

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NLRB Case No.05-RD-256888

MOUNTAIRE FARMS, INC.,

Employer,

v.

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 27

Union.

REPLY BRIEF OF UNION

October 21, 2020

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**UNITED STATES OF AMERICA
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MOUNTAIRE FARMS, INC.,

Employer,

and

Case: 05-RD-256888

UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL 27,

Incumbent Exclusive
Representative,

and

OSCAR CRUZ SOSA,

Petitioner.

REPLY BRIEF OF UNITED FOOD AND COMMERCIAL WORKERS LOCAL 27

As incumbent bargaining representative United Food and Commercial Workers Local 27 (“the Union”) argued in its opening brief, the National Labor Relations Board (“NLRB” or “Board”) should solely address the narrow issue presented in the Union’s request for review and decline to consider any other potential changes to existing contract-bar doctrine. Nothing in the briefs submitted by Mountaire Farms, Inc. (“the Employer”), Petitioner Oscar Cruz Sosa (“the Petitioner”), or any of the amici support the Regional Director’s decision to direct an election in this case or the range of other doctrinal changes the Board invited amici to address in its July 7, 2020 Notice and Invitation to File Briefs. Instead, the Board should apply longstanding precedent and reverse the Regional Director’s finding that the union-security clause in the collective-bargaining agreement between the Union and Mountaire Farms, Inc. (“the Employer”) was unlawful.

ARGUMENT

1. Under longstanding Board precedent, the Regional Director erred in finding that the union-security clause is incapable of a lawful interpretation.

As the Board explained in *Paragon Products Corp.*, 134 NLRB 662, 663 (1961), “as [contracts] tend to eliminate strife which leads to interruptions of commerce, they are conducive to industrial peace and stability. Therefore, when such a contract has been executed by an employer and a labor organization the Board has held that postponement of the right to select a representative is warranted for a reasonable period of time,” as long as the contract itself is consistent “with the policies of the Act.” Because contracts containing valid union-security clauses are consistent with the policies of the Act, the Board has judged that such contracts promote industrial stability and are therefore entitled to bar quality.

The question of whether a union-security clause is valid can arise in either the context of an unfair labor practice proceeding or a representation proceeding. Between the late 1950s and early 1960s, the Board refined its approach to determining whether a union-security clause is valid in the context of a representation proceeding. While the Board initially required Regional Directors to carefully scrutinize union-security clauses, the Board later concluded that a more deferential form of review was appropriate in *Paragon Products*. In their briefs, the Petitioner and the Employer invite the Board to make the same error the Regional Director made in this case, that is, to apply an unwarranted, exacting standard of review to the union-security clause in the parties’ contract that is at odds with *Paragon Products*.

In *Keystone Coat, Apron & Towel Supply*, 121 NLRB 880, 883 (1958), the Board held that unless a union-security clause “on its face conform[ed] to the requirements of the Act,” a contract containing such a clause would not bar an election petition. The Board acknowledged that this strict standard “might operate to the detriment of those who, because of carelessness, ineptitude,

or oversight, fail to make their union-security provisions comply with the law[.]” *Id.* at 884. Nevertheless, the Board concluded that it could not “close its eyes to such failures, irrespective of the reasons.” *Ibid.* Three years later, in *Paragon Products*, the Board overruled *Keystone* and held that “only those contracts containing a union-security provision which is clearly unlawful on its face” will fail to “bar a representation election.” 134 NLRB at 666. Under this standard, only a clause “which by its express terms clearly and unequivocally goes beyond the limited form of union-security permitted by Section 8(a)(3)” is “clearly unlawful.” *Ibid.* Critically, under *Paragon Products*, unless a union-security clause is “incapable of a lawful interpretation,” a Regional Director should find that the clause is valid and accord the contract bar quality. *Ibid.*

The Board justified its shift to the more deferential *Paragon Products* standard on three grounds. First, the Board noted that in two recent decisions, the Supreme Court criticized the Board for establishing rules that presumed unlawful conduct on the part of employers and unions. *See NLRB v. News Syndicate Co.*, 365 U.S. 695 (1961); *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961). The Board determined that it would not be sound “to continue applying a rule with respect to union-security provisions which indulges in precisely the type of presumption of illegality frowned upon by the Supreme Court.” *Paragon Products*, 134 NLRB at 664. Second, the Board concluded that because it found that “a substantial bulk of the contracts containing perfectly legal union-security provisions cannot meet the strict test required by *Keystone*,” the *Keystone* rule had an “extremely unsettling impact upon established collective-bargaining relations.” *Ibid.* Finally, the Board found that a less exacting standard was more appropriate given the investigatory, nonadversarial character of representation proceedings and the existence of separate “unfair labor practice proceeding[s] as the avenue of enforcement of the statutory proscription against discriminatory arrangements and practices.” *Id.* at 665.

