

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

Transdev Services, Inc.,

Employer,
and

Case No. 05-RD-268864

Amir Daoud

Petitioner,
and

Office and Professional Employees
International Union, Local 2, AFL-CIO, CLC,

Union.

**PETITIONER’S REQUEST FOR REVIEW AND
MOTION TO SUBSTITUTE PETITIONER**

Pursuant to Section 102.67(c) of the National Labor Relations Board’s (“Board”) Rules and Regulations, Petitioner Amir Daoud and Proposed Substitute Petitioner Sheila Currie (collectively, “Petitioners”) request review of the Regional Director’s December 22, 2020 Decision and Order applying the “contract bar” policy to dismiss Petitioners’ decertification petition as barred by the existence of a collective bargaining agreement.¹ In so doing, the Board

¹ On or about December 12, 2020, Petitioner Daoud took a non-unit position with the Employer as an Operator. Petitioner Daoud recognizes that, as a non-bargaining unit employee, he is no longer the appropriate petitioner in this case. However, his co-worker, Substitute Petitioner Currie, is an appropriate petitioner. Currie is employed within the bargaining unit and wishes to be substituted as the Petitioner. Daoud and Currie therefore ask that Daoud be removed from this matter and Currie be substituted as the Petitioner. The Board regularly allows such substitutions when employees’ circumstances change. *See, e.g., Jell-Well Dessert Co.*, 82 NLRB 101, 102 n.3 (1949) (treating the petition as filed by someone other than the original petitioner); *Nw. Photo Engraving, Co.*, 106 NLRB 1067 n.1 (1953) (unit employees requested petition continue after the death of petitioner); *Deffenbaugh Disposal Servs., Inc.*, Case No. 17-CA-22625, 2004 WL 1804090, JD(SF)-59-04 (July 30, 2004) at n.2 (recognizing in an unfair labor practice proceeding that the underlying petition had a substitute petitioner). Such a substitution is warranted because

should reject its current contract bar policy, reverse the Region’s dismissal of the petition, and order an election here. Alternatively, the Board should stay consideration of this matter pending its decision in *Mountaire Farms, Inc.* Case No. 05-RD-256888.

FACTS AND PROCEDURAL HISTORY

Petitioners are employees of Transdev, Inc. (“Transdev”) in a bargaining unit exclusively represented by the Office and Professional Employees International Union, Local 2, AFL-CIO, CLC (“Union”). Transdev is a successor employer, which assumed the prior exclusive bargaining agreement on or about July 1, 2019. Also in July 2019, the parties began negotiating a new contract. D&O at 3. (The Regional Director’s Decision and Order (“D&O”) is attached as Ex. 1). In June 2020, the Union presented a tentative agreement containing non-economic terms to the bargaining unit, which the employees voted down. *Id.* On October 21, 2020, a Union representative informed certain unit members via teleconference that he had negotiated a new agreement with a wage increase and that he “intended” to sign it without a ratification vote. *Id.* The Union representative did not inform unit members when he signed the agreement.

On November 10, 2020, Petitioner Daoud, who was unaware of the relevant dates, filed the instant decertification petition. *After* he filed the petition, unit members were informed about the date the parties signed the contract. *Id.* at 4. The Union’s and Transdev’s signatures are dated October 30 and 31, 2020, respectively.

“the petitioner is only a representative of the employees who are interested in a vote on continuing representation.” *Tyson Fresh Meats, Inc.*, 343 NLRB 1335, n.3 (2004); *see also Weyerhaeuser Timber Co.*, 93 NLRB 842, 844 (1951) (petitioner acts in a “representational capacity” filing a petition “in behalf of employees of Employer asserting that the Union is no longer the bargaining representative of such employees”). Based on the foregoing, Daoud and Currie move to remove Daoud and add Currie as the actual and appropriate Petitioner in this proceeding.

On December 22, 2020, the Regional Director found that the collective bargaining agreement operated as a bar to an election and dismissed the petition. *Id.* at 6.

ARGUMENT

Review should be granted here under the Board’s Rules and Regulations § 102.67(d)(4) because the Board’s current contract bar policy, in principle and in practice, violates the text of the Act and its core principles and should be overturned. Employees, like the Petitioners here, have a statutory right under the National Labor Relations Act (“NLRA”) to a vote at any time once they collect the requisite showing of interest.

