Mountaire Farms, Inc. *and* Oscar Cruz Sosa and United Food and Commercial Workers Union, Local 27, a/w United Food and Commercial Workers International Union, AFL–CIO. Case 05–RD–256888

April 21, 2021

DECISION ON REVIEW AND ORDER REMANDING

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, EMANUEL, AND RING

On April 8, 2020, the Regional Director issued a Decision and Direction of Election in which he found that the collective-bargaining agreement between the Employer and the Union does not bar the Petitioner's decertification petition because the agreement contains a clearly unlawful union-security clause. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Union filed a timely request for review.

On June 23, 2020, the Board granted the Union's request for review and also found merit in the Petitioner's contention that the Board should undertake a general review of its contract-bar doctrine.[1] A mail-ballot election was held from June 23, 2020, through July 14, 2020, and the ballots were impounded.[2] On July 7, 2020, the Board issued a Notice and Invitation to File Briefs, inviting the parties and interested amici curiae to file briefs addressing the specific contract-bar issue presented in this case and whether the Board should (1) rescind the contract-bar doctrine, (2) retain it as it currently exists, or (3) retain the doctrine with modifications.[3] The Employer, Petitioner, and Union each filed answering and reply briefs. Seventeen amicus briefs were also filed.[4]

Having carefully considered the briefs submitted by the parties and amici, including arguments for and against particular modifications to the contract-bar doctrine, we have decided not to modify the doctrine at this time.

Under the Board's current application of the contract-bar doctrine, a valid collective-bargaining agreement ordinarily is a bar to a representation petition during the term of the agreement, but for no longer than 3 years. *General Cable Corp.*, 139 NLRB 1123, 1125 (1962). During this "contract bar" period, the Board will dismiss all representation petitions unless they are filed during the 30-day period that begins 90 days and ends 60 days before the agreement expires. See *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000, 1001 (1962). In other words, there is a 30-day period—customarily known as the "window period"—during which a petition may be properly filed while the agreement is still in effect. The subsequent 60-day period immediately preceding and including the expiration date of an existing agreement is customarily known as the "insulated period" because, during that time, no timely petition may be filed. See *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1000 (1958). For collective-bargaining agreements to which health care institutions are parties, the insulated period is 90 days; thus, the 30-day window period begins 120 days and ends 90 days prior to contract expiration. See *Trinity Lutheran Hospital*, 218 NLRB 199 (1975).

If the window period is to serve its intended purpose, employees must be able to readily ascertain the date on which the window opens. Some parties and several amici argue that the relevant date may not always be readily ascertainable under the contract-bar doctrine in its current form. These arguments have considerable force. The

[1] Chairman McFerran was not a member of the Board when the Order granting review or notice and invitation to file briefs issued.

[2] In its June 23 Order, the Board also granted the Union's request to stay the mail-ballot election, but the Board's Order did not issue before the ballots were mailed. Accordingly, on June 24, 2020, the Board granted the Employer's and the Petitioner's requests for extraordinary relief and rescinded the stay, but it ordered the Regional Director to impound the ballots pending the Board's ruling on the Union's request for review.

[3] With respect to whether the Board should retain the contract-bar doctrine with modifications, the Board invited briefing to address the following, in addition to any other issues raised: the formal requirements for according bar quality to a contract, the circumstances in which an allegedly unlawful contract clause will prevent a contract from barring an election, the duration of the bar period during which no question of representation can be raised (including the operation of the current "window" and "insulated" periods), and how changed circumstances during the term of a contract (including changes in the employer's operation, organizational changes within the labor organization, and conduct by and between the parties) may affect its bar quality.