The standard announced in *Paragon Products* appropriately distinguishes between union-security clauses that are clearly unlawful and clauses that do not track the precise language of Section 8(a)(3) of the Act but nevertheless afford employees the statutorily mandated 30-day grace period. Unless a union-security clause is “incapable of a lawful interpretation,” *Paragon Products*, 134 at 666, the contract is consistent with the policies of the Act, and the Board’s policy favoring repose and industrial stability should govern.

In this representation proceeding, the Regional Director engaged in a searching analysis that surpassed the limited form of review contemplated by *Paragon Products*. As set forth more fully in the Union’s opening brief, although the union-security clause at issue in this case does not track the precise language of Section 8(a)(3), the clause provides employees with the required grace period. Article 3, Section 1 states that:

It shall be a condition of employment that all employees of the Employer covered by this Agreement who are members of the Union in good standing on the execution date of this Agreement shall remain members in good standing, 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, even if those days are not consecutive, shall become and remain members in good standing in the Union.

As the Union has repeatedly argued, the phrase “such employment” in the clause refers to employment “covered by the agreement” once the agreement is executed, and the futurity of the clause’s language reveals the parties’ intent to create a prospective obligation that complies with the Act’s requirements. By contrast, the Regional Director found that employment before the execution date could likewise be “covered by the agreement,” making reference to other articles in the parties’ collective-bargaining agreement in support of his interpretation. DDE 7-8.

The Regional Director’s decision is inconsistent with the principles underlying *Paragon Products*. By laboring to read the clause to deny certain employees the statutorily required grace

period, the Regional Director incorrectly presumed an intent on the part of the Union and the Employer to retroactively require membership at a time before the agreement was executed. In addition, the Regional Director's decision implicitly calls for extrinsic evidence to determine whether any employees were hired between the effective date and the execution date of the agreement, contrary to *Paragon Products*. Finally, the Regional Director's effort to construe the union-security clause as unlawful was particularly misplaced in the context of an investigatory representation proceeding, especially because the facial validity of the union-security clause is also the subject of a pending unfair labor practice charge.¹

Neither the Petitioner, the Employer, nor any amicus has argued that the Board should overrule *Paragon Products* or otherwise adopt a more exacting standard for scrutinizing the lawfulness of a union-security clause in the context of a representation proceeding. Because the union-security clause in the collective-bargaining agreement between the Union and the Employer is not "incapable of a lawful interpretation," the Regional Director erred in finding the clause unlawful. *Paragon Products*, 134 at 666. The Board should reverse this finding on review.

2. The Board should limit its decision to addressing the sole issue presented in the Union's request for review and retain the contract bar.

As argued in the Union's opening brief, the Board's July 7 Notice and Invitation to File Briefs solicited suggestions for changes to the Board's contract-bar doctrine that will neither affect the outcome of this case nor bear on the rights and obligations of the parties to this proceeding. For this reason, the Board's July 7 Notice conflated the distinction between rulemaking and adjudication and the separate procedures the Administrative Procedure Act requires for each type

¹ On April 22, 2020, the National Right to Work Legal Defense Foundation filed an unfair labor practice charge alleging that the union-security clause is unlawful. *See United Food & Commercial Workers Local 27 (Mountaire Farms, Inc.)*, 05-CB-259415. Although the Regional Director approved the Charging Party's request to withdraw portions of the charge on September 16, the relevant portions remain pending.

of proceeding. In addition, the Board risks improperly expanding the scope of its review by taking up arguments the Petitioner chose to waive when he failed to file his own request for review of the Regional Director's Decision and Direction of Election.