A. The Contract Bar Contradicts the Act and Fundamental Legal Principles

First, the contract bar has no basis in the text of the Act. When Congress enacted the NLRA, it created only one bar to elections—the “election bar,” which prohibits elections for one year after a valid election has been conducted. *See* 29 U.S.C. §§ 159(c)(3) & 159(e)(2). That Congress did not provide bars on employee free choice beyond the one-year “election bar” suggests the contract bar deviates from the statute Congress enacted. The fact that the contract bar is now three times *longer* than Congress’ one-year election bar further indicates that the contract bar contradicts congressional intent. Consistent with this understanding, in *New England Transp. Co.*, 1 NLRB at 138, the first Board rejected altogether a contract bar. It was not until decades later, in *General Cable Corp.* 139 NLRB 1123 (1962), that the Board concocted the current three-year bar without seriously discussing employees’ rights under NLRA Sections 7 and 9. The Board should return to its initial, correct assessment that the Act favors full freedom of association and forecloses any contract bar.

Second, the contract bar is contrary to the Act’s paramount objectives of employee self-representation and free choice. Section 7 of the Act could not be clearer: “Employees shall have

the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . and shall also have the right to refrain from any or all such activities” 29 U.S.C. § 157 (emphasis added). Similarly, NLRA Section 9(a) provides that “[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit.” 29 U.S.C. § 159(a) (emphasis added). Thus, the Act permits exclusive representation only if a majority of employees support that union’s representation. See *Int’l Ladies’ Garment Workers’ Union v. NLRB*, 366 U.S. 731 (1961); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring). Without the actual support of a majority of employees, exclusive representation violates the Act. *Garment Workers’*, 366 U.S. at 737–39. The contract bar, which has the effect of forcing unwanted representation on employees for as long as three years, is inimical to the purpose and policies of the NLRA.

The purported justification for the Board’s current bar policies is “industrial stability” or “labor peace.” See, e.g., *Lamons Gasket Co.*, 357 NLRB 739 (2011). However, industrial stability is especially diminished when, as in this case, employees are 1) barred from voting on their incumbent union and 2) are simultaneously barred from voting on whether to ratify or reject the union’s proffered CBA. Here, the employees voted down the first tentative agreement, and the second agreement was presented to the bargaining unit as a *fait accompli*. D&O at 3. Although the Union explicitly announced it was signing the agreement without ratification, it failed to provide unit employees with a date for signing. *Id.* at 3–4. Only after Petitioner Daoud filed his petition did the Union announce it had signed the agreement approximately ten days prior to the filing of the petition. *Id.* at 4. Despite all of this the Regional Director reflexively applied the

contract bar to saddle Petitioner Daoud and his fellow bargaining unit members with an unwanted Union and a contract they did not vote on, merely because the Union “won the race” and signed the contract ten days before Petitioner Daoud filed the petition.

In that way, the contract bar contradicts one of the most enduring and cherished principles of common law—that an agent serves at the pleasure of the principal and can be removed by the principal at any time. *See generally Comm’r of Internal Revenue v. Banks*, 543 U.S. 426, 436 (2005) (discussing the principal-agent relationship). Under the modern labor law paradigm, unions are the employees’ fiduciary agent and the employees are the principal. *Teamsters Local No. 391 v. Terry*, 494 U.S. 558, 567 (1990). The contract bar undermines these common law principals by holding employees hostage to an agent they may no longer want. *Emporium Capwell Co.*, 420 U.S. at 73 (Douglas, J., dissenting) (employees should not be “prisoners of the Union.”). A union cannot properly act as the employees’ fiduciary agent when there is a question of whether it remains their majority representative, or worse, if is known to be a *minority* representative. Yet the contract bar allows unions to regularly engage in such questionable representation because employees are forbidden from ousting them.

In short, the contract bar conflicts with the purpose and stated policy of the Act, and does nothing to enhance industrial stability. The bar should be eliminated.

B. The Contract Bar Has for Many Decades Hindered or Destroyed Employees’ Rights Under NLRA Sections 7 and 9.

In practice, the contract bar has led to decades of litigation and a morass of rules and restrictions that grossly infringe on employees’ Sections 7 and 9 rights. Far from ensuring the NLRA’s neutrality concerning employees’ decision to select a union or be unrepresented, *Baltimore Sun Co. v. NLRB*, 257 F.3d 419, 426 (4th Cir. 2001), the contract bar entrenches incumbent unions by keeping them in power almost indefinitely. Employees are stuck with unwanted unions unless they

collect signatures and file a petition during a short 30-day “open period” that falls 60–90 days (or 90–120 days in the health care industry) before the end of a three-year contract,² or during a hiatus with an unknown end date. This confusing process leads to virtually permanent unionization through inertia, frustration, or legal machinations, not willful free choice.

