Silvan Industries, a Division of SPVG, Employer/Petitioner *and* United Association of Plumbers, Steamfitters, and Pipefitters of the United States and Canada, Local 400. Case 18–RM–186941

October 26, 2018

DECISION ON REVIEW AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN AND EMANUEL

This case involves the Board's contract-bar doctrine, which limits the circumstances under which the Board will process an election petition that is filed during the term of a collective-bargaining agreement. Based on the contract-bar doctrine, the Regional Director dismissed a petition filed by the Employer in 2016 because it was filed after the Employer and the Union had reached agreement on a contract. Contrary to the Regional Director, however, this contract cannot bar the processing of the petition because the petition was filed before the contract's effective date.[1] Accordingly, we grant the Employer's request for review and remand the case to the Regional Director for further appropriate action.

I. BACKGROUND

The Employer operates a manufacturing facility in Marinette, Wisconsin. On October 16, 2015, the Union was certified as the exclusive collective-bargaining representative of the Employer's production and maintenance employees. After months of bargaining for an initial contract, on October 13, 2016, the parties reached a tentative agreement, subject to ratification by the bargaining-unit membership, effective by its terms from November 7, 2016,[2] through November 3, 2019. On October 15, the Union informed the Employer that the employees had ratified the proposed contract, and the parties agreed to meet in person on October 25 to execute the contract.

On October 25, an employee presented the Employer with a petition in which employees expressed opposition to continued representation by the Union. The Employer believed that the petition raised a good-faith reasonable doubt as to the Union's continuing majority status in the bargaining unit.[3] That same day, the Employer filed an RM petition with the NLRB regional office. Shortly thereafter, the Employer signed the collective-bargaining agreement.[4]

On December 19, the Regional Director administratively dismissed the RM petition without a hearing on the ground that it was filed after the Union had accepted the Employer's contract offer. Specifically, the Regional Director found that the Employer was precluded from challenging the Union's majority status under *Auciello Iron Works*, 317 NLRB 364 (1995), enfd. 60 F.3d 24 (1st Cir. 1995), affd. 517 U.S. 781 (1996). In light of this finding, the Regional Director did not address whether the Employer possessed evidence sufficient to create a reasonable good-faith uncertainty of the Union's continuing majority status. See *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 723 (2001) (holding that the Board will process an RM petition if the employer can demonstrate "reasonable good-faith uncertainty" as to a union's continued majority status).

In its request for review, the Employer asserts that the Regional Director erred in dismissing the petition. Citing *National Broadcasting Co.*, 104 NLRB 587, 587–588 (1953), the Employer contends that the parties' agreement cannot bar an election petition filed prior to the agreement's effective date. The Employer further contends that nothing in *Auciello Iron Works* requires a different result. It observes that *Auciello Iron Works* involved an employer's withdrawal of recognition and refusal to bargain during the term of an agreement, whereas the instant case concerns an RM petition filed at a time when no agreement was yet in effect. It also states that, unlike the employer in that case, it was not aware of the disaffection petition at the time it reached agreement with the Union. For the reasons set forth below, we find merit in the Employer's contentions. Accordingly, we grant the Employer's request for review and remand the case to the Regional Director for further appropriate action.

II. ANALYSIS

Section 9(c)(1) of the National Labor Relations Act empowers the Board to resolve questions concerning representation by conducting secret ballot elections among employees in an appropriate unit and certifying the results thereof. To promote stability in collective bargaining and

[1] On December 19, 2016, the Regional Director for Region 18 administratively dismissed the petition. Thereafter, in accordance with Sec. 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's administrative dismissal, to which the Union filed an opposition.

[2] All dates hereafter are in 2016 unless stated otherwise.

[3] There is neither allegation nor evidence that the petition was tainted in any way, either by supervisory interference or by unfair labor practices giving rise to the employees' disaffection with the Union.

[4] While the RM petition was pending before the regional office, the Employer continued to recognize the Union as the exclusive collective-bargaining representative of its production and maintenance employees. Since November 7, the Employer has adhered to the terms of the collective-bargaining agreement.

labor relations, however, the Board will generally decline to process an election petition that is filed during the term of a collective-bargaining agreement. See, e.g., *General Cable Corp.*, 139 NLRB 1123 (1962) (holding that a collective-bargaining agreement bars election petitions for the duration of the contract, up to 3 years). On the other hand, delay in resolving an otherwise-valid question concerning representation necessarily affects the Section 7 rights of employees who do not support continued union representation. As part of its efforts to appropriately balance these competing considerations, the Board has formulated specific requirements that must be satisfied before it will allow a collective-bargaining agreement to bar an election. These requirements include that the collective-bargaining agreement be in writing, signed by the parties, and specify its effective date on its face so that employees and outside unions may determine the appropriate time for filing petitions from the face of the agreement itself, without having to resort to parol evidence. *Appalachian Shale Products Co.*, 121 NLRB 1160, 1161–1162 (1958) ("[A] contract to constitute a bar must be signed by all the parties before a petition is filed and . . . unless a contract signed by all the parties precedes a petition, it will not bar a petition even though the parties consider it properly concluded and put into effect some or all of its provisions."); *Cooper Tire & Rubber Co.*, 181 NLRB 509, 509 (1970) (to constitute a bar, a contract must be sufficient on its face without having to resort to parol evidence so that employees and outside unions may determine the appropriate time for filing petitions).

