in making or enforcing the arrangement with the Employer. Accordingly, we shall dismiss the complaint.

[The Board dismissed the complaint.]

MEMBERS RODGERS and BROWN took no part in the consideration of the above Supplemental Decision and Amended Order.

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**Paragon Products Corporation *and* District 50, United Mine Workers of America, Petitioner.** *Case No. 22–RC–1192. November 22, 1961*

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Leonard Bass, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organizations involved claim to represent employees of the Employer.[1]

3. No question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act for the following reasons:

The Employer and Intervenor urge their contract entered into on May 13, 1959, effective from June 4, 1959, until June 3, 1962, and automatically renewable for 1-year periods thereafter, as a bar to this proceeding. They contend that the petition, filed on April 14, 1961—during the 60-day insulated period at the end of the first 2 years of their contract—was untimely and should be dismissed.[2]

Petitioner asserts that, because of the language used in the union-security provisions of the contract,[3] it cannot bar the petition under

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[1] Local 1159, International Brotherhood of Electrical Workers, AFL–CIO, was allowed to intervene on the basis of a contract interest

[2] *Deluxe Metal Furniture Company,* 121 NLRB 995, 1000; *Pacific Coast Association of Pulp and Paper Manufacturers,* 121 NLRB 990, 993

[3] Article II—section 3, of the current contract reads as follows:

(a) All present employees of the Company (exclusive of those eliminated by the Agreement) shall be required by both parties to this Agreement to become and remain members of the Union in good standing during the term of this contract, and conform to the Union's laws, rules and regulations, and they shall individually and collectively be bound by the terms of this Agreement.

New employees shall, after a period of thirty (30) days after date of employment by the Company, make application for membership in the Union and remain a member [sic] in good standing during the term of this contract

(b) Any employee failing to be in compliance with the foregoing provision shall, within one (1) week from date of notice sent by the Union to the Company, be discharged from the employment of the Company.

the Board's *Keystone* decision.[4] The Employer and the Intervenor urge the Board to reconsider the rules set forth in that decision. For reasons hereinafter indicated, the Board has decided to reconsider the rules enunciated in the *Keystone* decision.

At the outset it seems appropriate to set forth certain basic principles upon which the entire contract-bar doctrine is predicated and which, although well settled, deserve recapitulation in order to place the subject matter involved in its proper context.

In administering Section 9 of the Act, the Board has maintained the objective of giving expression and effect to congressional policy. In so doing, it has repeatedly found it necessary to weigh the dual and sometimes conflicting objectives of fostering stability in labor relations and of according to employees an opportunity to express in a Board-conducted election the freedom of choice guaranteed in Section 7 of the Act. Contracts established the foundation upon which stable labor relations usually are built. As they tend to eliminate strife which leads to interruptions of commerce, they are conducive to industrial peace and stability. Therefore, when such a contract has been executed by an employer and a labor organization the Board has held that postponement of the right to select a representative is warranted for a reasonable period of time. For effective and expeditious implementation of this policy, the Board has established certain administrative rules of decision permitting contracts to bar representation proceedings. Basic to the whole of contract-bar policy is the proposition that the delay of the right to select representatives can be justified only where stability is deemed paramount. Thus, the Board has excepted from the contract-bar rule certain types of contracts which in its considered judgment did not foster industrial stability such as contracts where the identity or existence of the representative was in doubt or contracts which themselves were in conflict with the policies of the Act, e.g., a contract containing an illegal union-security clause. It has been the Board's view that any stability derived from such contracts must be subordinated to employees' freedom of choice because it does not establish the type of industrial peace the Act was designed to foster. The Board's *Hager Hinge*[5] decision was based on this premise, as were cases which followed it.

With the avowed purpose of achieving clarity and simplicity in this complicated field of Board law, *Keystone* set forth the rules governing the interpretations which would be accorded union-security clauses in contracts urged as bars in representation proceedings. It also indicated the effect of the various types of clauses upon the status of such contracts as bars to petitions.