[4] Amicus briefs were filed by American Federation of Labor and Congress of Industrial Organizations; Americans for Prosperity Foundation; Center for Independent Employees; Coalition for a Democratic Workplace, et al.; Professor Ruben J. Garcia and Law Student Joseph Adamiak of the University of Nevada, Las Vegas, William S. Boyd School of Law; John E. Higgins, Jr.; HR Policy Association; International Brotherhood of Electrical Workers Local 304; International Union, Security, Police, and Fire Professionals of America; Susan Kania of the University of Wisconsin Law School and Alexia Kulwiec of the University of Wisconsin-Madison School for Workers; Laborers' International Union of North America Mid-Atlantic Regional Organizing Coalition; Service Employees International Union; Josephine Smalls Miller; Transport Workers Union of America, AFL–CIO; U.S. Poultry & Egg Association and National Chicken Council; and the Chairman and Vice-Chairman of the U.S. House of Representatives Committee on Education and Labor and the Chairwoman of the Subcommittee on Health, Employment, Labor, and Pensions. Former General Counsel Peter B. Robb also filed an amicus brief, but on February 10, 2021, the Board granted Acting General Counsel Peter Sung Ohr's motion to withdraw former General Counsel Robb's brief. Accordingly, we have not considered that brief.

efficacy of the contract-bar window period is obviously negated if employees are unable to determine when the window period opens and closes. Although we share this concern, a sufficiently compelling case has not been made for any particular proposed modification.[5]

Turning to the Union's request for review, having carefully considered the entire record in this proceeding, including the briefs on review, we have decided to reverse the Regional Director's decision.[6]

The Employer and the Union are parties to a collective-bargaining agreement (the Agreement) that was executed on February 8, 2019, but is effective by its terms from December 22, 2018, through December 21, 2023. The Petitioner filed the decertification petition on February 25, 2020, outside the window period for timely filing the petition. Nonetheless, the Regional Director processed the petition, finding that the contract was not a bar to an election because it contained a clearly unlawful union-security clause.

In *Paragon Products Corp.*, the Board held that a contract does not bar a representation petition if it contains a union-security clause that "is clearly unlawful on its face." 134 NLRB 662, 666 (1961). A clearly unlawful union-security clause, the Board explained, "is one which by its express terms clearly and unequivocally goes beyond the limited form of union-security permitted by Section 8(a)(3) of the Act, and is therefore incapable of a lawful interpretation." Id. An "ambiguous" union-security clause, however, is not "clearly unlawful," and contracts containing such ambiguous provisions will bar a petition. Id. at 667; see also *Weyerhaeuser Co.*, 142 NLRB 702, 702–703 (1963) (stating that if a union-security clause "can be legally interpreted," it will bar a petition). In determining whether a union-security clause is clearly unlawful or merely ambiguous, the Board limits its inquiry to the "four corners of the [contract] itself" and will not examine extrinsic evidence. *Jet-Pak Corp.*, 231 NLRB 552, 552–553 (1977). Clearly unlawful union-security clauses include "those which specifically withhold from incumbent nonmembers and/or new employees the statutory 30-day grace period" guaranteed by Section 8(a)(3). *Paragon Products*, 134 NLRB at 666.[7]

> Article 3, Section 1 of the Agreement contains the following union-security clause:
>
> 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 [sic] become and remain members in good standing in the Union.

The Regional Director found this union-security clause clearly unlawful on the basis that it fails to afford incumbent nonmember employees the statutorily mandated 30-day grace period to become union members. The Regional Director explained as follows:

> The parties acknowledge that while Section 8(a)(3) ties an employee's 30-day grace period to the later of the applicable contract's effective date or the date of employment, the Agreement in this case ties that grace period to the execution date of the Agreement. Yet while the language of Article 3, Section 1 provides nonmember incumbent employees 31 days to become Union members, it sets "the beginning of such employment" as the operative date to begin that 31-day period. Read literally, then, the only plausible interpretation of Article 3, Section 1 is that a nonmember employee as of the date of

[5] Chairman McFerran does not join her colleagues' observations about the potential problems with current law, but she agrees that no changes to the window period established in the contract-bar doctrine are appropriate at this time. The dates on which the window period opens and closes are determined by a contract's duration, which must be clearly stated for a contract to attain bar quality. Further, the Agency offers assistance to employees in calculating these dates through its Information Officer Program and forms NLRB 4654-Timing of Filing of Non-Healthcare Petitions and NLRB 5254-Timing of Filing Healthcare Petitions. Chairman McFerran observes that the briefs offer little support for claims that the window period is confusing. And given the decades of experience and explanatory case law developed under the current rules, making a change in this area would likely cause more confusion, rather than improve clarity.