Consistent with these principles, the Board has recognized time and again that the period during which a collective-bargaining agreement bars an election runs from its effective date. See *Benjamin Franklin Paint and Varnish Co.*, 124 NLRB 54, 56 (1959) ("[I]t would best effectuate the policies of the Act to compute the term of a contract for bar purposes from the effective date of the contract."); *Deluxe Metal Furniture Co.*, 121 NLRB 995, 999 fn. 6 (1958) ("[A]n initial contract . . . does not bar an election if a petition is filed with the Board before . . . the effective date of the contract where the contract goes into effect at some time subsequent to execution."); *Commercial Printing Co., Inc.*, 73 NLRB 159, 161 (1947) (holding that "[w]here . . . the contract . . . raised as a bar [to an election] is not the extension or renewal of an existing contract, the usual rule of determining contract bar questions by the effective rather than the execution date, governs"). Indeed, in *National Broadcasting Co.*, supra, 104 NLRB at 587-588, the Board specifically held that a petition, filed in that case by a rival union, was *not* barred by a collective-bargaining agreement where the petition was filed after the agreement was executed but before its effective date.[5] In this case, the petition was filed on October 25, and the parties' agreement was not effective until November 7. Accordingly, the petition was timely filed and is not barred by the parties' agreement.

We recognize that, in determining the period of time *after* its effective date during which a contract will bar an election, the Board in certain circumstances applies different standards to petitions filed by employers than to those filed by an employee or rival union. Specifically, a collective-bargaining agreement will only bar employee or rival union petitions during its term for up to 3 years, whereas an agreement will bar an employer petition for its entire term. *Montgomery Ward & Co., Inc.*, 137 NLRB 346, 347 (1962); *Shaw's Supermarkets*, 350 NLRB 585, 588 (2007) ("[A]n employer cannot file a petition while a contract to which it is a party is in effect.").[6] However, it does not follow from the holding of *Montgomery Ward* that an employer may not file an RM petition *before* a collective-bargaining agreement goes into effect.

We also recognize that the RM petition here was filed at a time when the Employer could not have lawfully withdrawn recognition. However, the Employer did not withdraw recognition. Rather, it engaged in good-faith bargaining as required by the Act, and when it received the employee petition opposing continued union representation, the Employer filed an appropriate petition with the Board. Thus, the standard for determining whether an employer could lawfully withdraw recognition does not govern this case.[7] To hold otherwise would disregard the teaching of *Levitz*, supra, 333 NLRB at 773, that an

[5] Our dissenting colleague dismisses the holding of *National Broadcasting* and other similar cases as based on concerns about employer-union collusion to prevent a challenge by employees or an outside union and thus inapplicable to employer petitions. The short answer to the dissent is that the Board has repeatedly held that the period during which a collective-bargaining agreement bars an election runs from its effective date, and it has done so without the limitation our colleague would impose. We believe these cases mean what they say. Moreover, as discussed above, the holding of those decisions is consistent with other contract-bar cases and is well grounded in the policy reasons cited therein.

[6] An RM petition may be filed, however, within the open period preceding contract expiration. See *River Forest Golden Bear*, 218 NLRB 1074, 1074 (1975); *Montgomery Ward*, 137 NLRB at 347.

[7] The Board has held that once an employer and union reach agreement on a collective-bargaining agreement, the employer may not refuse to bargain, withdraw recognition, or refuse to execute a written agreement based on subsequently acquired evidence calling into question the union's majority status, even if the contract has not been reduced to writing. See *Auciello Iron Works*, 317 NLRB at 368 (finding that employer violated Sec. 8(a)(5) when, after union accepted employer's contract offer, employer, asserting it had reason to believe union no longer represented majority of employees, refused to execute contract and withdrew recognition); *North Bros. Ford, Inc.*, 220 NLRB 1021, 1022 (1975) (finding that employer violated Sec. 8(a)(5) when, after parties reached agreement and were discussing corrections to draft written contract, employer asserted it had reason to believe union no longer represented

employer may file an RM petition in circumstances where it could not lawfully withdraw recognition.[8] Here, as explained above, the Board's contract-bar doctrine does not warrant dismissal of the petition because no contract was in effect when the petition was filed.