The great majority of the amici acknowledged the benefits of the contract-bar doctrine and the important role the Board plays in preserving parties' settled contractual understandings and securing industrial peace. As a result, nearly all the amici recommended that the Board retain the contract bar. *See* AFL-CIO Brief, at 2-12; Congressman Robert C. "Bobby" Scott et al. Brief, at 6-8; IBEW Local 304 Brief, at 3-4; John E. Higgins, Jr. Brief, at 7-11; Josephine Smalls Miller, J.D. Brief, at 14-16; LIUNA Mid-Atlantic Regional Organizing Coalition Brief, at 6-8; Professor Ruben J. Garcia et al. Brief, at 6-9; SEIU Brief, at 4-8; SPFPA Brief, at 2-4; University of Wisconsin-Madison Brief, at 5-9. Even those amici suggesting modifications to existing doctrine do not dispute that the contract bar has had a salutary and stabilizing effect on labor relations. *See* General Counsel Brief, at 7; HR Policy Association Brief, at 7.

The Petitioner, the Employer, and a handful of amici suggest that the Board abandon the contract bar. *See* Americans for Prosperity Foundation Brief, at 2-4; Center for Independent Employees Brief, at 6-10; Coalition for a Democratic Workplace Brief, at 5-14; U.S. Poultry & Egg Association et al. Brief, at 9-13. These parties principally argue that the contract bar unnecessarily impedes employees' ability to select or reject union representation and that the doctrine has no textual basis in the Act.

The Board should retain the contract bar and follow settled precedent to reverse the Regional Director's improper interpretation of the parties' union-security clause. For eighty years, the Board's contract-bar doctrine has contributed to industrial stability while according appropriate weight to employees' rights to select or reject union representation. As many amici persuasively

demonstrated, Congress has repeatedly endorsed the contract-bar doctrine, and the doctrine is now textually grounded in Section 8(f) of the Act. *See* AFL-CIO Brief, at 6-8; Congressman Robert C. “Bobby” Scott et al. Brief, at 3-5; HR Policy Association Brief, at 6-7; John E. Higgins, Jr. Brief, at 6-7; SEIU Brief, at 5. In addition, as several amici argued, the doctrine is consistent both with the Act’s policies and the Supreme Court’s repeated statements favoring stability in collective-bargaining relationships. *See* AFL-CIO Brief, at 4-6; HR Policy Association Brief, at 7-8; SEIU Brief, at 5-8. There is no justification for abandoning the contract bar in this case, especially in the context of an adjudicatory representation proceeding with such a limited record.

Several amici also offered additional suggested changes to the Board’s contract-bar doctrine based on the Board’s July 7 Notice, including changes to “the duration of the bar period during which no question of representation can be raised” and about how the Board should address “changed circumstances during the term of a contract.” The Board should decline to consider these arguments, which were not raised by the Union’s request for review and are not remotely related to this representation proceeding. Notably, the amici who addressed these issues did not make any effort to link their proposed changes to the facts presented in this case. Nor could they have done so, as the record developed in this case solely consists of the parties’ collective-bargaining agreement. The Board should properly restrict its focus to the issue presented in this case: whether the union-security clause in the parties’ collective-bargaining agreement is clearly unlawful.

CONCLUSION

The Union requests that the Board reverse the Regional Director’s finding that the union-security clause was unlawful and instead find that the collective-bargaining agreement barred the decertification petition.

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Respectfully submitted,

/s/ Joel A. Smith

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 21, 2020, a copy of the foregoing paper was sent by email to Sean Marshall, *Regional Director*, Andrea Vaughn, *Field Attorney*, National Labor Relations Board, Region 5, Bank of America Center, Tower II, 100 S. Charles Street, Ste. 600, Baltimore, MD 21201; Barry Willoughby, Esq., Adria Martinelli, Esq., and Lauren Russell, Esq., YOUNG CONAWAY, Rodney Square, 1000 North King Street, Wilmington, Delaware, 19801, *Counsel to the Employer*; and Glenn M. Taubman, Esq. and Angel J. Valencia, Esq., National Right to Work Legal Defense Foundation, Inc., 8001 Braddock Road, Ste. 600, Springfield, VA 22160, *Counsel to the Petitioner*.

/s/ Christopher R. Ryon

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