Here, Petitioner Daoud fell victim to the latter. He filed his petition ten days after Transdev and the Union secretly signed the contract. He had no knowledge of when the parties were going to sign the contract, and filed his petition believing a contract had not yet been signed. D&O at 4. The Regional Director’s Decision subjects this bargaining unit to the Union’s representation for at least another three years—against the express will of the signers of the showing of interest.

1. The three year period impermissibly restrains employees in the exercise of their Section 9 rights.

The current contract bar prohibits employees from filing a decertification petition for the term of a CBA or for three years, whichever is shorter. *See Gen. Cable Corp.*, 139 NLRB 1123.

The Board’s discussion in *General Cable Corp.*, 139 NLRB at 1124-29, nearly omitted mention of employee rights at all. At the end of its discussion, it baldly stated: “such [three-year bar] rule on balance will not seriously impair employee freedom of choice.” *Id.* at 1128. Proposed Petitioner Currie, who is now saddled with a union she does not want—unless and until she can file a new petition at the end of the contract’s term—disagrees.

Petitioner Daoud filed his petition on November 10, 2020, a mere ten days after the Union and Trasdev secretly executed their contract—without a ratification vote. If the Union succeeds in its argument that his petition is barred, Proposed Petitioner Currie and her fellow colleagues will be

² The insulated period is not at issue in this case, but is no less problematic.

subject to its representation for several additional years, all because of an arbitrary and non-statutory three-year prohibition on decertification elections.

All of these situations make a reasonable person wonder if the NLRB election process was purposefully designed to be a cruel pitfall for the unwary—the victims of which are most often unrepresented employees.

2. Contract hiatus rules are confusing for employees.

If an employee waits for the contract bar to end and a contract hiatus to occur before filing for decertification, he is subject to a set of arbitrary Board-created rules and limitations on his ability to file.

First, it can be difficult to calculate the contract expiration date such that the petitioner avoids the sacrosanct “insulated period.” For example, in *Smith’s Food & Drug Centers, Inc.*, No 27-RD-141924 (Order dated Feb. 13, 2015), a regional director dismissed a petition as untimely because, although the applicable memorandum of agreement did not have an automatic renewal provision, it incorporated by reference a contract that incorporated by reference a second contract containing such a provision. The regional director held this third-order automatic renewal provision created a new contract upon expiration of the CBA, and barred an election. With no apparent sense of irony, the regional director held that the CBA “clearly and unambiguously” incorporated an automatic renewal provision in a 1996 contract, despite recognizing the automatic renewal provision:

requires reference to the 1996 Utah Foodhandlers’ Agreement (possibly as modified by the 2001 Salt Lake County Settlement), as modified by the 2001 Cedar City Settlement, and finally as modified by the 2006 Cedar City Settlement. Review of the 2001 Salt Lake County Settlement, the 2001 Cedar City Settlement, the 2006 Cedar City Settlement, and the 2009 MOA reveals that the expiration dates listed in those agreements only changed the start and end dates of the various agreements (the term of the agreement). None of the agreements explicitly eliminated the automatic renewal language contained in the 1996 Foodhandlers’ Agreement.

Smith's Food & Drug Ctrs., RD Order at 20. Thus, the employees were prevented from exercising the Section 9 rights Congress gave them because of a decades-old automatic renewal provision they would have had no reasonable way to know existed.

Similarly, in *Forsythe Transportation, Inc.*, No. 05-RD-068230 (Order dated Dec. 1, 2011), the regional director dismissed a petition as untimely even though employees were kept in the dark about when they could timely file a petition. In that case, the CBA contained an automatic renewal provision and an expiration date of October 31, 2011. During the term of the contract, the parties changed the expiration date three times: to June 30, 2010, then to July 2011, and then again to October 2011. These changes were not communicated to employees. On September 22, 2011, the employee brought the contract (with the October 31, 2011 expiration date) to the Board's Washington Resident Office to ask about filing a timely petition. The information officer misinformed the petitioner that he had missed his window period, but could file after the contract expired on October 31, 2011 and before a new agreement was signed. The petitioner filed his petition on November 4, which was dismissed as untimely because of the automatic renewal provision.