Our dissenting colleague recognizes that the Board has never applied the contract-bar doctrine to bar an election petition filed before a contract's effective date. The dissent would nevertheless do so here. She would extend the contract-bar doctrine and refuse to process pre-effective-date petitions filed by employers, and only by employers. In support, she relies on precedent involving withdrawal of recognition, not the filing of election petitions. In our colleague's view, it matters not whether an employer challenges a union's majority status by filing an RM petition or by withdrawing recognition: a challenge is a challenge, and all challenges by an employer should be foreclosed the moment the contract is formed. We respectfully disagree.

First, we do not accept the dissent's premise that the circumstances of this case warrant prioritizing labor relations stability at the expense of employee free choice. Each finds its basis in the Act itself, and the Board is required to balance the statutory goal of promoting labor relations stability against its statutory responsibility to give effect to employees' wishes concerning representation. *Shaw's Supermarkets,* supra, 350 NLRB at 587. As noted above, some of the Employer's employees expressed opposition to continued union representation on October 25, 2016—enough, perhaps, to establish good-faith reasonable uncertainty as to whether the Union continued to enjoy majority support. Our colleague does not and cannot dispute that had the employees filed a decertification petition before the contract's November 7 effective date, the contract would not have barred the petition. Here, however, the employees chose to give their disaffection petition to the Employer instead of filing an RD petition themselves. We believe that the cost to employee free choice would be too high were we to deny the employees the opportunity to express their wishes concerning representation in a Board-conducted election for at least 3 years, on the basis of a contract that had not yet taken effect at the time the petition was filed, simply because they entrusted their petition to the Employer instead of filing it with Region 18 themselves.

Contrary to the dissent, it does matter that this case involves the filing of an RM petition and not a withdrawal of recognition. In authorizing the filing of RM petitions based on a showing of good-faith uncertainty of the union's continued majority status, the *Levitz* Board repeatedly emphasized that processing an election petition is less disruptive of labor relations stability than withdrawing recognition. *Levitz*, supra, 333 NLRB at 717, 727–728. The dissent's attempt to equate the two disregards this material difference—a difference that further demonstrates why Board precedent dealing with election petitions (e.g., *National Broadcasting*, supra) rather than cases involving withdrawal of recognition (e.g., *Auciello Iron Works*, supra) governs here.

Finally, we disagree with the dissent's suggestion that limiting the contract bar to the period that an agreement is in effect will give employers a "strong incentive" to seek delayed effective dates. Respectfully, we think our colleague is reaching. This case deals with a sequence of events that apparently has never happened before, at least so far as our published decisions disclose. As such, it is destined to occupy a deservedly obscure nook in the Board's representation caselaw. To believe that this decision will have the deleterious effect our colleague predicts it will have requires one to believe that employers will go out of their way to seek a delayed effective date, just in case employees *might* become disaffected from the union at the eleventh hour, so that they can file an RM petition on the further chance that employees *might* choose to make their disaffection known to the employer (just in the nick of time, too, before the contract takes effect) rather than pursuing the more direct path of filing an RD petition themselves. We think it unlikely that employers will attempt to delay the effective date of a contract based on the remote chance that such an improbable sequence of events might happen again. And if an employer were to seek a

majority of employees and refused to execute contract). These cases establish that, once an employer and union reach agreement on a collective-bargaining agreement, the employer may not thereafter justify its refusal to bargain or withdrawal of recognition based on the union's alleged loss of majority status "regardless of the status of any written instrument incorporating that agreement . . . ." *North Bros. Ford*, supra. However, *Auciello Iron Works* and *North Bros. Ford* are distinguishable. This case deals with the filing of a petition, not a withdrawal of recognition or refusal to execute a contract, and with employer actions prior to the contract's effective date, not during its term.

[8] Specifically, the Board in *Levitz* held that an employer may withdraw recognition only if it can prove actual loss of majority status, while at the same time adopting a "more lenient" "reasonable good-faith *uncertainty*" standard for RM petitions. 333 NLRB at 723 (emphasis in original). The Board adopted this approach to encourage employers to pursue RM elections, which the *Levitz* Board viewed as the preferred method for resolving questions regarding employees' continuing support for an incumbent union because it promotes "both employee free choice . . . and stability in collective-bargaining relationships." Id. at 727. Indeed, after *Levitz*, the Board rejected the view that an employer election petition should be held to the same standard as a withdrawal of recognition. In *Shaw's Supermarkets*, supra, the Board found that the employer lawfully withdrew recognition from the union after the third year of a 5-year contract although the withdrawal occurred at a time when, under contract-bar rules, the employer could not file an RM petition. 350 NLRB at 588–589.

suspiciously delayed effective date, the union would surely push back.