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[4] *Keystone Coat, Apron & Towel Supply Company, et al*, 121 NLRB 880, 883–884.
[5] *C. Hager & Sons Hinge Manufacturing Company*, 80 NLRB 163

The Board does not lightly undertake to disturb precedent upon which the parties subject thereto have come to rely. However, in view of certain expressions in Supreme Court decisions relating to the subject matter involved, and certain objectionable effects of the *Keystone* decision as reflected in the Board's experience with its application, the Board has, as indicated above, reevaluated the principles underlying the *Keystone* rule of contract clause interpretation.

We observe that the net effect of the rules of interpretation set forth in *Keystone* was to require a presumption of illegality with respect to any contract containing a union-security clause which did not expressly reflect the precise language of the statute. However, in recent decisions, the Supreme Court has sharply circumscribed the area in which the provisions of a contract may be presumed illegal under the statute. Thus, in the recent *News Syndicate* case,[6] the Supreme Court stated:

> . . . as we said in *Teamsters Local 357* v. *Labor Board*, decided this day . . . *we will not assume* that unions and employers will violate a federal law . . . against a clear command of this Act of Congress. As stated by the Court of Appeals "*In the absence of provisions calling explicitly for illegal conduct, the contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives.*" [Emphasis supplied.]

In the implementation of the policies of the Act Congress has granted to the Board broad discretion in representation proceedings. However, in the face of this explicit language of the Supreme Court, we do not consider it sound administrative practice for us to continue applying a rule with respect to union-security provisions which indulges in precisely the type of presumption of illegality frowned upon by the Supreme Court.

Another unsatisfactory aspect of *Keystone* which has become evident in its application is its extremely unsettling impact upon established collective-bargaining relations. Our experience shows that a substantial bulk of the contracts containing perfectly legal union-security provisions cannot meet the strict test required by *Keystone*, i.e., that they expressly reflect the statutory language. Thus, because of the broad sweep of this rule, disruption of an inordinate number of contracts has taken place at times when they would, under ordinary contract-bar rules, have barred an election.

One of the vital considerations which has motivated our decision to change the *Keystone* rule is inherent both in the expressions of the Supreme Court stated above and in our dissatisfaction with the application of that rule. This factor is that contracts conclusively presumed illegal under *Keystone* included those which could not form the basis

[6] *N.L.R.B* v. *News Syndicate Company, Inc., et al.*, 365 U S. 695 (April 17, 1961)..

of an unfair labor practice charge, because their only infirmity was that they did not conform to the statutory language in *haec verba*,[7] and those which at the very least would require additional evidence to establish their illegality. In other words, under the *Keystone* rule the very contracts presumed illegal in representation cases would in the main be found perfectly lawful in unfair labor practice proceedings.

As a matter of policy, we have not in the past permitted, nor do we intend now to permit, litigation of allegations of unfair labor practices in the preelection phases of representation proceedings. For, such proceedings are investigatory in character and do not afford a satisfactory means for determining matters which are more properly the subject of adversary proceedings with their accompanying safeguards. Moreover, Congress has provided the unfair labor practice proceeding as the avenue of enforcement of the statutory proscription against discriminatory arrangements and practices.

Yet, in the administration of the Act, we believe the Board should take cognizance of unlawful union-security provisions where the illegality is clear in the explicit terms of the contract. In treating with the legality of union-security provisions in representation proceedings, 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. We do not thereby engage in presumptions of illegality or in findings of intent or practice. For contracts which on their face contain forbidden union-security provisions, require no evidence of application or interpretation and no presumption, but state a purpose contrary to law. As stated by the Supreme Court in *Los Angeles-Seattle Motor Express:*[8]

> We cannot assume . . . that the parties to [a] contract did not intend to adhere to its express language.[9]

In this same case Justice Harlan in his concurring opinion indicated that illegal contract terms which are not equivocal on their face required no independent evaluation of their actual meaning. As an example of a well-established line of circuit court cases to this effect, he cited the Second Circuit's decision in *Red Star*.[10] There the court said:

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[7] As stated by the Supreme Court in *N.L.R.B.* v *Rockaway News Supply Company, Inc.*, 345 U.S. 71, " . . . There is no reason apparent why terms should be implied by some outside authority to take the place of legal terms collectively bargained "

[8] *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* v. *N.L.R.B.*, 365 U.S. 667 (April 17, 1961). See Justice Harlan's concurring opinion, in which he distinguishes *Red Star Express Lines of Auburn, Inc.* v. *N.L.R.B.*, 196 F 2d 78 (C.A. 2), and *Gaynor News Company, Inc* v. *N.L.R.B.*, 347 U.S. 17, and related cases.

[9] While this quotation had specific reference to a contract which stated a lawful purpose, as a rule of contract interpretation, it is equally applicable here.

[10] *Red Star Express Lines of Auburn, Inc.* v. *N.L.R.B.*, *supra.*

> The execution of a contract containing a forbidden union-security clause constitutes an unfair labor practice. This is so because the existence of such an agreement without more tends to encourage membership in a labor organization. . . . It is no answer to say that the Act gives [an employee] a remedy in the event that he is discharged. The act requires that the employee shall have freedom of choice, and any form of interference with that choice is forbidden.

In the same vein, the court in *Gottfried Baking* [11] stated:

> The preferential hiring clause contained in the three contracts above-described was clearly illegal . . . . We think that the mere execution of a contract containing such a provision, even apart from its actual enforcement, constitutes "discrimination in regard to hire" on the part of an employer and hence falls squarely within the prohibition of Section 8(a)(3) . . . .

Thus the circuit courts have indicated, with apparent approval by the Supreme Court, that a contract provision which on its face requires—though unintentionally—forbidden discrimination, is illegal. As we evaluate these expressions, contract clauses which are illegal on their face are the only kinds where extrinsic evidence of lack of enforcement or intent becomes immaterial.

In view of the above considerations, we have decided that the following rules shall obtain in determining whether a contract containing a union-security provision will bar an election.

Whereas under *Keystone* a contract could not qualify as a bar if its union-security provision did not expressly reflect the limitations placed thereon by the statute, we now hold that only those contracts containing a union-security provision which is clearly unlawful on its face, or which has been found to be unlawful in an unfair labor practice proceeding, may not bar a representation petition. A clearly unlawful union-security provision for this purpose 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.

Such unlawful provisions include (1) those which expressly and unambiguously require the employer to give preference to union members (a) in hiring, (b) in laying off, or (c) for purpose of seniority; (2) those which specifically withhold from incumbent nonmembers and/or new employees the statutory 30-day grace period; and (3) those which expressly require as a condition of continued employment the payment of sums of money other than "periodic dues and initiation fees uniformly required."

[11] *N L R B* v. *Gottfried Baking Co, Inc, et al* 210 F 2d 772, 779 (C A 2)

The mere existence of a clearly unlawful union-security provision in a contract will render it no bar regardless of whether it has ever been or was ever intended to be enforced by the parties, unless the contract also contains a provision which clearly defers the effectiveness of the unlawful clause or such clause has been eliminated by a properly executed rescission or amendment thereto.

Contracts containing ambiguous though not clearly unlawful union-security provisions will bar representation proceedings in the absence of a determination of illegality as to the particular provision involved by this Board or a Federal court pursuant to an unfair labor practice proceeding. No testimony and no evidence will be admissible in a representation proceeding, where the testimony or evidence is only relevant to the question of the practice under a contract urged as a bar to the proceeding.

We believe the aforesaid rules are in conformity with the pertinent principles of interpretation enunciated by the Supreme Court. They have the advantage of retaining the simplicity aspired to in the *Keystone* case without the objectionable presumptions of illegality required therein and avoid prejudging a union-security provision the validity of which may become the subject of a subsequent complaint case. Moreover, they are more in accord with the Act's objective of stabilizing labor relations than was the rule of interpretation set forth in *Keystone*. Thus, we will now remove a contract as a bar only when the law has clearly been ignored.

