT AGREEMENT CONTAINED AN UNLAWFUL UNION-SECURITY CLAUSE AND THEREFORE THE CONTRACT-BAR DOCTRINE COULD NOT BE APPLIED

A. The Union-Security Clause is Unlawful Because It Requires that Nonmember Incumbent Employees Become Union Members 31 Days Following the Beginning of Their Employment, Not 31 Days Following the Execution of the Contract.

The Employer's Brief in support of the DDE noted that the Board has long recognized that an existing collective bargaining agreement does not constitute a bar to the holding of a representation election where the contract contains a clause that violates the National Labor Relations Act (the "Act"). *Martin Building Material Co., Inc.*, 431 F.2d 1246 (5th Cir. 1970). *See also Gary Steel Co.*, 144 NLRB 470 (1963); *Paragon Products Corp.*, 134 NLRB 662 (1961). A contract containing an unlawful union-security provision that is unlawful on its face will not bar a representation petition. *Paragon*, 134 NLRB 662. Further, the burden of proving that a contract acts as a bar to a representation election is on the party asserting the doctrine. *Roosevelt Memorial Park, Inc.*, 187 NLRB 517 (1970).

Section 8(a)(3) of the Act mandates a 30-day grace period before employees become Union members, and ties that period to the later of the contract's effective date, or the date of employment. In relevant part, it states: "nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an

employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of **such employment** or the effective date of the agreement, whichever is the later . . .” 29 U.S.C. § 158(a) (3) (emphasis added).

The Agreement in this case ties the 30-day grace period to the *execution* date of the agreement, not the *effective* date. The Board in *Paragon* held that while collective bargaining agreements did not have to quote the statute verbatim to be legal, they must still meet the requirements of the Act for a lawful grace period. In this case, the grace period afforded to incumbent nonmember employees does not meet the statutory requirement.

The Regional Director therefore correctly concluded that the Union Security clause was unlawful because:

[A]ny incumbent employee who was hired prior to the Agreement’s execution date—February 9, 2019—would have been denied the statutorily mandated 30-day grace period. Because Article 3, Section 1 mandated that nonmember employees become Union members after 31 days following the beginning of their employment, and not 31 days following the execution of the contract, Article 3 is unlawful.

DDE at 7.

The Union’s claim that the Union Security clause is lawful, is an unavailing attempt to have the Board engage in linguistic gymnastics. The Union’s Brief concedes that:

[w]hether the agreement can be read to provide a full 30-day grace period to employees who were hired before the execution date of the agreement depends on what is meant by the phrase “beginning of such employment.” There is no dispute that “such employment” means employment “covered by the agreement.” See DDE 7-8. The Union’s position is that the employment “begin[s]” to be “covered by the agreement” once the agreement is executed.

In essence, the Union asks the Board to *disregard* any employment before the signing of the agreement. This strained argument does not square with the collective bargaining agreement itself nor the parties’ stipulation that the Union has represented the employees since 1978. DDE at 2. The parties clearly understood and considered that Mountaire, at the time the Agreement was executed, would have incumbent employees in its employ whose then-existing terms and conditions of employment would thereafter be governed by the Agreement. For example, as the Regional Director pointed out, Article 5 – Wages – provides that

Whenever any employee covered by this Agreement is receiving a higher rate than the minimum rate provided for at the time of the signing of this Agreement, such differential shall continue for the terms of this Agreement.

The Union’s argument that employment prior to the signing or the agreement’s execution must be disregarded becomes even more absurd when other provisions of the collective bargaining agreement are considered. Article II, the Recognition clause, provides that *a new employee* will become *a regular employee*

ninety (90) days after the date of hire. The date of an employee's hire is obviously not the date that the contract is signed.