In addition, Chairman McFerran notes that the briefs reflect a range of opinion regarding the optimal length of the contract bar and that the Board may wish to address this question in a future proceeding. At this time, Chairman McFerran takes no position on whether a shorter or longer contract bar period might be appropriate.

Contrary to his colleagues, Member Emanuel would reduce the duration of the contract bar period during which no question of representation can be raised from 3 years to 2 years. See *Pacific Coast Assn. of Pulp & Paper Manufacturers*, 121 NLRB 990 (1958). He also would increase the "window period" discussed above from 30 days to 60 days. Member Emanuel believes that these proposed modifications to the contract-bar doctrine would strike a more appropriate balance between "the statutory goal of promoting labor relations stability" and the Board's "statutory responsibility to give effect to employees' wishes concerning representation." *Silvan Industries*, 367 NLRB No. 28, slip op. at 3 (2018). The Board's current contract-bar doctrine gives undue emphasis to labor relations stability at the expense of employee free choice.

[6] Member Ring dissents from this reversal for the reasons stated in his partial dissent.

[7] Sec. 8(a)(3) of the Act states, in relevant part, "[t]hat nothing in [the Act], 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 such agreement, whichever is the later . . . ." 29 U.S.C. §158(a)(3).

> the Agreement's execution has 31 days following the beginning of that employee's employment to become and remain a member in good standing in the Union. Thus, any incumbent employee who was hired prior to the Agreement's execution date—February 8, 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.

The Union, however, contends that the union-security clause is capable of a lawful interpretation. The Union asserts that the phrase "beginning of such employment" refers to employment after the Agreement's execution, as evidenced by language in Article 3, Section 1 that refers to "all employees . . . *covered* by this Agreement." (Emphasis added.) The Union contends that until the Agreement was executed, no employment could be "covered by this Agreement." "By making 'the execution date' the pivotal moment in defining when the union-security obligation attaches as a condition of employment for incumbents," the Union explains, "the union-security clause clearly contemplates that the obligation will operate prospectively and apply to 'such employment' as is 'covered by this Agreement,' not to earlier points in incumbents' employment history."[8]

Contrary to the Regional Director, we find that the union-security clause is capable of a lawful interpretation. As the Union notes, one plausible interpretation of the clause is that the union-security obligation applies only prospectively to incumbent nonmember employees because the phrase "covered by this Agreement" qualifies the clause requiring membership in good standing "on or after the thirty-first day following the beginning of such employment." That is, "such employment" is employment "covered by this Agreement"; no employment could be "covered by this Agreement" until the Agreement was executed; and incumbent employees have until "the thirty-first day following the beginning of such employment" to become members. We agree with the Union that this is a plausible interpretation of Article 3, Section 1. See *Television & Radio Broadcasting Studio Employees Local 804 (Triangle Publications)*, 135 NLRB 632, 634–635 (1962) (finding valid a union-security clause providing that "all present employees . . . shall become members of the Union and all future employees must become members of the Union within a period of thirty (30) days after employment, and that all employees will continue their membership in the Union during the term of this agreement"), enfd. 315 F.2d 398 (3d Cir. 1963).[9]

This interpretation is at least as plausible as the one advanced by the Regional Director, which relies in part on an unrelated wage provision in Article 5 of the Agreement to read the union-security clause to impose a retroactive union-security obligation on incumbent employees.[10]

[8] The Regional Director found that the Union's interpretation could not be squared with another provision of the Agreement, Article 5, which provides that "[w]henever 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 term of this Agreement." This wage provision, according to the Regional Director, demonstrates that the parties clearly knew that there may be incumbent employees "whose then-existing terms and conditions of employment would thereafter be governed by the Agreement upon its execution," and such employees' employment cannot be employment "which exists only on and after the Agreement's execution date."