Turning now to the union-security provisions involved in the instant case, it is apparent that in order to determine whether there were any nonmember "present employees" who were denied a 30-day period in which to join the Union, it would be necessary to look to extrinsic evidence. Similarly, it is not clear whether failure "to be in compliance with" *de facto* membership or with "membership in good standing" according to "the Union's laws, rules and regulations" or failure to "be bound by the terms of [the] agreement" required discharge from employment. Under these circumstances, as the union-security provision is not clearly unlawful, and as we are not willing to indulge in a presumption of illegality, we hold that the union-security clause does not remove the contract as a bar.[12]

As the petition herein was filed during the 60-day insulated period of the contract, we further find that its filing was untimely. Accordingly, we shall dismiss the petition.

[The Board dismissed the petition.]

[12] To the extent that this decision is inconsistent therewith, *Keystone Coat, Apron & Towel Supply Company, et al., supra,* is hereby overruled

MEMBERS RODGERS and LEEDOM dissenting:

We cannot agree with our colleagues that revision of the contract-bar rules set forth in the *Keystone* [13] case is necessary or desirable.

Our colleagues say that a revision of these rules is necessary because in their view such rules indulge in a "presumption of illegality frowned upon by the Supreme Court" in its recent decisions, and because in their opinion "under the *Keystone* rule the very contracts presumed illegal in representation cases would in the main be found perfectly lawful in unfair labor practice proceedings." They are, however, misreading the *Keystone* case when they say that its rules are based upon a presumption of illegality.

As is true of all the Board's contract-bar rules,[14] the *Keystone* rules were designed to simplify the applicable criteria and reflect an accommodation of two sometimes conflicting objectives—the promotion of stability in labor relations and the assurance to employees of their statutory right to a free choice of representatives. As illustrated in those cited cases, the various rules reflect the Board's administrative judgment that in certain circumstances the existence of a contract warrants a postponement of the employees' exercise of their statutory right, whereas in other circumstances such a postponement is not warranted, even though the contract in issue may be unquestionably lawful.[15] The rules established in *Keystone* were similarly the reflection of the Board's administrative judgment that the Board-devised contract-bar doctrine ought not to be invoked to deny to employees the exercise of their statutory right unless the contract in issue was clearly on its face in accord with the statutory requirements, and even though it might, under the different principles applicable to unfair labor practice proceedings, be deemed lawful in such a proceeding. Thus, as the Board pointed out at page 885 of the *Keystone* decision, the rules were established "for contract-bar purposes only," and it was clear from the whole tenor of the discussion that the Board was not there attempting to prejudge what the result would be if the same provision were attacked in an unfair labor practice proceeding. It is significant, too, that there is nothing in the Act which requires the Board to give weight to past bargaining practices. Consequently, we do not believe that the Supreme Court decisions relating to unfair

[13] *Keystone Coat, Apron & Towel Supply Company, et al*, 121 NLRB 880

[14] See *Hershey Chocolate Corporation*, 121 NLRB 901; *Pacific Coast Association of Pulp and Paper Manufacturers*, 121 NLRB 990; *Deluxe Metal Furniture Company*, 121 NLRB 995; *Appalachian Shale Products Co*, 121 NLRB 1160; *General Extrusion Company, Inc*, *General Bronze Alwintite Products Corp.*, 121 NLRB 1165.

[15] We assume our colleagues are not troubled by the rules holding that a contract, for example, of indefinite duration, of unreasonable term, or one affected by a schism or an expanding unit, would be no bar, even though the reasons for holding the contract no bar could under no circumstances form the basis for unfair labor practice findings.

labor practice proceedings necessitate revision of the Board's contract-bar rules relating to agreements containing union-security provisions.[16]

Nor have our colleagues pointed to any policy considerations which warrant revision of the *Keystone* rules. As the Board noted in *Keystone*, the congressional policy with respect to union-security agreements was carefully considered and clearly set forth "more than 11 years ago"—now more than 14 years ago—and there was in the Board's view no valid reason why the parties could not comply with the statutory requirements in drafting union-security agreements. What could be simpler than quoting the statute verbatim? Because of these considerations and because of the potentialities for infringement upon employee rights inherent in agreements not clearly conforming to the statutory requirements, the Board concluded, as indicated above, that unless the contract asserted as a bar did clearly conform to the statute, the utilization of such a contract to deny to employees the right to exercise their franchise was unwarranted. This judgment is as valid now as it was 3 years ago.

To justify reversing this judgment our colleagues, in addition to their attack on a nonexistent presumption of illegality, assert that application of the *Keystone* rules has had an "extremely unsettling impact upon established collective bargaining relations" and that "a substantial bulk of the contracts containing perfectly legal union-security provisions cannot meet the strict test required by *Keystone* . . . ." They offer no support for this categorical pronouncement. But even if it were so, it would not warrant their conclusion. For it must be kept in mind that the Board's contract-bar rules are a Board-devised infringement upon a right given employees by the Act. To justify such an infringement the Board must be able to say that in its judgment the objective of stability in labor relations is paramount over the right of employees to an election and that the contract held to be a bar promotes the stability objective. We do not see how the Board can make such a judgment when the contract in issue, because it does not clearly comply with the Act, serves only to promote instability in labor relations because of its potential for infringement upon employee rights. Here again, we would like to point out that for contract-bar purpose, whether or not the contract in fact interferes is not the overriding question; it is sufficient that in the Board's judgment, it might tend to interfere with employees' full freedom to exercise their rights under the Act.

Contrary to what our colleagues may believe, we do not here presume that the parties to such a contract will act unlawfully. All we

[16] See *McLeod* v. *Local 476, United Brotherhood of Industrial Workers (Anton Electronic Laboratories)*, 288 F. 2d 198 (C A. 2), pointing out that the Board has broad discretion in fashioning its contract-bar rules, and clearly implying that in fashioning such rules it is not compelled to adhere to principles applicable to unfair labor practice proceedings.

would hold is that where the contract might tend to interfere, the Board should not withhold from employees the right to determine their representation in a Board-conducted election. Our colleagues here are doing precisely the opposite. For it is clear, from the broad sweep which our colleagues are giving to their revised rules, as evidenced by their application of these revised rules to the facts in this case, that they have held that no union-security provision will remove a contract as a bar unless its nonconformity with the Act is so blatant that even the blind must see it.

Applying the *Keystone* rules to this case it is clear, apart from any other considerations, that the contract in issue does not give incumbent nonmember employees any grace period. We would find, accordingly, that the contract is not a bar and the petition was timely.[17] As there are no other issues in the case, we would therefore direct an election in the stipulated unit.

[17] *National Brassiere Products Corp.*, 122 NLRB 965.

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**Teamsters "General" Local No. 200 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *and* Howard Bachman, Joseph B. Bachman and Myron J. Coplan, a Partnership d/b/a Bachman Furniture Company.** *Case No. 13–CP–15. November 24, 1961*

## DECISION AND ORDER

On November 14, 1960, Trial Examiner A. Norman Somers issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in any unfair labor practices and recommending that the complaint be dismissed in its entirety, as set forth in the Intermediate Report attached hereto. Thereafter, the General Counsel, the Respondent, and the Charging Party filed exceptions to the Intermediate Report and supporting briefs.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, except as modified herein.[1] Compare *Retail Store Employees' Union, Local No. 692, Retail Clerks*

[1] Although we find, in agreement with the Trial Examiner, that the Respondent's picketing was not conducted for an object proscribed by Section 8(b)(7)(B) of the Act, we do not adopt or rely upon that portion of the Intermediate Report relating to the distinction, sometimes made, between the so-called ultimate and immediate objects which are alleged to underlie all picketing.