UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

MOUNTAIRE FARMS, INC.,
Employer,

and Case No. 05-RD-256888

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 27,
Union,

and

OSCAR CRUZ SOSA,
Employee-Petitioner.

PETITIONER'S OPPOSITION TO UNION'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION; AND PETITIONER'S OPPOSITION TO UNION'S MOTION TO DEFER RD ELECTION PENDING DISPOSITION OF REQUEST FOR REVIEW

INTRODUCTION

By and though his undersigned counsel, Petitioner Oscar Cruz Sosa opposes UFCW Local 27's ("Local 27") Request for Review of the Regional Director's April 8, 2020 Decision and Direction of Election. Petitioner also opposes Local 27's Motion to indefinitely defer the secret ballot election scheduled for June 17, 2020 until the Board decides this Request for Review.

ARGUMENT

POINT I. Although Local 27's Request for Review cites Section 102.67 of the Board's Rules and Regulations, it fails to mention or discuss the specific criteria set forth in Section 102.67(d)(1)-(4) for determining *when* such discretionary review by the Board is appropriate.[1] That is no surprise, as this case raises no novel or compelling issues that require review, and it raises no issues of nationwide importance. To the contrary, the Regional Director properly applied well-established law and principles to a flawed "union security clause," which was capable of only one interpretation: that incumbent nonmember Mountaire Farms employees had no 30-day grace period under the contract as written, thus directly violating NLRA Section 8(a)(3).[2]

POINT II. The Regional Director's analysis was correct and in accord with existing law. See, e.g., *Paragon Products Corp*., 134 NLRB 662, 666 (1961);

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[1] R&R 102.67(d) provides:
Grounds for review. The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:
(1) That a substantial question of law or policy is raised because of:
(i) The absence of; or (ii) A departure from, officially reported Board precedent.
(2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
(3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

[2] The Board can take administrative notice that Petitioner has recently filed a ULP charge against Local 27 to attempt to recoup some of the dues money seized pursuant to that unlawful "union security" clause. See NLRB Case No. 05-CB-259415.

Standard Molding Corp., 137 NLRB 1515, 1516 (1962); see generally *Ace Car & Limousine Serv., Inc.*, 357 NLRB 359 (2011) (reaffirming *Paragon Products* and holding that a "savings clause" did not save an unlawful clause). Simply stated, Article 3, Section 1 of the Local 27-Mountaire Farms CBA does not afford nonmember incumbent employees 31 days before they must become "union members"[3] following the execution of the agreement, nor does it state that nonmember employees must become "union members" in good standing *following* the later of the beginning of their employment or the CBA's execution date. Instead, the "union security clause" requires that incumbent nonmember employees become "union members" 31 days following *the beginning of their employment*, not 31 days following the execution of the contract. This can never be a valid clause under NLRA Section 8(a)(3). The Regional Director's analysis is correct, and the Request for Review should be summarily denied.

POINT III. If the Board grants review in this case to clarify when and how the contract bar operates, it should actually use this case to overrule or greatly narrow the existence of such a bar. The contract bar is a non-statutory,

[3] We place the term "union members" in quotes to highlight the misleading and underhanded language regularly used by Local 27 and other unions in their "union security clauses" to coerce employees to do more than legally required under NLRA section 8(a)(3). As Local 27 well knows, no employee is actually required to become or remain a "union member," *NLRB v. General Motors Corp.,* 373 U.S. 734 (1963) and *Pattern Makers' League v. NLRB*, 473 U.S. 95 (1985), nor is any employee required to pay full dues or fees. *Communications Workers v. Beck*, 487 U.S. 735 (1988). Yet unions like Local 27 persist in using misleading terminology in their "union security clauses" to coerce employees and deny their rights.

discretionary Board-created policy that thwarts the paramount policy of the Act—employee free choice. The contract bar subjects employees' Section 7 and 9 rights to the whims of the union and employer for as long as three years.

The "contract bar" is an invention of the Board. It has no basis in the statutory language of NLRA Section 9 or in the Act's legislative history, and it should be dispensed with in the name of employee free choice. The contract bar has become a device that entrenches unions regardless of majority support, thereby undermining the cornerstone of the Act—voluntary unionism and employee free choice to select or remove a union as the bargaining representative. This is particularly clear here, where the Union has no support but is desperately clinging to power.

Originally, the Board rejected a contract bar. *New England Transp. Co.*, 1 NLRB 130, 138-39 (1936). The Board first developed a contract bar in *National Sugar Ref. Co.*, 10 NLRB 1410 (1939). There, the Board stated that it would not conduct an election because the duration of the contract—one year—was not "contrary to the purposes and policies of the Act," *id.* at 1415, a proposition that is erroneous when the Act's paramount policy—employee free choice—is considered. Further cementing this error, the Board later extended the bar to agreements lasting for two years. *Pacific Coast Ass'n of Pulp & Paper Mfg.*, 121 NLRB 990 (1958).

Finally, in 1962, the Board again extended the contract bar's duration, this time to three years. *General Cable Corp.*, 139 NLRB 1123 (1962). Currently, collective bargaining agreements "of definite duration for terms up to 3 years will bar an election for their entire period," and "contracts having longer fixed terms will be treated for bar purposes as 3-year agreements and will preclude an election for . . . their initial 3 years." *Id.* at 1125; *see also NLRB v. Burns Int'l Security Serv.*, 406 U.S. 272, 290 n.12 (1972). During this now elongated "contract bar" period, the Board dismisses all representation petitions unless they are filed during a 30-day "open period" that begins 90 days and ends 60 days before the contract expires, or during any period following expiration in which no contract is in effect. *See Leonard Wholesale Meats, Inc.*, 136 NLRB 1000, 1000-01 (1962).

Thus, if the Board grants review here, it should use this case to revisit, overrule, or drastically limit the contract bar for five principal reasons:

First, the contract bar has no basis in the text of the NLRA and undermines its purpose—employee free choice. Were it Congress' intent to limit employees' "full freedom of association" beyond the one-year "election bar" provided in NLRA Section 9, Congress would have included language to that effect.

Second, the contract bar regime, with its tricky "window periods," requires employees to have the foresight and legal knowledge to plan any decertification efforts far in advance of the contract's expiration. Otherwise, they may have no

opportunity to file for an election if their employer and union agree to a successor contract during the sixty-day insulated period. Narrow thirty-day windows do not adequately protect employees' rights to choose their own representative.

Third, the vast majority of union-represented employees—an astonishing 94%—have never have voted for their union representative.[4] This shocking figure warrants adjusting the Board's policies to provide employees' with *more* opportunities to vote on whether they truly desire union representation, not less.

Fourth, barring employees from voting on union representation once a contract is in place does not aid industrial stability because employees usually cannot judge a union's effectiveness until *after* it agrees to a contract. Employees should be able to vote on whether they wish to work under a particular union contract at any time they wish.

Lastly, one of the most ancient and cherished principles in common law is the idea that an agent (the union) serves at the pleasure of the principal (the employees) and can be removed by the principal at any time. *See generally Teamsters Local No. 391 v. Terry*, 494 U.S. 558 (1990) (discussing fiduciary relationships). Besides labor unions, few, if *any*, private entities possess a

[4] James Sherk, "Unelected Representatives: 94 percent of Union Members Never Voted for a Union," Heritage Foundation *Backgrounder* No. 3126 (Aug. 30, 2016), http://www.heritage.org/research/reports/2016/08/unelected-representatives-94-percent-of-union-members-never-voted-for-a-union.

government-granted privilege to continue serving as a compulsory agent against the wishes of the principal. The contract bar undermines this principle and holds employees hostage to a union "agent" they do not want, for as long as three years.

POINT IV. The election scheduled for June 17, 2020 should not be deferred, and the Union's Motion to delay it indefinitely or to impound the ballots should be denied. Employees' Section 7 and 9 rights are at stake and those rights should be protected, not cast aside. By Local 27's Motion, an unpopular incumbent union is simply trying to delay its day of reckoning at the ballot box. The Board has been refusing to delay elections even when COVID-19 is an issue, see, e.g., *Crozer-Chester Medical Center*, Case No. 04-RC-257107 (unpublished order dated April 23, 2020), and the Board should refuse to delay the election in this case.

CONCLUSION

The Board should deny Local 27's Request for Review, and it should refuse to delay the election currently scheduled for June, 17, 2020.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that the true and correct copy of the foregoing Opposition to Request for Review and Opposition to Motion to Defer Election was e-filed with the NLRB's Executive Secretary and served via email on the following parties or counsel this 28th day of April, 2020:

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