[9] Our dissenting colleague notes that in *Triangle Publications* the disputed clause required that current employees "shall become members of the Union" without specifying the future date on which membership would be required, whereas the clause here requires membership "on or after the thirty-first day following the beginning of such employment." The dissent also endeavors to distinguish between finding a clause ambiguous because a necessary term is missing (as in *Triangle Publications*) and finding a contract term ambiguous (here, "such employment"). These contentions ignore the fundamental point that the Board in *Triangle Publications* found the clause there *lawful* "[e]ven were it urged that [it] suffers from ambiguity." Id. at 635. In our view, the case thus supports finding the clause in this case to be at least ambiguous notwithstanding the differences cited by the dissent, and ambiguity, however derived, is sufficient to preserve the bar quality of an agreement from a challenge based on its union-security provision. See *Paragon Products*, 134 NLRB at 667. Nothing in *Paragon Products*, *Triangle Publications*, or any other precedent supports the distinction between types of ambiguity that our dissenting colleague espouses.

Further, our dissenting colleague claims that we have created ambiguity where none otherwise exists. To the contrary, the parties created any ambiguity present here by using the phrase "beginning of such employment" when, given the awkward construction of the union-security clause, it is not clear what employment that phrase references. We acknowledge that the parties certainly could have drafted a union-security clause that more clearly sets forth the limited form of union security permitted by Sec. 8(a)(3), but the *Paragon Products* Board rejected the Board's prior "presumption of illegality with respect to any contract containing a union-security clause which did not expressly reflect the precise language of [Sec. 8(a)(3)]." 134 NLRB at 664. Therefore, we will not apply such an exacting standard to the union-security clause here.

[10] As discussed above, according to the Regional Director, Article 5 of the Agreement demonstrates that the parties understood that at the time of the execution of the Agreement, the Employer employed employees whose terms and conditions of employment would thereafter be governed by the Agreement. However, the Union does not dispute that the Agreement covers employees whose employment began before the execution of the Agreement. The primary issue here is whether the phrase "beginning of such employment" can only be read in a manner that renders the Agreement's union-security clause "incapable of a lawful interpretation" and thus "clearly unlawful." *Paragon Products*, 134 NLRB at 666. Article 5 is irrelevant to that specific inquiry because it does not shed light on what the term "*such* employment" (emphasis added) refers back to in the context of the union-security clause.

Moreover, the Regional Director insists that the *only* plausible interpretation of Article 3, Section 1 "is that a nonmember employee as of the date of the Agreement's execution has 31 days following the beginning of that employee's employment to become and remain a member in good standing in the Union." In other words, for any incumbent nonmember employee whose employment began more than 31 days before the Agreement was executed, the membership obligation attached *before* the Agreement was executed. But this cannot be the only plausible interpretation, given that Article 3, Section 1 provides that employees who are not members on the date the Agreement is executed "shall become . . . members," i.e., *after* the Agreement is executed. See *Triangle Publications*, 135 NLRB at 634–635 (union-security clause lawful where it required that current employees "shall become members of the Union" without fixing a limitation in time). And, as discussed above, the union-security clause can be plausibly interpreted to give incumbent nonmember employees 31 days following the beginning of their employment covered by the Agreement—i.e., 31 days following the Agreement's execution date—to become union members, which is an interpretation consistent with the union-security clause's use of "shall become . . . members." In sum, we find that the union-security clause is, at most, ambiguous with regard to its retroactive application to incumbent nonmember employees. As such, it is neither "incapable of a lawful interpretation" nor "clearly unlawful on its face." *Paragon Products*, 134 NLRB at 666–667.[11]

As the Board explained in *Paragon Products*, the proper forum for determining whether a particular union-security clause is unlawful is an unfair labor practice proceeding. 134 NLRB at 665. In addressing the legality of union-security provisions in representation proceedings, in contrast, "the Board is concerned only that as a matter of policy it should not permit contracts containing union-security clauses explicitly forbidden by statute to govern the time when employees may exercise their freedom of choice in a Board-conducted election." Id. To do otherwise would unnecessarily disrupt collective-bargaining relationships in a manner contrary to the policies the contract-bar doctrine is designed to promote. Id. at 664. Our decision today respects these principles.