Second, after a hiatus begins employees must race to file for decertification before the hiatus ends. The Board outlined its test for determining whether a contract exists to bar a petition in *Appalachian Shale*. In that case, the Board held that for a contract to constitute a bar, it must: (1) contain "substantial terms and conditions of employment" and (2) be signed by all parties before the filing of a petition. *Id.* 121 NLRB at 1162. While these rules might seem like a logical application of basic contract formation principles, in practice they punish employees for missing deadlines over which they have no control and are likely unaware, and are ripe for abuse by unions and colluding employers. Individual employees are often kept in the dark about bargaining

progress and do not know exactly when a contract was or will be executed, or what constitutes enough of a contract to meet the *Appalachian Shale* tests. Union officials can sign and enter into contracts without ratification votes or notice to the unit employees, *Beatrice/Hunt-Wesson, Inc.*, 302 NLRB 224, 224 & n.2 (1991) (Member Stephens, concurring), and often rush through substandard contracts that harm employee interests solely to avoid a contract hiatus or a new “open period.”

It is not uncommon for employees seeking to decertify, like Petitioner Daoud, to learn that secret agreements or contract signings, to which they were not privy, had a determinative effect on their Sections 7 and 9 rights. *See, e.g., USF Holland LLC*, No. 18-RD-239688 (Regional Director dismissal Order dated May 7, 2019 and Board Order denying review dated Nov. 7, 2019) (decertification petition dismissed because the original bargaining unit of about 12 employees was merged into a nationwide unit of 20,000 without the original employees’ knowledge and assent). Moreover, it is not uncommon for unions to enter into secret agreements with employers that compromise employee interests, despite the fiduciary duties owed to those employees. *See, e.g., Merk v. Jewel Food Stores Div. of Jewel Cos., Inc.*, 945 F.2d 889 (7th Cir. 1991) (secret agreement violates federal labor policy); *Aguinaga v. United Food & Com. Workers*, 993 F.2d 1463 (10th Cir. 1993) (condemning a secret agreement between a union and employer); *Lewis v. Tuscan Dairy Farms, Inc.*, 25 F.3d 1138 (2d Cir. 1984) (union’s secret agreement with employer not to enforce employees’ seniority rights breached the duty of fair representation).

Even further limiting employee rights, a tie does not go to the “runner” when the proverbial “race to the court house” ends in a tie. Instead, the employee is out of luck and his election is barred. Even if a petition is filed *before* a contract is executed, but both occur on the same day, the contract bars the petition if the employer was not previously informed of the petition. *Deluxe Metal*

Furniture, 121 NLRB at 999. In *Bendix Corp.*, 210 NLRB 1026 (1974), the Board held that a letter of agreement signed the same day as the decertification petition was filed constituted a sufficient informal document to bar an election. The employee-petitioner in *Central Ohio Gaming Ventures, LLC*, No. 9-RD-126599 (May 14, 2014), faced a similar situation. There, the employee filed his petition on April 15 at 12:16 pm. Later that day, the employer e-mailed the union: “[w]e have a deal.” The regional director held that this message, along with a prior union acceptance, constituted a contract for purposes of the contract bar and dismissed the petition as untimely. Cruel jokes, unseemly “races to the courthouse,” and pitfalls for the unwary await employees who try to navigate these shoals.

In short, employee rights under NLRA Sections 7 and 9 should not depend upon unknowable, arbitrary, and sometimes purposefully rigged rules like these. Incumbent unions should no longer be allowed to rely on arcane technicalities to thwart elections and “game the system,” especially when they are no longer wanted by a majority of those they purport to represent. In *Appalachian Shale*, the Board noted it was:

reexamining its contract bar rules with a view toward simplifying and clarifying their application wherever feasible in the interest of more expeditious disposition of representation cases and of achieving a finer balance between the statutory policies of stability in labor relations and the exercise of free choice in the selection or change of bargaining representatives.

121 NLRB at 1160. But the vast amount of litigation over the minutiae of the contract bar rules and timelines shows that the Board has failed, in stunning fashion, to achieve this “balance.” The Board should take this opportunity to return to simplicity and stability for employees—the real beneficiaries of the Act—and achieve the correct balance of the Act’s policies through a complete rejection of the contract bar.

3. Collecting a Showing of Interest is Not Easy

Finally, an often overlooked part of the analysis in an RD case is the sacrifice of and work by individual employees required to collect and file a showing of interest. In order to collect a petition to free himself from unwanted compelled representation, an employee, like Petitioner Daoud, must publically voice his concerns with his colleagues—he is not allowed to sign a petition in silence or to cast a secret-ballot vote. This cannot be easy and can make him a target for unwanted attention. Moreover, an employee must collect a sufficient number of signatures for his showing of interest. This can be a significant undertaking, as bargaining units can be large and signatures must only be collected on personal time.

