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 THE UNION'S MOTION FOR RECONSIDERATION

Petitioner Oscar Cruz Sosa opposes UFCW Local 27's ("Union's") Motion for Reconsideration, filed July 15, 2020. The Union's Motion asks the Board to rescind its July 7, 2020 Notice and Invitation to File Briefs concerning various aspects of the contract bar, all of which have direct implications for this specific case. The Union's Motion is misplaced, documenting yet again another attempt to deny a workplace election that has already concluded, and disenfranchise some 900 voters.

I. The Union downplays that *it* filed a Request for Review of the Regional Director's April 8, 2020 Decision and Direction of Election, which raised

the proper application of the contract bar in this case. The Union's Request for Review argued that "only a union-security clause that is 'clearly unlawful on its face' will fail to bar an election. *Paragon Products Corp.*, 134 NLRB 662, 666 (1961)." Request for Review at 4. In granting the Union's Request for Review, the Board has every right to decide that specific point while assessing the continuing validity of the contract bar itself. *Any* decision on these issues will affect the outcome of this case and the viability of Petitioner's decertification petition.

II. The Union claims that "this case does not possibly involve the duration of the contract bar or the effect of changed circumstances during the term of a contract. No party has contended otherwise." Motion for Reconsideration at 7. That is false. Petitioner's Opposition to the Request for Review specifically requested that "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." Petitioner Opp. at 3. Petitioner's Opposition specifically noted that the contract bar has been erroneously extended over the decades from one year to two years to the current three years, all by case adjudication. Petitioner's Opposition also discussed the unfairness and unworkability of the contract bar's shifting 60-90 day "window periods" (or 90-120 days in the health care industry) followed by insulated periods for filing

election petitions. *Id*. at 3-7. The Board's Notice and Invitation to File Briefs directly followed up on these arguments, all of which affect the parties here.

III. The "contract bar" doctrine is a Board-invented policy, adopted and modified through many adjudications over the years. The current iteration bars a decertification election for up to three years during the life of a contract. The Board accepted the Union's Request for Review to determine whether it should keep, amend, or overrule the contract bar doctrine. The question presented in the Motion for Reconsideration is whether amending the contract bar doctrine in any way in this case would amount to a "rulemaking" under the Administrative Procedure Act ("APA"), which would require the Board go through the APA's procedural notice and comment process before amending the doctrine. The answer is no. The Board has the power to amend the contract bar doctrine through an adjudication because doing so is not an APA "rulemaking." Thus, the Board should deny the Union's Motion for Reconsideration.

First, as the Union concedes, the Supreme Court recognizes the Board's primary discretion to choose between rulemaking and adjudication to formulate policy. Union Request for Reconsideration at 2. See *NLRB v. Wayman-Gordon Co.*, 394 U.S. 759 (1969); see also *NLRB v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267 (1974).

Second, when the Board exercises its discretion to proceed through adjudication, it is not making "rules" in the APA sense, but is "formulating policy" in the case before it and applying that policy to the parties in a final "order." See 5 U.S.C. § 551(6), (7). An "order" will "immediately bind parties by retroactively applying the law to [the parties'] past actions." *Safari Club Int'l, v. Zinke*, 878 F.3d 316, 333 (D.C. Cir. 2017) (citation omitted). Here, whether the Board chooses to keep the current "contract bar" doctrine, overrule the doctrine, or amend the doctrine, it will be applying that policy to the parties in the form of an "order"—it will not be applying that policy only to future cases. Cf. *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 216–17 (1988) (Scalia, J., concurring) (noting the "central distinction between rulemaking and adjudication" is that "rules have legal consequences only for the future").

For example, if the Board were to disestablish the contract bar entirely or shorten it to bar elections for only one year, then there would be no bar to Petitioner's election because the current CBA between the Union and Employer runs for five years, from December 22, 2018, through December 21, 2023. Thus, if the Board modifies the contract bar in this way, it can apply that policy in an "order" to the parties in this case. That is a classic "adjudication," not a "rulemaking" requiring additional APA procedures as the Union argues.

Third, agency policies created by adjudication fundamentally differ from APA rules because parties to case adjudications have litigated their unique concerns, and the resulting order will apply to them and their past actions. Adjudications, "may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein . . . But this is far from saying that commands, decisions, or policies announced in adjudications are [APA] 'rules.'" *Wyman-Gordan Co*., 394 U.S. at 765–66; see also *Bell Aerospace Co.*, 416 U.S. at 294; *Neustar, Inc. v. FCC*, 857 F.3d 886, 894 (D.C. Cir. 2017) ("The fact that an order rendered in an adjudication 'may affect agency policy and have general prospective application,' does not make it rulemaking subject to APA section 553 notice and comment.") (citations omitted). Here, the Union studiously omits that the contract bar doctrine itself was created and modified in many adjudications—not rulemakings. *See New England Transp. Co.*, 1 NLRB 130, 138-39 (1936) (rejecting contract bar); *National Sugar Ref. Co.*, 10 NLRB 1410, 1415 (1939) (a one-year bar was not "contrary to the purposes and policies of the Act"); *Pacific Coast Ass'n of Pulp & Paper Mfg.*, 121 NLRB 990 (1958) (extending the bar to two years); *General Cable Corp*., 139 NLRB 1123 (1962) (extending the bar to three years).

In essence, the Union is making a roach motel argument: The Board can create a policy to lock workers in to unionization through adjudications (check in),

but then must go through onerous APA procedural hurdles to overrule or even modify that policy (hard to check out). This is not required by the APA and the law, and thus the Board should deny the Union's Motion for Reconsideration.

IV. Many unions and even Board members have regularly criticized the Board for *failing* to seek amicus briefing when it contemplates policy changes in a given case. See, e.g., *Labor Board Repeatedly Topples Precedent Without Public Input* (Bloomberg Law News July 15, 2020) (copy attached); *Johnson Controls Inc*., 368 NLRB No. 20, slip op. at 17 & n. 25 (July 3, 2019) (Member McFerran, dissenting). Yet here, when the Board issues a public Notice and invites amicus briefing about the broader implications of the contract bar doctrine, the Union criticizes it for engaging in illicit "rulemaking." And when the Board uses rulemaking to craft new procedures for elections, "Representation – Case Procedures, 85 Fed. Reg. 18,366 (April 1, 2020), it gets sued by unions in federal court for engaging in too much rulemaking. *AFL-CIO v. NLRB*, Civil Case No. 20-cv-1909 (D.D.C. filed July 15, 2020).

CONCLUSION: For all of these reasons the Union's Motion for Reconsideration should be expeditiously denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the true and correct copy of the foregoing Petitioner's Opposition to Motion for Reconsideration was e-filed with the NLRB's Executive Secretary and served via email on the following parties or counsel this 16th day of July, 2020:

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