ORDER

The Regional Director's Decision and Direction of Election is reversed. This case is remanded to the Regional Director for appropriate action consistent with this Decision and Order.

Dated, Washington, D.C. April 21, 2021

Lauren McFerran, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER RING, dissenting in part.

The Employer and the Union are parties to a collective-bargaining agreement (the Agreement) that was executed on February 8, 2019, but is effective by its terms from December 22, 2018, through December 21, 2023. The Petitioner filed the decertification petition on February 25, 2020, which was outside the window period for timely filing the petition. Nonetheless, the Regional Director processed the petition, finding that the contract was not a bar

Additionally, we do not dispute our dissenting colleague's contention that the union-security clause's mention of "employees of the Employer covered by this Agreement" refers to bargaining-unit employees as defined by the Agreement's recognition article. However, that observation does not change the fact that those unit employees did not become "covered by this Agreement" until the parties executed the Agreement. Thus, their employment covered by the Agreement, and the 31-day period for them to become union members following the beginning of *such* employment, began on the Agreement's execution date.

[11] The Employer disputes the Regional Director's finding that an assessment provision in the Agreement does not render the union-security clause unlawful. Art. 3, Sec. 2 provides, in relevant part, that "[t]he Employer shall deduct . . . regularly authorized assessments . . . from the wages of each employee . . . who has filed with the Employer a written assignment authorizing such deductions . . . ." A union-security clause requiring the payment of "assessments" in addition to dues is unlawful because assessments do not fall within the meaning of "periodic dues" under the proviso to Sec. 8(a)(3). See *Santa Fe Trail Transportation Co*., 139 NLRB 1513, 1515 (1962); see also *Paragon Products*, 134 NLRB at 666 (holding that it is unlawful to "expressly require as a condition of continued employment the payment of sums of money other than 'periodic dues and initiation fees uniformly required'"). We agree with the Regional Director that this assessment provision is not clearly unlawful because it only permits the Employer to deduct assessments for those employees "that have authorized the same."

The parties dispute the retroactive nature of the Agreement and whether that retroactivity renders the union-security clause unlawful. The Regional Director found, and we agree, that it is unnecessary to resolve this dispute because the union-security clause is tied to the Agreement's execution date, not the effective date. See *Standard Molding Corp.*, 137 NLRB 1515, 1516 (1962) ("When a contract is retroactive," and a union-security clause provides that "the 30-day grace period is computed from [the contract's] execution date," the union-security clause does not prevent the contract from barring a petition.).

to an election because it contained a clearly unlawful union-security clause. Contrary to my colleagues, I would affirm the Regional Director's well-reasoned conclusion that the union-security clause is unlawful on its face and cannot serve as a bar to the petition.

It is well settled that a contract does not function as a bar to a petition if it contains a union-security clause "which is clearly unlawful on its face," i.e., a clause that "by its express terms clearly and unequivocally goes beyond the limited form of union-security permitted by Section 8(a)(3) of the Act." *Paragon Products Corp.*, 134 NLRB 662 (1961). Section 8(a)(3) of the Act only permits union-security provisions that afford employees at least 30 days from the beginning of their employment or the effective date of the collective-bargaining agreement, whichever is the later, to become union members.[1] Union-security clauses "which specifically withhold from incumbent nonmembers and/or new employees the statutory 30-day grace period" are unlawful and cannot bar a petition. *Paragon Products*, 134 NLRB at 666. As noted by the Regional Director, the burden of proving that a contract is a bar to a representation petition rests with the party asserting the doctrine—here, the Union. *Roosevelt Memorial Park, Inc.*, 187 NLRB 517 (1970).

The union-security provision at issue in this case relevantly states:

> 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 [sic] become and remain members in good standing in the Union.[2]

As the Regional Director correctly observed, this clause "effectively groups employees into two categories: the first is employees who are members of the Union in good standing at the time of the Agreement's execution, and the second [is] those employees that are not Union members at the time the Agreement was executed." Article 3, Section 1 states that employees who are not Union members on the execution date the Agreement "shall, on or after the thirty-first day following *the beginning of such employment*, . . . become and remain members in good standing in the Union" (emphasis added).

As stated, Section 8(a)(3) mandates employees be provided at least 30 days from the collective-bargaining agreement's *effective* date or the beginning of their employment, whichever is later. The Board has found unlawful union-security provisions that tie the 30-day grace period to the "signing" date of the agreement. See *Chun King Sales, Inc.*, 126 NLRB 851 (1960) (employees not given 30 days after "date of signing" of contract in which to become union members). Union-security clauses keyed to the date the agreement is executed are not presumptively unlawful, but they must be carefully worded to ensure that employees are afforded the statutorily required 30-day grace period. See, e.g., *Checker Taxi Company, Inc.*, 131 NLRB 611, 615 fn. 11 (1961) (finding lawful union-security clause requiring that "those who are not members on the date of execution of this agreement shall, on the thirtieth day *following the date of execution of this agreement,* become and thereafter remain members in good standing of the [u]nion") (emphasis added)); *Local 25, Teamsters (Tech Weld Corp.)*, 220 NLRB 76, 76 fn. 2 (1975) (finding lawful union-security clause providing that "[a]ll present employees who are not members of the [u]nion and all employees hired hereafter shall become and remain members of the [u]nion as a condition of employment on or after the thirtieth (30) day following the

[1] Sec. 8(a)(3) of the Act states, in relevant part, "[t]hat nothing in [the Act], 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 such agreement, whichever is the later . . . ." Other rules, not applicable here, govern union-security provisions applicable to employment in the construction industry.

[2] The provision, in full, reads as follows:

ARTICLE 3—UNION SECURITY AND CHECK-OFF

1. 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.

2. The Employer shall deduct periodic dues and initiation fees uniformly required as a condition of membership in the Union, and regularly authorized assessments on a weekly basis from the wages of each employee covered by this Agreement who has filed with the Employer a written assignment authorizing such deductions, which assignments shall not be irrevocable for a period of more than one (1) year or beyond the termination date of this Agreement whichever occurs sooner. Such dues, initiation fees and assessments shall be forwarded to the Union within fifteen (15) days. The Union will send the Employer a letter by certified mail notifying the Employer of any change in the amount of dues; initiation fees and assessments shall be kept separate and apart from the general funds of the Employer and shall be deemed trust funds.

3. The Union shall indemnify and hold the Employer harmless from any and all claims, demands, suits or other forms of liability which shall arise out of or by reason of action taken or not taken by the Employer in compliance with the provisions of Sections 1 and 2 of this Article.

beginning of such employment or the effective date of this Contract *or the date of execution* of this Contract, whichever is the latest") (emphasis added).

Article 3, Section 1 is not carefully worded in this regard. The union-security provision deprives employees hired before the Agreement's execution date of the Section 8(a)(3)–mandated grace period to become union members. It requires them to become union members "on or after the thirty-first day following the beginning of such employment." "The beginning of such employment" plainly refers to the date the employee was hired. Requiring current employees who are not members on the date the Agreement is executed to become members "on or after the thirty-first day" *after they were hired*—rather than after the Agreement's execution date—obviously deprives those employees the requisite statutory grace period.[3]

In an attempt to save its facially unlawful union-security clause, the Union has posited an interpretation that, it argues, makes the clause lawful or at least ambiguous. The Board has held that an "ambiguous" union-security clause is not "clearly unlawful," and contracts containing ambiguous union-security clauses will not bar a petition. *Paragon Products Corp.*, 134 NLRB at 666.

The Union contends that the phrase "the beginning of such employment" in Article 3, Section 1 refers only to "employment . . . covered by this agreement"—that is, only employment once the Agreement was in place. With this interpretation, the Union says, "such employment" can only be understood to cover employment following execution of the Agreement. Under this interpretation, the Agreement is lawful (or at worst ambiguous and thus does not deprive the Agreement of bar quality) because if "such employment" means employment while the Agreement was in place, the statutory grace period for nonmember employees employed prior to the execution of the agreement would not begin to run until the Agreement was executed. Thus, the Union argues that we should read the union-security provision as covering employment beginning after the Agreement's execution date, or at least that the Agreement is amenable to such an interpretation and thus is ambiguous rather than clearly unlawful.

I agree with the Regional Director that Article 3, Section 1 is not amenable to the interpretation the Union attempts to give it. There are several problems with the Union's interpretation, and they all point to the inescapable conclusion that this is an effort to create ambiguity where none exists. First, the interpretation advanced by the Union distorts the plain language of the union-security clause. Article 3, Section 1 does not refer to *employment* "covered by this Agreement." It refers to "*employees of the Employer* covered by this Agreement." Under any reasonable reading of that phrase, the language clearly refers to the scope of the unit (employees working for the employer) as opposed to some temporal limitation (employment during the term of the Agreement).

Indeed, as a matter of well-settled usage, "employees of the Employer covered by this Agreement" means unit employees. See *Teamsters Local 348 Health & Welfare Fund v. Kohn Beverage Co.*, 749 F.2d 315, 318–319 (6th Cir. 1984) (contract provision requiring benefit fund contributions "for each regular employee covered by this Agreement" encompassed all "regular" unit employees), cert. denied 471 U.S. 1017 (1985); *John Deklewa & Sons*, 282 NLRB 1375, 1377 (1987) (In processing election petitions for employees covered by 8(f) agreement, "the appropriate unit normally will be the single employer's employees covered by the agreement."), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1987), cert. denied 488 U.S. 889 (1988). This interpretation is supported by the Agreement's recognition article, which immediately precedes the union-security clause and defines the bargaining unit.[4] "[E]mployees of the Employer covered by this Agreement" most naturally refers back to this article, which defines the employees that the Agreement covers: employees in the bargaining unit.

There is thus no basis in the four corners of the Agreement to read this language as establishing a temporal limitation on the union-security requirement, i.e., as referring

[3] I agree with my colleagues that, as the Regional Director found, the union-security provision is not invalid by reason of the Agreement's retroactivity or based on the provisions of Section 2 dealing with "assessments." In addition to the reasons given by the Regional Director, I note that Article 3 is titled "Union Security and Check-Off," and Section 2 of Article 3 plainly is a dues checkoff provision—describing those payments to be deducted by checkoff when authorized by an employee—rather than one that further defines employees' union-security obligations. Even if Section 2 did require any payments as a condition of employment, it can be reasonably read to do so for dues and initiation fees only, and not to make the payment of assessments a condition of employment. Section 2 is thus capable of a lawful interpretation for that reason as well, as the Regional Director found.

[4] Article 2 provides as follows:

ARTICLE 2 - RECOGNITION

The Employer recognizes the Union as the sole bargaining agency in the matter of wages, hours of work and other conditions of employment, in the bargaining unit consisting of all regular employees now employed or who may be employed by the Employer at their Selbyville, Delaware Poultry Processing Plant located at Hoosier and Railroad Avenue on the Delmarva Peninsula, as follows:

> All production employees including but not limited to the following: live hangers, pinners, eviscerating, grading, cut-up, sawing, deboning, and other further processing employees, but excluding all employees currently covered under contract between Mountaire Farms of Delmarva and Local 355 of the Teamsters Union.

A new employee will become a regular employee after ninety (90) calendar days after the date of hire.

only to employment after the contract's execution date. Moreover, as the Regional Director cogently noted, the Union's interpretation cannot be squared with other provisions in the parties' collective-bargaining agreement.[5] Specifically, the Regional Director points to Article 5, which contains a wage provision applicable to pre–execution date employment. The Regional Director correctly concludes: "Clearly the parties understood that the Employer, at the time the Agreement was executed, may have incumbent employees in its employ whose then-existing terms and conditions of employment would thereafter be governed by the Agreement upon its execution."

TV & Radio Broadcasting Studio Employees, No. 804 (Triangle Publications), 135 NLRB 632, 634–635 (1962), enfd. 315 F.2d 398 (3d Cir. 1963), an unfair labor practice case on which the majority relies, does not support finding Article 3, Section 1 ambiguous. In *Triangle Publications,* the clause stated, in relevant part, that "all present employees . . . shall become members of the Union and all future employees must become members of the union within a period of thirty (30) days after employment . . . ." As the Board there recognized, the date on which present employees were required to be union members truly was ambiguous: the requirement did not take effect immediately because the clause stated that current employees "shall become" members, but the clause also didn't specify the future date on which membership would be required. It didn't say anything about that at all. Under those circumstances, the Board found that the General Counsel, who bears the burden of proof in an unfair labor practice case, failed to establish that the clause was unlawful. Any ambiguity, the Board found, should be resolved consistent with "the intent of the parties as manifested by their own lawful construction and administration of the contract."[6] Id. at 635.

In this case, in contrast, the Union bears the burden of proving that its contract is a bar to the election. Moreover, my colleagues do not find Article 3, Section 1 ambiguous because of a missing term, as was the case in *Triangle Publications*. Instead, they *create* ambiguity by assigning an unreasonable interpretation to the phrase "employees of the Employer covered by this Agreement." No precedent supports the view that ambiguity can be established in this way. To the contrary, "words are not infinitely malleable, and a contract term is not ambiguous simply because an imaginative party conjures up an alternative interpretation." *Mason v. Telefunken Semiconductors America, LCC*, 797 F.3d 33, 42 (1st Cir. 2015) (internal citations omitted); accord *NLRB v. Manitowoc Engineering Co.*, 909 F.2d 963, 969 (7th Cir. 1990) (rejecting party's attempt to create ambiguity in provisions of collective-bargaining agreement and union constitution based on interpretation of term that was contrary to its plain meaning).

The majority posits that Article 3, Section 1 must be lawful because it, like the clause at issue in *Triangle Publications,* contains the phrase "shall become" and therefore makes the union-security obligation effective on some date after the Agreement was executed. This superficial similarity does not outweigh the fact that the Agreement also specifies when that future date arrives: "on or after the thirty-first day following the beginning of such employment." No similar provision existed in *Triangle Publications,* which, as noted, was completely silent about when current employees were required to "become" union members.

The premise of the Board's contract-bar doctrine is that the statutory right of employees to change their bargaining representative may properly be deferred for a limited period of time when a collective-bargaining agreement is in force, in the interest of promoting industrial peace and stability in labor relations. See *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958). Under longstanding precedent, however, a contract containing an unlawful union-security provision cannot bar an election because such a contract "does not establish the type of industrial peace the Act was designed to foster." *Paragon Products Corp.*, 134 NLRB at 663. Because the majority's approval of the union-security clause in this case contravenes these vital principles, I respectfully dissent.

Dated, Washington, D.C. April 21, 2021

John F. Ring, Member

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[5] The lawfulness of the union-security provision should be analyzed in the context of other provisions in the Agreement. See *H. L. Klion, Inc.*, 148 NLRB 656, 660 (1964).

[6] Regarding the parties' intent, the Board relied on the fact that the unit employees had been subject to a union-security requirement for more than a decade, meaning that there were no incumbent nonmember employees who could be adversely affected by the absence of a grace period applicable to them. Those circumstances, the Board found, nullified any "technical" deficiency in the language of the clause itself. That analysis, which goes beyond the four corners of the document, would not appear to be applicable here in the contract-bar context. See *Jet-Pak Corp.*, 231 NLRB 552, 552–553 (1977) (In determining whether a union-security clause is clearly unlawful or merely ambiguous, the Board limits its inquiry to the "four corners of the [contract] itself" and will not examine extrinsic evidence.). Even if it were applicable, there is no basis for making such a finding here. The Regional Director found that the Union had represented the employees for many years, but he made no finding that prior contracts eliminated any possible unlawful application of the union-security provision in the manner found by the Board in *Triangle Publications*.