The inflexible and hypertechnical contract bar rules can make these, sometimes herculean, efforts of petitioners to collect a showing of interest for naught. Employees deserve better. If an employee has the courage to publicly voice his opposition to his exclusive representative to his co-workers and collect a valid petition, the Board should process it.

CONCLUSION

The Board should grant review here and return to its original and proper understanding of the Act—that a contract bar is neither necessary nor permitted. Alternatively, the Board should stay this case pending its decision on the contract bar doctrine in *Mountaire Farms, Inc.*, Case No. 05-RD-256888.

Additionally, Petitioners' Motion to Substitute Petitioner should be granted, with Substitute Petitioner Currie added as the Petitioner, and Petitioner Daoud removed from this proceeding since he is no longer employed in the unit.

Date: January 11, 2021

Respectfully submitted,

/s/ Alyssa K. Hazelwood

Alyssa K. Hazelwood

Glenn M. Taubman

William L. Messenger

c/o National Right to Work Legal

Defense Foundation, Inc.

8001 Braddock Road, Suite 600

Springfield, VA 22160

Telephone: (703) 321-8510

Fax: (703) 321-9319

akh@nrtw.org

gmt@nrtw.org

wlm@nrtw.org

Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioners' Request for Review was e-filed with the NLRB's Executive Secretary and served via e-mail on the following this

11th day of January, 2021:

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

David Levinson
Levinson Law Office
3731 Fessenden Street, NW
Washington D.C. 20016
levlaw@gmail.com

*Counsel for Office & Professional Employees
International Union, Local 2*

James Foster
McMahon Berger, P.C.
2730 North Ballas Road, Suite 200
P.O. Box 21901
Saint Louis, MO 63131-3039
foster@mcmahonberger.com

Counsel for Transdev Services, Inc.

/s/Alyssa K. Hazelwood
Alyssa K. Hazelwood

Exhibit 1

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

TRANSDEV SERVICES, INC.,¹

Employer,

and

Case 05-RC-268864

AMIR DAOUD,

Petitioner,

and

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 2,
AFL-CIO, CLC,

Union.

DECISION AND ORDER

Amir Daoud (“Petitioner”) filed the petition herein with the National Labor Relations Board (“Board”) under Section 9(c) of the National Labor Relations Act, as amended (“Act”), seeking to decertify the Office and Professional Employees International Union, Local 2, AFL-CIO, CLC (“Union”) as the exclusive collective-bargaining representative of approximately 52 employees employed by Transdev Services, Inc. (“Employer”) at three Employer locations in Virginia. The sole issue in this proceeding is whether the instant petition is barred by a collective-bargaining agreement executed by the Union and the Employer prior to this petition being filed. Petitioner argues that the petition is invalid because the Union misled the unit employees about the negotiations for a successor collective-bargaining agreement, no member was notified about a signed agreement prior to the petition being filed, and no agreement was validly signed prior to the petition being filed. The Employer and the Union, on the other hand, argue that a valid successor collective-bargaining agreement was executed and made effective prior to the petition being filed, thus, the petition is barred from being processed further.

A hearing was held via videoconference on December 3, 2020 before a hearing officer of the Board.² The parties were permitted to file post-hearing briefs, to which the Union and the

¹ The Employer’s name appears as amended by stipulation of the parties.

² Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated the undersigned its authority in this proceeding. Upon the entire record in this proceeding, I find:

1. The hearing officer’s rulings, made at the hearing, are free from prejudicial error and are hereby affirmed.
2. The parties stipulated, and I find, that the Employer is a corporation with offices and places of business in Huntington, West Ox, and Fairfax, Virginia, and has been engaged in the business of providing passenger transportation services. In conducting its operations during the 12-month period ending November 30,

Employer availed themselves, and I have carefully considered the respective positions of all parties.³

For the reasons set forth below, and in accordance with extent legal authority, I find that the Employer and the Union are parties to a collective-bargaining agreement, the agreement is valid and effective, and consequently serves to bar the processing of this petition. Accordingly, I will dismiss the petition.