Further, the Union's position that employment prior to the day of signing of the collective bargaining agreement is inconsistent with Article VII of the contract addressing employee vacations. Article VII not only refers to "regular employees" as identified in Article 2, but also explicitly provides for longer periods of vacation based on the employee's length of service. Thus, there can be no doubt that the parties contemplated that the employer would have incumbent employees in its employ at the time the contract was executed, who would thereafter be governed by agreement upon its execution. See RDD at 8.

Further, the parties stipulated that the collective bargaining relationship has been in effect for several decades. The Union argument that those "now employed" as provided in the Recognition clause of the bargaining unit (Article 2) are only those hired on or after February 9, 2019, is implausible. The Regional Director's holding that the only "plausible interpretation of the phrase 'beginning of such employment' as used in Article 3, Section 1 is the beginning of an employee's employment with the Employer" is therefore correct.

Indeed, as pointed out in Petitioner's Brief, the Union's proposed interpretation desecrates the text of the Union Security clause of the collective bargaining agreement. As Petitioner points out, had the parties intended the result

the Union argues for, they would have included language such as that set forth on page 33 of the Petitioner’s Brief, *e.g.*, “and those who are not members on the execution date of this Agreement shall, on or after the thirty-first day following the beginning of such employment, [*or the execution of the contract, whichever is later*] . . . shall become and remain members in the Union.”

Paradoxically, the Union next argues that the Regional Director disregarded *Paragon*, claiming that the Regional Director considered extrinsic evidence beyond the four corners of the contract in his decision. Yet, the Union asserts that “there is no evidence here that any new employees were hired between the effective date and the execution date of the agreement. There is nothing in the record to indicate that any employee was actually denied the 30-day grace period.” Union Brief at 6.

The Union’s argument is an attempt to disregard *Paragon*. The Union’s unsubstantiated assertion *would require* the Regional Director to consider extrinsic evidence of whether in fact, any incumbent non-member employees were denied their statutorily required 30-day grace period. To make such a determination, the Regional Director would have to hold an evidentiary hearing. Such an approach is directly contrary to the holding of *Paragon* that the determination of the legality of a union’s security clause must be made by analysis of the four corners of the

applicable collective bargaining agreement. Accordingly, the Union's strained argument is without merit.

B. The Board Is Not Restricted From Considering The Proper Scope of The Contract Bar Doctrine By The Administrative Procedures Act.

The Union attempts to limit the Board's consideration of the issue before it by arguing that it has engaged in unlawful rule making by inviting comments on the continued vitality of the Contract Bar Doctrine, and/or whether the Contract Bar Doctrine should be modified. The Union is wrong.

The Union's argument turns on its claim that in determining the case before it, the Board cannot consider whether the Contract Bar Doctrine itself, a Board created doctrine, should be abolished or modified. The plain answer is that the issue before the Board is whether the Union can use the Union Security clause in issue, as a vehicle to suppress employee free choice in the election of their representative.

Contrary to the Union's claims, adjudicating whether the Board created Contract Bar Doctrine remains viable is central to the issue now before the Board. In this case, the parties entered into a five-year contract that under existing law would have a contract bar in place for three years. To determine whether the Union Security clause prevents employees from voting on whether they wish to be

represented by the Union may require the Board to determine whether the Contract Bar Doctrine remains in force and, if so, the scope of the doctrine.

Indeed, many of the briefs of the *amici* traced the history of the Contract Bar Doctrine, including the many modifications the Board has adopted with respect to the time and scope of the Bar. In none of those cases did the Board or the Courts consider that the Board's adoption of the policy or amendment of the policy was constrained by the APA.

It is well established that “the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.” *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 293 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)). As held by the U.S. Supreme Court in *Chenery*:

[a]ny rigid requirement [for formal rulemaking] would make the administrative process inflexible and incapable of dealing with many of the specialized problems which ariseNot every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. . . . the agency must retain power to deal with problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards.

Chenery, 332 U.S. at 202-03.

In *Bell Aerospace*, the Court observed that while rulemaking would “provide the Board with a forum for soliciting the informed views of those affected in industry and labor before embarking on a new course . . . the Board has discretion to decide that the adjudicative procedures in this case may also produce the relevant information necessary to mature and fair consideration of the issues.” *Bell Aerospace*, 416 U.S. at 295. The Court further noted that “[t]he NLRA does not specify in what instances the Board must resort to rulemaking.” *Id.* at 290, n.21. The Court held that “the views expressed in *Chenery II* and *NLRB v. Wyman-Gordon Co.* [294 U.S. 759 (1969)] make plain that the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board’s discretion.” *Id.* at 294.

Here, the Board taken the additional step of soliciting *amicus* briefs before issuing any decision on the contract-bar issue, ensuring that informed views besides those of the parties are taken into consideration. The contract bar doctrine was created and expanded by Board rulings on specific cases; it is entirely appropriate that it may be rescinded or narrowed by adjudication as well.

II. THE CONTRACT-BAR DOCTRINE SHOULD BE ABOLISHED IN ITS ENTIRETY

In its Brief in support of the DDE, the Employer pointed out that Congress did not intend to establish a contract bar to employee free choice in the selection,

or non-selection of a representative for collective bargaining. Instead, the Contract Bar Doctrine was developed by the Board through *ad hoc* case rulings. Nothing in the Act suggests that Congress intended to prohibit employee free choice in selecting their representative for any reason other than the statutory election bar. There is no legislative history supporting the administratively adopted Contract Bar Doctrine, which limits employee free choice.

Numerous *amici* briefs were filed both for and against the prospect of rescinding the Contract Bar and/or modifying it. The Employer reasserts its position set forth in detail in its Brief in support of the DDE. The following points from the Amicus Briefs merit consideration.

First, as argued by the Americans for Prosperity Foundation, the use of the word “shall” in 29 USC § 159(e)(1) must be construed as a mandate for an election when thirty percent or more of the employees in a bargaining unit have petitioned for an election. Brief of Americans for Prosperity Foundation, at 3. In other words, absent a statutory provision such as the Election Bar, the specific statutory mandate set forth above *requires* an election be held by the terms of the Act itself. A Board-created doctrine such as the Contract Bar should not be permitted to supersede the mandates of the Act.

Further, the Brief of the Americans for Prosperity Foundation raises a second serious question: does the current application of the contract bar violate

freedom of association principles under the First Amendment. Although constitutional rights do not apply to private relationships, when, as here, a government entity by statute or otherwise limits the rights of individuals, constitutional protections apply. In other words, the NLRB's policy as a governmental entity limiting employee rights constitutes state action for constitutional purposes. The Contract Bar Doctrine restricting the rights of employees therefore implicates the First Amendment rights of employees to associate or not associate with others by limiting their right to remain a member of an incumbent Union. *See* "Brief of the Americans for Prosperity Foundation at 4-7.

The brief of the LIUNA Mid-Atlantic Regional Organizing Coalition, notes the many modifications to the Contract Bar Doctrine since its inception. This point is consistent with the Employer's position as argued above, that Board has not violated the APA.

III. IF THE BOARD RETAINS THE CONTRACT BAR DOCTRINE, IT SHOULD BE SUBSTANTIALLY MODIFIED

In the Employer's Brief in support of the DDE, Mountaire pointed out that the Contract Bar Doctrine in its current state is unduly complicated, overly restrictive, and almost impossible for Bargaining Unit Employees to understand if they wish to seek an election to decertify an incumbent Union.

Mountaire reasserts those positions in summary fashion below and addresses the salient points raised by the *amici* briefs.

A. The Duration of the Bar Period and the Operation of the Current “Window” and “Insulated” Periods.

The current NLRB Contract Bar Doctrine makes it extremely difficult for employees to file a petition seeking to decertify an incumbent Union, and should therefore be modified. Mountaire believes that if the Contract Bar Doctrine is retained at all, the duration of the Bar should not be longer than the one-year Election Bar.¹ Further, if the contract bar is extended beyond one year, the “window” should be much wider than that allowed by existing Board policy.

The window for Decertification should instead run from the period beginning six months before the expiration of the contract, and ending on the day of the expiration of the contract, regardless of whether the union and the employer reach agreement on a successor contract during this time. In addition, Mountaire believes that employees ought to be allowed a second window of shorter duration after a successor contract is reached, to allow incumbent employees and new hires the opportunity to determine whether they wish to seek an election to retain the incumbent union.

¹ As noted above, Mountaire believes that the Contract Bar Doctrine should be abolished.

B. The Formal Requirements for Affording Bar Quality to a Contract.

Except as noted below, the Board requirements for affording bar quality to a contract should remain consistent with the Board's current rules. To ensure employee free choice, however, ratification of the collective bargaining agreement should be required in all cases before affording contract bar quality, even if the contract itself does not state that ratification is required. *See Merico, Inc.*, 207 NLRB 101 (1973).

C. Circumstances When Contract Provision Will Prevent the Application of a Contract Bar.

- 1. Contracts including a union security clause compelling the employer to terminate non-members, even if lawful, should preclude the application of a Contract Bar.**

Mountaire submits that the Contract Bar Doctrine should not be applied to any contract in which the incumbent union has negotiated a union security clause that compels bargaining unit employees to become members of the union or face termination.² Union security provisions *even if lawful*, should not allow an

² This rule should apply equally to right-to-work states. Union contracts in such jurisdictions are usually artfully worded to state that "membership" only means paying the union's dues and assessments. The effect on employees is the same as termination, because to retain their jobs they must comply with the union's financial demands. Further, it is questionable whether lay employees understand the subtle definitional difference resulting from the artful wording unions often negotiate.

incumbent union to prevent employees from having the opportunity to freely choose their representative.

2. Illegal contract terms such as unlawful union security provisions should prevent the application of the Contract Bar.

Existing rules prohibiting the application of a contract bar to collective bargaining agreements containing unlawful provisions should continue to apply if the contract bar is not abolished, including an illegal union security clause. A union ought not to benefit from a union security clause that is unlawful.

Likewise, the Board should expand its examination to include union check off provisions, including the forms unions negotiate to compel bargaining unit employees to pay dues and other assessments. In other words, if there is a question about whether the union dues and assessments extend beyond core financial payments, the contract bar ought not to apply.

D. The Effect of Changes in Circumstances During the Term of the Contract.

A number of changed circumstances may support the need for a representation election to establish whether the incumbent union represents a majority of the workforce, as set forth in detail in the Employer's Brief in support of the DDE.

E. Issues set forth in the Briefs of the *Amici*

As noted above, the Union failed to present any arguments concerning the Board's request for briefing concerning possible modification of the Contract Bar Rule, and other requirements for the application of the Rule. Multiple briefs of the *Amici* support the modification of the Rule in various ways. All of the proposals and arguments will not be repeated here.

It is notable, however, that the General Counsel, while disagreeing that the Contract Bar Rule should be abolished, does support a change in the window for employee decertification petitions. The General Counsel concurs with the Employer's position that given the very brief current window, it is unlikely that employees who are not schooled in the technical nuances of the NLRB will be able to timely file a decertification petition. Accordingly, the General Counsel supports an expansion of the window. The HR Policy Association makes a similar argument for modification of the current Contract Bar Rules.

The Employer continues to maintain that the Contract Bar Doctrine should be rescinded, but that if the Board does not entirely abolish it, the Bar should be restricted as set forth in the Employer's brief in support of the DDE dated August 21, 2020.

CONCLUSION

For the foregoing reasons, the Regional Director's Decision and Direction of Election dated April 8, 2020, should be upheld. In addition, the Contract-Bar Doctrine should be rescinded or modified as discussed above.

Respectfully Submitted,

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