In sum, the Employer filed its RM petition at a time when there was no contract in effect, which means there was no contract to bar the Employer's petition. Accordingly, the Board is required to process the petition, thereby giving employees the election that Congress contemplated when it provided for Board-conducted elections to resolve questions concerning representation. We therefore reverse the Regional Director's administrative dismissal of the RM petition, reinstate the petition, and remand this case to the Regional Director for further action consistent with this decision.[1]

ORDER

This case is remanded to the Regional Director for further appropriate action.

Dated, Washington, D.C. October 26, 2018

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

As the Supreme Court has observed, the "object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes . . . ."[2] The question here, applying the Board's contract-bar doctrine, is whether the Board should permit an employer to file an election petition challenging a union's majority status *after* the employer and the union have reached an initial collective-bargaining agreement, but before the agreement's effective date, based on new uncertainty that the union has majority support? My colleagues say "yes." But given the statutory goal of promoting and protecting stable collective-bargaining relationships, and in light of well-established Board precedent, that answer is mistaken. It is the employer—and not employees or a rival union—that is seeking to challenge the union's status. What is decisive here, then, is that the employer had entered into a binding agreement *before* filing its petition. Accordingly, I would affirm the Regional Director's dismissal of the Employer's petition.

I.

On October 16, 2015, the Board certified the Union as the collective-bargaining representative of a unit of the Employer's production and maintenance employees. The parties then began bargaining for a first contract. Eventually, they reached a tentative agreement and, on October 15, 2016, the Union informed the Employer that employees had ratified the proposed agreement. The parties agreed to meet to formally execute their agreement, although by its terms the agreement was not effective until November 7.

On October 25, the parties met and signed the agreement. What union representatives present did not know was that earlier the same day, the Employer had filed an election petition with the Board, claiming a newly-discovered good-faith uncertainty that the Union still had majority support among employees.[3] Thus, the Employer's petition was filed after the parties had reached an agreement, but before its effective date.

The Regional Director dismissed the petition. His premise was that the Employer's good-faith uncertainty of the Union's majority status arose *before* the parties reached agreement. He thus applied the Board's holding in *Auciello* (ultimately upheld by the Supreme Court) that "where objective evidence to support a good-faith doubt of a union's majority status is known to the employer before a union's acceptance of the employer's contract offer but the employer does not act on that evidence prior to acceptance, the union's acceptance creates a valid

[1] The Regional Director made no finding as to whether the Employer established a good-faith reasonable uncertainty as to the Union's continuing majority status among the unit employees. On remand, the Regional Director shall determine whether the Employer made the showing required for further processing of its RM petition. See Case Handling Manual, Part Two, Representation Proceedings, Sec. 11042 ("The regional director should process a RM petition based on a prima facie showing of objective considerations that a union has lost its majority status, provided that there have been no unfair labor practices committed that undermine the employees' support for the union.").

[2] *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996), affirming 60 F.3d 24 (1st Cir. 1995), enforcing 317 NLRB 364 (1995).

[3] The Employer asserts in its brief that on October 25 a unit employee presented it with an antiunion petition establishing a good-faith reasonable doubt as to the Union's continued majority status. The Regional Director seemed to believe that the Employer's uncertainty arose sooner—during the parties' contract talks and before the Union's acceptance of the Employer's last contract offer. But the Regional Director did not explicitly make a finding, and I do not draw any inference from the dismissal letter. Having reinstated the Employer's petition, the majority remands this issue.

collective-bargaining agreement" and so forecloses the employer from challenging the union's status.[4]

Auciello involved an employer's unlawful withdrawal of recognition from the union, in violation of its duty to bargain in good faith under Section 8(a)(5) of the Act. The "contract bar" doctrine, developed in the context of representation cases like this one, is the analogue of the irrebuttable presumption of majority support during the contract term that applies in unfair labor practice cases like *Auciello*. "[T]he same policy underlies both the presumptions of majority status and the contract bar rules: achieving a reasonable balance between industrial stability and employee freedom of choice."[5]

Seeking review, the Employer argues that the Regional Director erred in applying *Auciello*, for two reasons. First, the employer's withdrawal of recognition from the union in *Auciello* occurred during the term of the collective-bargaining agreement, while here the Employer's petition was filed before the effective date of the agreement. Second, unlike the employer in *Auciello*, at the time it reached agreement with the Union, the Employer was not aware of the evidence suggesting the Union's loss of majority support. The Employer contends that this case is controlled not by *Auciello*, but by *National Broadcasting*, a 1953 decision in which the Board held that the "contract bar" doctrine did not apply to a representation petition filed by a rival union after the execution—but before the effective date—of a collective-bargaining agreement between the incumbent union and the employer.[6]

I agree with my colleagues that the Employer's request for review raises a substantial issue and that the Board should grant review. But, for the reasons that follow, I think the majority errs in reversing the Regional Director's dismissal of the RM petition.