I. FACTUAL OVERVIEW

On July 27, 2016, the Union was certified by the Board in Case 05-RC-176580 as the exclusive collective-bargaining representative of the following unit (“Unit”):

[a]ll full-time and regular part-time road supervisors, station supervisors, dispatchers, classroom trainers, and EOCC controllers employed by [MV Transportation Inc. (“predecessor”)] at its Fairfax Connector Division at work sites in Huntington, West Ox, and Fairfax, Virginia, excluding all chief supervisors, assistant chief supervisors, and all other employees represented by a labor organization, clerical office, professional employees, guards, and supervisors as defined in the Act. However, the maintenance supervisor, utility supervisor, and shop foreman are neither included nor excluded from the bargaining unit covered by this certification, inasmuch as the parties did not agree on the inclusion or exclusion of the maintenance supervisor, utility supervisor, and shop foreman, and, because it was directed that they vote subject to challenge and because resolution of their inclusion or exclusion is unnecessary because their ballots were not determinative of the election results.⁴

2020, the Employer performed services valued in excess of \$50,000 in states other than the Commonwealth of Virginia.

3. I further find, as also stipulated by the parties, that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
4. The parties additionally stipulated, and I find, that the Union is a labor organization within the meaning of the Act.

³ At the hearing, the hearing officer, pursuant to my direction and Section 102.66(d) of the Board’s Rules and Regulations, precluded the Union from raising any issue, presenting any evidence related to an issue, cross-examining any witnesses concerning any issue, and presenting arguments concerning any issue with respect to the contract bar issue because the Union failed to timely file a responsive statement of position (“RSOP”). Section 102.66(d) of the Board’s Rules and Regulations required the Union to timely file and serve on the other parties a RSOP, and it failed to do so. I hereby affirm this ruling made on the record.

⁴ This unit description appears as it does in the original certification in Case 05-RC-176580. At hearing, the parties stipulated to the following Unit description, which appears in the executed collective-bargaining agreement between the Employer and the Union covering this Unit: all full-time and regular part-time road supervisors, station supervisors, dispatchers, BOCC controllers, gate checker and classroom trainers employed by the Employer at its Fairfax Connector Division with worksites currently in Lorton, Herndon, and Fairfax; but excluding all assistant chief supervisors, auditor driver certification, all other employees represented by a labor organization, clerical, office professional employees, guards and supervisors as defined in the Act. Notwithstanding the difference

On about July 1, 2019, the Employer succeeded the predecessor as the employing entity of the employees in the Unit, and voluntarily recognized the Union as the exclusive collective bargaining representative of the Unit. According to the Employer, at the time that it succeeded the predecessor, it assumed the existing collective-bargaining agreement between the Union and the predecessor, with minor changes.

Beginning in July 2019, the Employer and the Union began negotiating a successor collective-bargaining agreement (the “Agreement”). In June 2020,⁵ the Union presented to the bargaining unit a tentative agreement covering non-economic terms agreed to by the Union and Employer. The record discloses that the bargaining unit voted down the non-economic tentative agreement. According to the Union, in about mid-October, the Employer and the Union engaged in a mediation session with an Arbitrator to attempt to resolve a prolonged dispute over the nature of a wage increase set forth in the predecessor collective-bargaining agreement. The mediation session led to the Union and the Employer reaching the Agreement. As part of the mediation, the Employer agreed to give eligible Unit employees an additional two percent wage increase retroactive to July 2019, and an across the board two percent wage increase for all Unit employees retroactive to November 2019.

On about October 21, Union representative Mike Spiller—the individual responsible for representing the Unit and who was a member of the Union’s negotiation team that negotiated the Agreement with the Employer—held a videoconference call with Unit members. During the videoconference, Mr. Spiller presented the Agreement to the Unit members, and informed them that based on recommendations from the Union’s counsel, the Arbitrator, and based on his experience, the Agreement was the best set of terms that the Unit was going to receive from the Employer. It is undisputed that during this call, Mr. Spiller informed the Unit employees that he intended to sign the Agreement, and that he did not need a ratification vote or Unit members’ approval to do so.

On October 30, Mr. Spiller executed the written Agreement, and the following day, Employer General Manager Terence Thompson did the same. Aside from the last page of the Agreement, both parties initialed every page. According to the face of the Agreement, it is effective from October 30 through November 10, 2023. The Agreement contains substantial terms and conditions of employment, including articles related to recognition, union security, wages, hours of work, discipline, grievance and arbitration procedures, benefits, leave policies, and others. The Employer has given effect to the Agreement, and has begun implementing the terms and conditions outlined in the Agreement. Lastly, the Agreement does not contain a ratification requirement.

The Petitioner filed the petition on November 10.

between the unit descriptions, no party to this matter disputes that the petitioned-for bargaining unit herein is the same Unit involved in the Board’s certification in case 05-RC-176580.

⁵ Hereinafter, all dates occurred in 2020, unless otherwise noted.