II.

In *Auciello*, as noted, the Board found unlawful an employer's withdrawal of recognition from a union, after the parties had reached a collective-bargaining agreement, on the basis of evidence tending to show the union's loss of majority support was known to the employer *before* it reached the agreement.[7] The policy rationale that informed the Board's decision (and the Supreme Court's subsequent affirmance) is clear. See *Auciello*, supra, 517 U.S. at 786–788. Permitting an employer to sit on evidence suggesting that the union has lost majority support until after a collective-bargaining agreement is reached would undermine the stability of the bargaining relationship, at the employer's option—an unacceptable result, even giving proper weight to employee free choice. See id. at 787; 317 NLRB at 369, 373--374.

The *Auciello* Board also "reaffirm[ed] the rule set forth in *North Bro[thers] Ford* that a union's acceptance of an employer's outstanding contract offer precludes the employer from [challenging] the union's majority status based on events occurring *after* acceptance," a rule "based on the fact that before or at the time the contract was formed no one had questioned the majority status of the union and the consequent validity of the agreement."[8] Here, again, the policy rationale is clear. In the words of the *Auciello* Board, the *North Brothers Ford* rule "promotes industrial peace and labor relations stability by enabling a union to concentrate on obtaining and fairly administering its collective-bargaining agreement[] without the concern that, absent immediate results, it will lose majority support and be decertified." Id. (footnote omitted).

The Supreme Court has explained the rationale behind conclusive presumptions of majority support like those exemplified by the rules in *Auciello* and in *North Brothers Ford*:

> The overriding policy of the NLRA is "industrial peace." . . . The presumptions of majority support further this policy by "promot[ing] stability in collective bargaining relationships, without impairing the free choice of employees." . . . In essence, they enable a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support and will be decertified. . . . The presumptions also remove any temptation on the part of the employer to avoid good-faith bargaining in the hope that, by delaying, it will undermine the union's support among the employees. . . . The upshot of the presumptions is to permit unions to develop stable bargaining relationships with employers, which enable the unions to pursue the goals

[4] *Auciello Iron Works*, 317 NLRB 364, 368 (1995), enfd. 60 F.3d 24 (1st Cir. 1995), affd. 517 U.S. 781 (1996).

[5] *Auciello*, supra, 317 NLRB at 367 fn. 26. See generally *Auciello*, supra, 517 U.S. at 786; *General Cable Corp.*, 139 NLRB 1123 (1962). See also Robert A. Gorman & Matthew W. Finkin, *Labor Law Analysis and Advocacy* §4.9 (2013); American Bar Association, Section of Labor & Employment Law, 1 *The Developing Labor Law* 609-633 (6th ed., 2012) (John E. Higgins, Jr., ed.).

[6] *National Broadcasting Co., Inc.*, 104 NLRB 587, 588 (1953).

[7] At the time *Auciello* was decided, an employer generally was permitted to withdraw recognition from a union (or, alternatively, to petition the Board for an election) if it had a "good-faith doubt" of the union's majority status. *Auciello*, 317 NLRB at 367–368. Under current law, an employer may withdraw recognition unilaterally only if it can prove that the union has actually lost majority support; in contrast, it may petition for an election if it can demonstrate "good-faith reasonable uncertainty" as to the union's continuing majority status. *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 717 (2001).

[8] 317 NLRB at 368 (emphasis in original), citing *North Bros. Ford*, 220 NLRB 1021, 1022 (1975).

> of their members, and this pursuit, in turn, will further industrial peace.

Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 38-39 (1987) (internal citations omitted).

III.

The Board must view this case with these considerations in mind. Assuming that the Employer, in fact, had no evidence *prior to* October 25 supporting a good-faith uncertainty regarding the Union's majority status, this case is not controlled by the narrow holding of *Auciello* and its stated concern of preventing employers from sitting on evidence of uncertainty about a union's majority status to see how contract negotiations play out. But *Auciello*, and in particular its reaffirmation of *North Brothers*, support a broader proposition: that once a contract is formed (as it was here), the "contract bar" doctrine is triggered and the employer (at least) is precluded from challenging the union's majority status, even if the parties agreed that the contract would not immediately become effective.[9] Nothing in *Auciello* or *North Brothers* suggests that the effective date of the collective-bargaining agreement is key, and certainly the policy considerations regarding stability in labor relations underlying both *Auciello* and *North Brothers* weigh in favor of upholding the validity and legal effect of the contract against a challenge brought by an employer in these circumstances.

The decision invoked by the Employer and the majority, meanwhile, is distinguishable in crucial respects: *National Broadcasting*, which long pre-dates both *North Brothers* and *Auciello,* involved an election petition filed by a rival union, not the employer. The Board has long observed that it is not required to "treat all petitioners identically regardless of the facts of each situation." *Montgomery Ward & Co., Inc.*, 137 NLRB 346, 349 (1962). And, here, there are sound reasons to distinguish between the RM petition filed by the Employer and a petition that might have been filed by the Employer's employees or a rival union. In addition to the long-recognized principle that the Board—with the approval of the Supreme Court—traditionally has "giv[en] a short leash to the employer as vindicator of its employees' organizational freedom,"[10] there are clearly different policy considerations at stake in determining whether to apply the contract-bar doctrine when an employer seeks to undermine the representative status of a union with which it has just engaged in—and concluded—contract negotiations.[11]

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[9] My position is consistent with the view expressed by the Office of the General Counsel, in its basic reference work on representation case law, at the time of the events here. See NLRB, Office of the General Counsel, *An Outline of Law & Procedure in Representation Cases* §7-220 at 69 (Aug. 2008) ("Once an incumbent union has accepted a contract offer, the employer cannot challenge its majority status by filing an RM petition[,] even though a RD [decertification] or rival RC [representation] petition could be filed assuming acceptance would not otherwise be precluded by the Board's [contract] bar standards.") (citing *Auciello*, supra, 317 NLRB at 374).

[10] *Auciello*, supra, 517 U.S. at 790. The *Auciello* Court cited *Brooks v. NLRB*, 348 U.S. 96 (1954). There, the Court had upheld the Board's determination that an employer was required to bargain with a union that had prevailed in a Board election, notwithstanding that the union apparently had lost majority support between the date of the election and the date on which the Board certified the union as the employees' bargaining representative. The *Brooks* Court observed:

> The underlying purpose of this statute is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it.

348 U.S. at 103.

[11] There is no merit, meanwhile, in the contention that the Regional Director departed from Board precedent in disregarding *National Broadcasting*. Nothing in *National Broadcasting* addresses any of the policy considerations implicated here. It provides no explanation for the decision to focus on the effective date of the collective-bargaining agreement (rather than the date of contract formation) to determine that a rival union's petition was *not* barred in the circumstances of that case.

Certainly, where an incumbent union and an employer seek to block another union's attempt to represent employees, on the basis of an existing collective-bargaining agreement, the Board is alert to the possibility of collusion intended to frustrate employee free choice and thus has adopted rules to ensure that the agreement is genuine, not illusory. See *YWCA*, supra, 349 NLRB at 764. This concern—completely absent here—is what would seem to animate the Board's decision in *National Broadcasting*, as the even older cases cited there illustrate. See *National Broadcasting*, supra, 104 NLRB at 588 fn. 9, citing *De Soto Creamery & Produce Co.*, 94 NLRB 1627 (1951), and *Mississippi Lime Co. of Missouri*, 71 NLRB 472 (1946).

The issue in *DeSoto* was whether a new contract, executed during the term of a prior contract, constituted a "premature extension" of the prior contract and thus did not operate to bar a rival union's petition. In such situations, the *DeSoto* Board explained, the general rule had been that "the effective and not the execution date of a control controls contract bar questions." 94 NLRB at 1628–1629. *Mississippi Lime* referred to the same rule. 71 NLRB at 475.

The precedent cited in *DeSoto* and *Mississippi Lime*, meanwhile, confirms that the Board's focus on the effective date of contracts has always been designed to prevent an employer and an incumbent union from unjustifiably foreclosing representational claims by another union. See, e.g., *Kimberly-Clark Corp.*, 55 NLRB 521, 524 (1944); *Foster-Grant Co., Inc.*, 54 NLRB 802, 805 (1944). Notably, at the time such cases were decided (before the Taft-Hartley Amendments of 1947) the Act did not permit employers to petition the Board for elections and the Board routinely dismissed employer petitions seeking to decertify unions. See American Bar Association, Section of Labor & Employment Law, 1 *The Developing Labor Law* at 588 & fn. 44 (6th ed. 2012) (John E. Higgins, Jr., ed.). Given this background, applying *National Broadcasting* to the circumstances of this case makes no sense.

For essentially the same reasons, I am not persuaded that the footnote language from *Deluxe Metal Furniture Co.*, 121 NLRB 995, 999 fn. 6 (1958), cited by the Employer and the majority, has any bearing here. That case, too, involved the application of the "contract bar" doctrine to cases involving rival union petitions. The Board's reference to the principle that the effective date of the contract is controlling for contract-bar purposes is surely to the cases discussed above, although the footnote itself cites no authority at all.