II. POSITIONS OF THE PARTIES

Petitioner principally argues that the agreement is invalid and does not bar this petition because the Union misled the bargaining unit for 14 months and did not continue to negotiate the agreement throughout that period. He further argues that none of the Unit members were informed that the Agreement was signed prior to him filing the instant petition. Therefore, Petitioner contends that no valid collective-bargaining agreement was signed prior to this petition being filed.

In contrast, the Employer and the Union contend that the Agreement bars the instant petition from being processed further. To support their positions, the Employer and the Union argue that the Agreement is valid, it meets the Board's definition of a collective-bargaining agreement, it was properly executed, and it became effective prior to the instant petition being filed. Accordingly, the Employer and the Union urge me to find that the Agreement operates as a bar to this petition.

III. APPLICABLE BOARD LAW

The Board's well-settled contract bar doctrine attempts to balance often competing aims of employee free choice and industrial stability. See, e.g. *Seton Medical Center*, 317 NLRB 87, 88 (1995). This doctrine is intended to afford the contracting parties and the employees a reasonable period of stability in their relationship without interruption and at the same time to afford the employees the opportunity, at reasonable times, to change or eliminate their bargaining representative, if they wish to do so. The burden of proving that a contract is a bar is on the party asserting the doctrine. *Roosevelt Memorial Park, Inc.*, 187 NLRB 517 (1970). "The single indispensable thread running through the Board's decisions on contract bar is that the documents relied on as manifesting the parties' agreement must clearly set out or refer to the terms of the agreement and must leave no doubt that they amount to an offer and an acceptance of those terms through the parties' affixing of their signatures." *Seton Medical Center*, 317 NLRB 87, 87 (1995).

When a petition is filed for a representation election among a group of employees who are alleged to be covered by a collective-bargaining agreement, the Board must decide whether the agreement meets certain requirements such that it operates to serve as a contractual bar to the further processing of that petition. See *Hexton Furniture Co.*, 111 NLRB 342 (1955). A contract must be a "collective" agreement. *J. P. Sand & Gravel Co.*, 222 NLRB 83 (1976). It must be reduced to writing. *Empire Screen Printing, Inc.*, 249 NLRB 718 (1980); *J. Sullivan & Sons Mfg. Corp.*, 105 NLRB 549 (1953). Further, the contract must be signed by authorized representatives of all the parties before the rival petition is filed. *DePaul Adult Care Communities*, 325 NLRB 681 (1998); *Wickly, Inc.*, 131 NLRB 467 (1961); *Freuhauf Trailer Co.*,

87 NLRB 589 (1949). The party asserting contract bar has the burden of proving the agreement was signed by the parties prior to the filing of a petition. *Jackson Terrace Associates*, 346 NLRB 180 (2005).

Moreover, a collective-bargaining agreement must contain substantial terms and conditions of employment to which parties can look for guidance in resolving day-to-day problems. *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958). It must also clearly by its terms encompass the employees involved in the petition, and will not constitute a bar if it does not. *Houck Transport Co.*, 130 NLRB 270 (1961); *Bargain City, U.S.A., Inc.*, 131 NLRB 803 (1961); *Plimpton Press*, 140 NLRB 975, 975 fn. 1 (1963); *Moore-McCormack Lines*, 181 NLRB 510 (1970). Further, the contract must cover an appropriate unit. *Mathieson Alkali Works*, 51 NLRB 113 (1943); *Indianapolis Power & Light Co.*, 76 NLRB 136, 138 fn. 4 (1948); *Moveable Partitions*, 175 NLRB 915, 916 (1969). In considering the appropriateness question, the Board places great weight on bargaining history and “will not disturb an established relationship unless required to do so by the dictates of the Act.” *Great Atlantic & Pacific Tea Co.*, 153 NLRB 1549, 1550 (1965); *Canal Carting, Inc.*, 339 NLRB 969, 970 (2003).

Finally, a master agreement covering more than one plant is not a bar to an election at one of the locations where by its terms the agreement is not effective until a local agreement has been completed, or until the inclusion of the plant has been negotiated by the parties as required by the master agreement, and a petition is filed before these events occur. *Appalachian Shale Products Co.*, 121 NLRB at 1164; *Burns International Security Service*, 257 NLRB 387, 387–388 (1981).

IV. ANALYSIS

As extent Board law requires, I must examine the terms of the Agreement “as they appear within the four corners of the instrument itself” in assessing whether it retains its status as a bar to the instant petition. *Jet-Pak Corporation*, 231 NLRB 552, 553 (1977). After careful review of the Agreement and the record, as well as consideration of the parties’ arguments, I find that the Agreement operates as a bar to the processing of this petition.