As in *North Brothers Ford*, the Employer sought to challenge the Union's majority status based on events occurring after the Union's acceptance of the contract offer that resulted in the formation of a collective-bargaining agreement.[12] The destabilizing effect of such a challenge is obvious. To paraphrase the Supreme Court in *Fall River Dyeing*, at a period when the union should be able to concentrate on fairly administering its newly-reached collective-bargaining agreement—here, of course, its very first contract with the employer—it must instead worry about decertification, if its administration of the contract does not produce the immediate results that employees may desire. The employer, meanwhile, has every incentive to resist or delay compliance with the contract, in the hope that the union's support among employees will be undermined and that the employer ultimately will rid itself of both the union and the contract. This is not a recipe for industrial peace.

Further, for purposes of the Act's policies and contrary to the majority, it makes no difference that, at the time of the Employer's petition to the Board, the collective-bargaining agreement had not yet gone into effect.[13] The effective date was a mere 2 weeks away, and if the Employer's petition had been accepted by the Regional Director, the Board's representation proceeding and the election process would have moved forward at a time when the agreement was actually in effect.[14] The *Auciello* Court rejected the notion that because a collective-bargaining agreement was new when the employer sought to challenge the union's majority status, the "loss of repose would be slight" and "little would be lost by [permitting the challenge] and [potentially] wiping the contractual slate clean." 517 U.S. at 788. Additionally, were the Board to focus on the effective date of a contract (rather than the date of its formation) when applying the "contract bar" doctrine in cases like this one, employers would have a strong incentive to seek delayed effective dates, a result just as contrary to the Act's goal of encouraging collective-bargaining agreements (and their stabilizing effects) as a deliberate delay in reaching an agreement in the first place.[15]

There are powerful reasons, then, to apply the rule of *North Brothers Ford* here. And the Board should do so, rejecting the Employer's argument that *National Broadcasting* requires the Board to process an *employer* petition even after a collective-bargaining agreement has been reached by that employer and the union, so long as the petition is filed before the agreement's effective date. The Employer insists that "[a]s a matter of federal labor policy, there is no basis for treating an RM [employer] petition differently than an RD [employee] or RC [union] petition" and that the outcome in this case "should not depend on who files the petition."[16] "On the contrary, the "contract bar" doctrine itself requires, and the Board frequently has made, distinctions among filing parties based on the circumstances of the particular case." *Montgomery Ward*, supra, 137 NLRB at 349 (footnote collecting cases omitted).

As the majority acknowledges, the Board in certain circumstances *does* treat employer petitions less favorably. Thus, in *Montgomery Ward* itself the Board held that the contract bar applied to petitions filed by the contracting parties (the employer and the union) for the entire term of the agreement, no matter how long, while non-parties

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My colleagues insist that "these cases mean what they say," but the cases—by their terms—have no application to the issue actually posed here. They long pre-date the Supreme Court and Board decisions explaining the policy considerations that should drive the Board's decision today.

[12] In *North Brothers Ford*, the employer justified its refusal to execute a written contract and to bargain with the union based on a decertification petition filed by employees with the Board after a collective-bargaining agreement had been reached, but before it was executed. The Board rejected this defense, explaining that "[o]nce final agreement on the substantive terms was reached, and regardless of the status of any written instrument incorporating that agreement, the [employer] was not free to refuse to bargain even if it then ha[d] lawful grounds for believing that [the union] had subsequently lost its majority status." 220 NLRB at 1022 (footnote omitted). The Board has continued to follow this rule. See *Young Women's Christian Association of Western Massachusetts*, 349 NLRB 762, 763 (2007) (hereinafter cited as "*YWCA*").

[13] It is true that the collective-bargaining agreements in *Auciello* and *North Brothers Ford* did not have delayed effective dates, as the contract here did. But there is no indication in those decisions, which talk entirely in terms of contract formation, that the date on which the contract became effective was material.

[14] Conceivably, in some extraordinary case, an agreement could have an effective date so far in the future that it arguably would not serve to stabilize the workplace at any relevant time. But this clearly is not such a case, and it is hard to imagine that, at least in first-contract situations, a rational union would ever desire such delay.

[15] My colleagues insist that such a result is unlikely, but it seems to me the Board should err on the side of caution in crafting its rules. There can be no doubt that employers sometimes delay in complying with their legal duties when presented with the possibility of avoiding a binding collective-bargaining agreement that also insulates the union from challenge. Thus, in *YWCA*, supra, the employer unlawfully refused to execute an agreement and withdrew recognition from the union, citing evidence of the union's loss of majority support after the contract was formed. 349 NLRB at 762–763, 773. The same situation was presented in *Utility Tree Service, Inc.*, 215 NLRB 806 (1974), enfd. mem. 539 F.2d 718 (9th Cir. 1976). It is surely plausible, then, that an employer reluctant to commit itself to an agreement might seek a delayed effective date in order to increase the possibility that employee disaffection will come to fruition.

[16] Petitioner's Request for Review at 8. I assume that if the employees in this case had filed a decertification petition with the Board, or if a rival union had sought to represent employees, it would have been proper to process the petition. Cf. *North Bros. Ford*, supra, 220 NLRB at 1022 (rejecting employer's argument that filing of employee decertification petition justified its refusal to bargain, without commenting on whether petition was properly processed).