To begin with, the Agreement is in writing and the record reflects that it is the result of free collective bargaining between the Employer and the Union. The Agreement contains signatures and initials from Mr. Thompson on behalf of the Employer, and Mr. Spiller on behalf of the Union.⁶ Both Mr. Spiller and Mr. Thompson testified at the hearing that they signed the Agreement on the date shown on the signatory page—October 30 and October 31, respectively.

⁶ No party asserts that Mr. Thompson was not an authorized representative of the Employer. Petitioner challenges the efficacy of Mr. Spiller and the Union’s representation of the Unit, but stipulated that Mr. Spiller is a representative of the Union. Petitioner also stipulated that Mr. Spiller has been the Unit representative for at least the prior two years. While Petitioner contends that Mr. Spiller was not authorized to execute a contract without ratification by the Unit, there is no evidence in the record to find the same. Accordingly, for these reasons, I find that Mr. Spiller is an authorized representative of the Unit with the authority to enter into the Agreement on behalf of the Union and the Unit.

Therefore, the Employer and Union have met their burden to show that the Agreement was executed prior to the petition being filed. Also, the Agreement, on its face, clearly states that it became effective on October 30. Thus, the Agreement was executed, and became effective, prior to the filing of the instant petition on November 10.

Additionally, a plain reading of the Agreement shows that it contains substantial terms and conditions of employment, that it encompasses the employees covered in this petition, and that the Unit is appropriate for purposes of collective bargaining. Indeed, no party involved in this proceeding has raised as an issue that the Unit, an established bargaining unit, is inappropriate. Lastly, while the Agreement covers multiple Employer locations, there is no evidence that each of the three locations executes a local agreement, or that the Agreement cannot take effect until the parties conduct individual-site bargaining. On the contrary, the Agreement on its face covers all three locations, and there is no evidence in the record that Unit employees' terms and conditions of employment are covered in any other agreement or document other than the Agreement.⁷

Consequently, because I find the Agreement to be a valid collective-bargaining agreement that conforms to certain bar-quality requirements set forth by the Board and was executed prior to the November 10 petition, I find that the Agreement serves to bar an election in this matter.

V. CONCLUSION AND ORDER

Based on the record evidence, as discussed in detail above, the Employer and the Union have met their burden in establishing that the Agreement operates as a bar to processing this petition further. Thus, I conclude that: (1) the Employer and the Union collectively-bargained the terms and conditions set forth in the Agreement that took effect on October 30; (2) authorized representatives of the Employer and the Union executed the Agreement on October 30 and 31, respectively; (3) the Agreement contains substantial terms and conditions of employment that cover the Unit employees—an appropriate unit—involved in this petition; (4) the Agreement retains its bar status even though it covers multiple Employer locations; and (5) the Agreement was executed, and became effective, prior to the instant petition being filed, and thus operates to bar an election. Accordingly, it is hereby ordered that the petition in this matter is dismissed.

⁷ Throughout the hearing, Petitioner, through his own statements or through questions asked of testifying witnesses, presented arguments questioning the effectiveness of the Union's representation of the Unit, in line with allegations typically made in unfair labor practice charges filed against labor organizations. Such arguments are not before me in this proceeding. I am called only to resolve whether a bar exists to conducting an election due to a valid collective-bargaining agreement being executed and in effect prior to the instant petition being filed, and that is the only issue I reach in this Decision and Order.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations you may obtain a request for review of this Decision by filing a request with Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of Section 102.67 (d) and (e) of the Board's Rules and Regulations and must be filed by **January 8, 2021**.

Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlr.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden.⁸ A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Issued at Baltimore, Maryland this 22nd day of December, 2020.

(SEAL)

/s/ *Sean R. Marshall*

Sean R. Marshall, Regional Director
National Labor Relations Board, Region 05
Bank of America Center, Tower II
100 S. Charles Street, Ste. 600
Baltimore, MD 21201

⁸ On October 21, 2019, the General Counsel (GC) issued Memorandum GC 20-01, informing the public that Section 102.5(c) of the Board's Rules and Regulations mandates the use of the E-filing system for the submission of documents by parties in connection with the unfair labor practice or representation cases processed in Regional offices. The E-Filing requirement went into immediate effect on October 21, 2019, and the 90-day grace period that was put into place expired on January 21, 2020. Parties who do not have necessary access to the Agency's E-Filing system may provide a statement explaining the circumstances, or why requiring them to E-File would impose an undue burden.