(employees and rival unions) were subject only to a time-limited bar. Id. at 347–348. The *Montgomery Ward* Board saw no reason "to permit employers or certified unions to take advantage of whatever benefits may accrue from the contract with the knowledge that they have an option to avoid their contractual obligations and commitments through the device of a petition to the Board for an election." Id. at 348–349 (footnotes omitted).[17]

This reasoning anticipates the Supreme Court's observation in *Auciello* that an employer with knowledge of the union's potential loss of majority support should not be permitted to "go right on bargaining, with the prospect of locking in a favorable contract that it could, if it wished, then challenge." 517 U.S. at 789. It has application here, as well, where the employer has agreed to a contract, but now seeks to challenge it, by questioning the union's majority status.

In sum, there are good reasons to distinguish between the RM petition filed by the Employer and a petition that might have been filed by the Employer's employees or a rival union, notwithstanding the fact that the Employer's petition was filed prior to the effective date of the parties' previously agreed-upon contract. Unlike employees seeking to decertify their union, or a rival union seeking to replace it, the Employer negotiated and entered into a collective-bargaining agreement with the Union at a time when its majority status remained unquestioned. The parties thereby successfully achieved one of the Act's primary goals: reaching an agreement that stabilized their relationship and governed employees' terms and conditions of employment for the duration of the agreement. That the agreement had a future effective date does not detract from that achievement or warrant departing from the rule of *North Brothers Ford* that reaching agreement precludes the employer from subsequently challenging the union's majority status. It remains the case that "[i]t would be profoundly destabilizing to the collective-bargaining process to allow one party unilaterally to back out of its agreement, based on events that took place after the fact." *YWCA*, supra, 349 NLRB at 763. It is no answer simply to assert, as the majority does, that "it does not follow from the holding of *Montgomery Ward* that an employer may not file an RM petition *before* a collective-bargaining agreement goes into effect."

Nor does it matter that this case does not involve a withdrawal of recognition, but rather the filing of an election petition. As explained, the policy considerations—promoting and protecting stable collective-bargaining relationships—are the same in either situation. Whether the bargaining relationship is disrupted by the employer's unilateral action or by the results of a Board election is immaterial.[18] The question is *whether*, not how, an employer should be permitted to challenge the union's majority status, even though a collective-bargaining agreement has been reached. The majority acknowledges that the "RM petition here was filed at a time when the Employer could not have withdrawn recognition," but points out that the Employer did not withdraw recognition and insists, as does the Employer, that the Employer's approach was consistent with the "safe harbor" announced in *Levitz Furniture Co. of the Pacific*, supra. But the *Levitz* Board did not purport to decide, or even address, the question presented here. The Board's analysis focused instead on the appropriate thresholds for an employer to lawfully withdraw recognition and to appropriately file an RM petition, not the appropriateness of the timing of such a petition relative to the formation of a collective-bargaining agreement. Hence, nothing in the Board's *Levitz* decision requires processing the Employer's petition.

Instead of engaging in a careful analysis of policy and precedent, the majority retreats into empty formalism: because the collective-bargaining agreement had not gone into effect, the contract-bar doctrine does not apply. But *why* this should be the case, the majority fails to explain in any persuasive way. Policy and precedent actually dictate a different result: When an employer enters into a collective-bargaining agreement with a union, even an agreement with a delayed effective date, it should not be permitted immediately to undermine the agreement, by challenging the union's majority status. If the employer is uncertain of the union's support, of course, it need not enter into an agreement in the first place. And if uncertainty does not arise until after the agreement is reached, then only employees, or a rival union with their support, should

[17] The majority has no difficulty treating the Employer's petition as if it had been filed with the Board by employees seeking an election. But, of course, employees did *not* come to the Board, for reasons we can only guess at. Instead, they came to the Employer. As the Supreme Court's *Auciello* decision observed, the distinction has meaning, both as a matter of Board precedent, and from a policy perspective, if for no other reason than the "Board is . . . entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union, *which is subject to a decertification petition from the workers if they want to file one*." 517 U.S. at 790 (emphasis added).

[18] The majority simply misses the point when it insists, citing *Levitz*, that "processing an election petition is less disruptive of labor relations than withdrawing recognition." What matters is that because a collective-bargaining agreement here was formed, the Employer that participated in the process of negotiating that formed agreement should not be permitted to challenge the Union's representative status, by whatever means. Processing the Employer's petition, of course, could culminate in voiding the completed agreement—an outcome certainly "disruptive of labor relations."

be free to petition the Board for an election. Only this approach appropriately balances the aims of labor law.

Dated, Washington, D.C. October 26, 2018

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD