
**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

LINDA KANDEL, GALEN RABER, JUANITA
MILLER AND RENATE CROLL

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL
SERVICE WORKERS INTERNATIONAL UNION AFL-CIO, CLC

Intervenor

ON PETITION FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Rule 28(a)(1) of the Rules of this Court, counsel for the National Labor Relations Board certify the following:

A. Parties and Amici: United Steelworkers of America, now named United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial Service Workers International Union AFL-CIO, CLC (“the Union”) and Heartland Industrial Partners, LLC were the respondents before the National Labor Relations Board. Linda Kandel, Galen Raber, Juanita Miller and Renate Croll were the charging parties before the Board and are the Petitioners. The Board is the respondent. The Union has intervened on the side of the Board. The Board’s General Counsel was a party before the Board.

b. Rulings Under Review: The case under review is a decision and order of the Board issued on November 7, 2006, and reported at 348 NLRB No. 72.

C. Related Cases: This case has not previously been before this Court. The Board is not aware of any related cases pending or about to be

presented to this Court or any other court.

Linda Dreeben
Assistant General Counsel
National Labor Relations Board

dated at Washington, D.C.
this 30th day of July 2007

heartland-28(a)

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No. 07-1044

LINDA KANDEL, GALEN RABER, JUANITA
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Petitioners

v.

NATIONAL LABOR RELATIONS BOARD

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ON PETITION FOR REVIEW OF AN ORDER OF
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BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court upon the petition of Linda Kandel, Galen Raber, Juanita Miller, and Renate Croll (collectively “the Petitioner”) to review a

final order of the National Labor Relations Board (“the Board”) dismissing an unfair labor practice complaint against Heartland Industrial Partners, LLC (“the Company”) and United Steelworkers of America (“the Union”). The Board had jurisdiction over the unfair labor practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). This Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act (29 U.S.C. § 160(f)). The Board’s Decision and Order issued on November 7, 2006, and is reported at 348 NLRB No. 72. (A. 265-79.)¹ The petition for review was timely filed with the Court on February 15, 2007; the Act places no time limit on the institution of proceedings to review Board orders. The Union has intervened on the side of the Board.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board had a rational basis for finding that Sections 2 and 3 of the Heartland Agreement between the Company and the Union do not constitute an agreement to cease doing business, and therefore do not violate Section 8(e) of the Act.

¹ “A.” references are to the Joint Appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

APPLICABLE STATUTES

The relevant statutory provisions are contained in an addendum to this brief.

STATEMENT OF THE CASE

Based upon an unfair labor practice charge, the Board's General Counsel issued a complaint alleging that two provisions in an agreement between the Company and the Union require the Company to cease doing business with another person in violation of Section 8(e) of the Act (29 U.S.C. § 158(e)). (A. 265, 271; 7-11, 12-14, 15-19.) The Company and Union timely filed answers denying the commission of an unfair labor practice. (A. 20-24, 25-49.)

After a hearing, an administrative law judge issued his decision, finding that the two provisions in the parties' agreement did not violate Section 8(e) for three separate reasons. (A. 271-79.) First, the judge found that the agreement containing the two challenged provisions merely relates to the Company's acquisition of other businesses, and that an employer's acquisition of other businesses does not constitute "doing business" within the meaning of Section 8(e). (A. 267 n.5, 278.) Second, the judge found that the challenged provisions do not constitute an agreement "to cease doing business." (A. 267 n.5, 278.) Finally, the judge found that the challenged provisions do not run afoul of Section 8(e) of the Act because the "with another person" criterion of Section 8(e) is not met. (A. 267 n.5, 279.)

After the parties filed exceptions to the judge's decision, the Board issued its decision. (A. 265-71.) A majority of the Board found that the challenged provisions do not violate Section 8(e) of the Act because they do not constitute an agreement to cease doing business. The Board majority therefore found it unnecessary to pass on the judge's first and third reasons for rejecting the Section 8(e) allegation. (A. 266-71 & n.5.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

- A. Background; the Company and the Union's Heartland Agreement Addresses Union Organizing at Businesses the Company Acquires and Controls; Section 2 of the Agreement Provides that if the Union Notifies the Company that It Intends To Organize One of Those Acquisitions, the Company Will Cause the Controlled Acquisition To Execute a Similar Agreement, and Thereby Adopt a Position of Neutrality During the Union Campaign

The Company is an investment firm that invests in manufacturing companies located in the Midwest, the "heartland" of America. It employs no manufacturing employees itself. (A. 265, 272; 149-52, 157, 175-76.) On November 27, 2000, the Company and the Union executed an agreement ("the Heartland Agreement") addressing union organizing at businesses the Company acquires and controls. (A. 265; 16(¶7), 21(¶7), 25(¶7), 30-38, 39-49, 145.)

The Heartland Agreement consists of two parts: a Side Letter and a Framework for a Constructive Collective Bargaining Relationship ("the

Framework”). (A. 265; 15(¶7), 21(¶7), 26(¶7), 30-38, 39-49, 152-53.) The Side Letter specifies the circumstances and conditions for applying the Framework to businesses the Company acquires and controls. (A. 265; 16-17(¶8), 21(¶8), 26(¶8), 31-38.) Under the Framework, a business that the Company acquires and controls must, under certain circumstances, remain neutral during a union organizing campaign and recognize, and bargain with, the Union upon a majority showing. (A. 265; 40-44, 46-47.)

Section 2 of the Side Letter provides that the Company shall notify the Union when it becomes an investor in a “Covered Business Enterprise” (“CBE”), defined in Section 3 as any business enterprise in which the Company directly or indirectly owns more than 50 percent of the common stock; controls more than 50 percent of the voting power; or has the power to direct the management and policies of the enterprise. (A. 265; 31-32.) Section 2 further provides that no less than six months after the Company invests in a CBE, the Union may notify the Company of its intent to organize the CBE, whereupon the Company will cause the CBE to execute a Side Letter and Framework with the Union that is, in form and substance, identical to the Heartland Agreement. (A. 265; 31-32.) Sections 2 and 3 of the Heartland Agreement do not explicitly require the Company to sever its relationship with a CBE that does not become bound by the Side Letter and Framework. (A. 268; 31-32, 169.)

More specifically, the Side Letter reads in pertinent part:

The following will confirm our understanding regarding certain matters concerning the United Steelworkers of America . . . and Heartland Industrial Partners . . .

2. [W]e agree that in the event Heartland, after the date of this letter, directly or indirectly becomes an investor in a Covered Business Enterprise (“CBE”) (as defined below), Heartland will:
 - A. Within 30 days of the consummation of the transaction that results in Heartland becoming an investor in said CBE (a “Transaction”), provide the [Union] with a detailed description of the CBE including:
 - (i) a list of each of the CBE’s plants, and for each of those plants, the products, markets, number of employees eligible for union representation and the classifications, union status and affiliation (if any) of those employees; and
 - (ii) the business and financial due diligence, plans and forecasts which Heartland in the ordinary course of business would provide to its limited partners.
 - (iii) In addition, Heartland will, upon request, informally discuss with the Union, from time to time, its present plans (as such plan may exist) for the utilization, expansion, contraction, or other major changes in the role or size of the production facilities of the CBE.

The Union shall keep all such information strictly confidential within its senior officials and elected leadership and/or organizing department. Finally, the Union explicitly recognizes that any plans discussed may be speculative, contingent, or subject to change at any time.

- B. If, at any time after six months following a Transaction, the Union notifies Heartland in writing of its actual intent to organize any of the facilities of the CBE, then within ten (10) days of such

notification, Heartland will cause the CBE to immediately execute an agreement (hereafter known as the “Framework for a Constructive Collective Bargaining Relationship” or “Framework Agreement”) between said CBE and the [Union] in form and substance identical to Exhibit 1 hereto, as well as this Side Letter, both of which shall also at that time be executed by the Union.

3. A Covered Business Enterprise or CBE shall be defined as any business enterprise in which Heartland, directly or indirectly: (i) owns more than 50 percent of the common stock; (ii) controls more than 50 percent of the voting power; or (iii) has the power, based on contracts, constituent documents or other means, to direct the management and policies of the enterprise; with only the following limited exceptions:

* * *

(A. 31-32.)

The Framework states that the CBE will adopt a position of neutrality during an organizing campaign and will post a notice to its employees advising them of its neutral position. (A. 265; 40-42.) The Framework also provides that the CBE will grant the Union access to its premises to distribute information and to meet with the employees, and furnish the Union with employee names and addresses. (A. 265; 43-44.) The Framework further provides that the CBE will recognize the Union based on a majority showing after a card check, bargain within 14 days of recognition, and submit to interest arbitration any issues that remain open after 90 days of bargaining. (A. 265; 44, 46-47.)

The Framework also includes a dispute resolution procedure. (A. 265; 47-48.) Under this procedure, either party can submit disputes involving the terms of the Framework to an arbitrator. (A. 265; 47.) The arbitrator’s remedial authority

includes “the power to issue an order requiring [a CBE] to recognize the Union where, in all the circumstances, such an order would be appropriate.” (A. 265; 47.)

The arbitrator’s award is final and binding on the parties. The parties waive the right to seek judicial review of the award, but may seek its judicial enforcement.

(A. 265; 48.)

B. The Heartland Agreement Has Not Affected the Company’s Investment Decisions

The Company does not consider Sections 2 and 3 of the Heartland Agreement when deciding whether to invest in a business. (A. 267, 269, 272, 278; 183, 185-86.) The Company has not informed any potential acquisition of the existence of the Heartland Agreement until after its acquisition was complete. (A. 272, 278; 183-85.) The Union has never asked the Company not to acquire any particular business. (A. 157-58, 185-86.)

Since the Company and Union entered into the Heartland Agreement, the Union has invoked it on three occasions, and each time the CBE in question has become bound by the Side Letter and Framework. None of the Company’s CBEs has declined to be bound by the Heartland Agreement. (A. 265, 273 & n.5; 16-17(¶¶2(c), 12, 13(a)), 26-27(¶¶2(c), 12, 13(a), 159-60, 186-88, 190.)

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Members Schaumber and Walsh; Chairman Battista dissenting) found that Sections 2 and 3 of the Side Letter portion of the Heartland Agreement do not violate Section 8(e) of the Act (29 U.S.C. § 158(e)), because they do not constitute an agreement to “cease doing business” with another entity. (A. 265, 267-70 & n.5.) Accordingly, the Board dismissed the Complaint. (A. 270.)

SUMMARY OF ARGUMENT

This case involves the Board's dismissal of an unfair labor practice complaint alleging that two provisions in an agreement between the Company and the Union violate Section 8(e) of the Act on their face. The Board plainly had a rational basis for finding that the challenged provisions are not facially unlawful. Thus, the General Counsel failed to establish the first required element of a Section 8(e) violation: namely, that the challenged provisions constitute an agreement, express or implied, to cease doing business with another person, either because they prohibit the signatory employer from forming a business relationship with another person in the first instance, or because they require the signatory employer to cease a preexisting business relationship with another person.

Contrary to the Petitioner's claim, the provisions on their face do not expressly require the Company to refrain from forming a business relationship in the first place with a CBE that refuses to be bound by the Side Letter and

Framework. Nothing in the challenged provisions limits the Company's discretion to invest in any business it chooses. The provisions on their face also do not expressly require the Company to cease a preexisting relationship with a CBE that refuses to be bound by the Side Letter and Framework. The General Counsel likewise failed to show that the provisions constitute an implied agreement to cease doing business. Thus, the General Counsel failed to show that the provisions impose onerous conditions on the Company in the event it chooses to form, or continue, a relationship with a CBE that refuses to be bound by the Side Letter and Framework.

The Board reasonably rejected the Petitioner's claim that, because the Union could file a grievance if the Company fails to cause a CBE to execute the Side Letter and Framework, the challenged provisions constitute an agreement to cease doing business with CBEs that do not become bound by the Side Letter and Framework. There is no evidence that an arbitrator has the power to order the Company to sever its relationship with a CBE as a remedy for that CBE's refusal to be bound by the Side Letter and Framework. Consistent with well-settled law, the Board reasonably interpreted the provisions, which are not clearly unlawful on their face, to require no more than what is allowed by law. And, the text of the statute undermines the Petitioner's additional claim that the Board should have

found a violation because antiunion business owners might refuse to do business with the Company because of the Company's agreement with the Union.

Contrary to the Petitioner, the Board's decision is not inconsistent with precedent. In determining whether a challenged provision constitutes an implied agreement to cease doing business with another person, the Board examines all the circumstances. In the cases cited by the Petitioner, the totality of the circumstances established the cease-doing-business element, whereas here they do not.

The Board had no reason to consider on this record whether the Union would violate the Act if it engaged in certain actions to enforce the Heartland Agreement, because the Union has not engaged in such actions. Finally, the Petitioner's policy arguments do not compel the finding of a violation, because Section 8(e) prohibits only certain contract terms, which are absent here.

ARGUMENT

THE BOARD HAD A RATIONAL BASIS FOR FINDING THAT SECTIONS 2 AND 3 OF THE HEARTLAND AGREEMENT BETWEEN THE COMPANY AND THE UNION DO NOT CONSTITUTE AN AGREEMENT TO CEASE DOING BUSINESS, AND THEREFORE DO NOT VIOLATE SECTION 8(e) OF THE ACT

A. Introduction, Applicable Principles and Standard of Review: A Section 8(e) Violation Requires an Agreement, Express or Implied, To Cease Doing Business

There is no dispute that under Sections 2 and 3 of the Heartland Agreement, the Company is required to cause an enterprise it has invested in to execute the Side Letter and Framework if both the enterprise qualifies as a CBE, and if no sooner than 6 months after the Company's investment in the CBE, the Union informs the Company that it intends to organize the CBE. The Petitioner argues (Br. 13-62) the two challenged provisions constitute an agreement to cease doing business with a CBE that refuses to be bound by the Side Letter and Framework, and therefore violate Section 8(e) of the Act on their face.

Section 8(e) of the Act (29 U.S.C. § 158(e)) was designed to close a loophole in the Taft-Hartley Act whereby, although it was unlawful for a union to induce employees to strike to force an employer to cease doing business with another person with whom the union had a dispute, it was not unlawful for the union and employer to agree to a clause requiring the employer to cease doing business with that other person. *Amalgamated Lithographers of America*, 130

NLRB 985, 985-86 (1961), *enforced in part*, 309 F.2d 31 (9th Cir. 1962). Section 8(e) “plug[ed] th[e] gap in the legislation by making the . . . clause itself unlawful.” *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 634 (1967). Thus, Section 8(e) of the Act (29 U.S.C. § 158(e)) provides in pertinent part: “It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer . . . agrees . . . to cease doing business with any other person”

As the statutory language makes clear, a finding of a Section 8(e) violation requires the existence of an agreement, express or implied, to cease doing business. *See Sheet Metal Workers, Local Union No. 91 v. NLRB*, 905 F.2d 417, 421 (D.C. Cir. 1990) (“As the text of the statute plainly states, the Board must find an ‘agreement, express or implied, . . . to cease doing business with any other person.’”) The agreement to cease doing business must also have a secondary, as opposed to primary work preservation, objective, and it must not be saved by coming within the terms of the construction industry proviso to Section 8(e). *See Sheet Metal Workers, Local Union No. 91 v. NLRB*, 905 F.2d at 420-21 & nn. 7-8.²

² Under the terms of the construction industry proviso, Section 8(e) does not apply “to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work due to be done at the [construction] site. . . .” (29 U.S.C. § 158(e)).

It is well settled that the agreement-to-cess-doing-business element of a Section 8(e) violation ““is satisfied by proof of prohibitions against forming business relationships in the first place as well as requirements that one cease business relationships already in existence.”” *Spectacor Management Group v. NLRB*, 320 F.3d 385, 390 n.2 (3d Cir. 2003) (citation omitted). Absent such an agreement to cease doing business, no Section 8(e) violation may be found. *See International Organization of Masters, Mates and Pilots*, 224 NLRB 1626, 1626 (1976), *enforced*, 575 F.2d 896 (D.C. Cir. 1978). Accordingly, when the Board is presented with a complaint alleging an 8(e) violation, the Board must first determine whether an agreement, express or implied, to cease doing business actually exists.

In some cases, the agreement that is alleged to violate Section 8(e) expressly prohibits the employer from doing business with other persons, and thereby plainly satisfies the cease-doing-business element. *See, for example, Building Material & Dump Truck Drivers, Teamsters Local 36*, 277 NLRB 970, 972, 974 (1985) (clause--stating that employer “shall not utilize th[e] services of any other person to perform driving work”--falls within 8(e)’s strictures); *Newspaper & Mail Deliverers’ Union*, 337 NLRB 608, 608, 617 (2002) (clause--stating that publisher “shall not distribute its newspapers . . . through any wholesaler . . . unless such wholesaler” is party to, or willing to enter into, a union collective-bargaining

agreement--satisfies the cease-doing-business element because it requires the employer to refrain from doing business with wholesalers who are not party to a union agreement).

In other cases, the agreement alleged to violate Section 8(e) does not expressly require the employer to refrain from, or to cease, doing business with another employer. However, the fact that a clause does not expressly require the signatory employer to refrain from establishing, or to discontinue, a relationship with another employer is not necessarily a defense to a Section 8(e) charge, because, as this Court has noted, Section 8(e) prohibits “express *or implied*” agreements to cease doing business. *Sheet Metal Workers, Local Union No. 91 v. NLRB*, 905 F.2d 417, 421 (D.C. Cir. 1990) (emphasis added in part).

As the Board has explained, “[t]he term ‘implied’ is used in law . . . when the ‘intention in regard to the subject matter is not manifested by explicit and direct words, but is gathered by implication, or necessary deduction from the circumstances, the general language, or by the conduct of the parties.’” *Sheet Metal Workers Local Union No. 91 (Schebler Co.)*, 305 NLRB 1055, 1056 (1991) (citation omitted). In determining whether the challenged clause constitutes an implied agreement to cease doing business, the Board considers its purpose and likely effect. *Raymond O. Lewis*, 148 NLRB 249, 252-53 (1964), *remanded on other grounds*, 350 F.2d 801 (D.C. Cir. 1965). And in determining the purpose

and effect of an alleged unlawful agreement, the Board “looks at the agreement in its context, including how the agreement in issue operates” within the remainder of the contract and the employer's operation. *Sheet Metal Workers Local Union No. 91 (Schebler Co.)*, 305 NLRB at 1056. The Board also considers extrinsic evidence regarding the parties' intent. *Id.* In short, “it is all the circumstances' which determine whether . . . [such] an agreement . . . has in fact been made.” *Id.*

For example, the Board “has long held that where an agreement permits the doing of business [with another person], but only under extremely onerous conditions, such an agreement impliedly prohibits the doing of business” within the meaning of Section 8(e). *Int'l Organization of Masters, Mates and Pilots*, 220 NLRB 164, 164 n.2 (1975). *Accord Raymond O. Lewis*, 148 NLRB 249, 253 (1964), *remanded on other grounds*, 350 F.2d 801 (D.C. Cir. 1965). After all, an agreement that offers an employer the alternatives of a cessation of business or of adopting another injurious course of action, likely leaves the employer with “no real choice” but not to do business with the other employer. *ILA Local 1410*, 235 NLRB 172, 179 (1978) (“The alternative so offered--cessation of business or payment of a penalty--satisfies . . . the ‘cease-doing-business’ requirement of Section 8(e)”).

Thus, this Court has upheld the Board's finding that the agreement-to-cessation-doing-business element is satisfied when an employer and union agree to a clause

providing that if the employer affiliates with a nonunion employer, the union is entitled to rescind its contract. *See Sheet Metal Workers, Local Union No. 91 v. NLRB*, 905 F.2d 417, 418-22 (D.C. Cir. 1990). As this Court explained, because employers have a vital interest in receiving the benefits of their union contracts, the threatened loss of a collective-bargaining agreement operates as a penalty on the employer for doing business with a nonunionized employer, and therefore is tantamount to an agreement to cease doing business with that other employer for purposes of Section 8(e). *Id.* at 421-22. *Accord Amalgamated Lithographers of America*, 130 NLRB 985, 988 (1961), *enforced in pertinent part*, 309 F.2d 31, 35-36 (9th Cir. 1962). In such circumstances, the absence of an express prohibition on doing business with nonunion affiliates does not prevent the Board from finding that the cease-doing-business element is satisfied. *See Sheet Metal Workers, Local Union No. 91 v. NLRB*, 905 F.2d at 421-22.

Similarly, the Board, with court approval, has found the agreement-to-cessedoing-business element satisfied if the agreement permits the signatory employer to do business with a nonunion contractor, but requires the signatory employer to incur substantial additional costs if it does so. *See, for example, id.* at 422 (noting that “a clause that automatically doubled the wages of employees should the contractor become affiliated with a nonunionized contractor would be tantamount

to an ‘agreement’ to cease doing business for purposes of 8(e))’; *ILA Local 1410*, 235 NLRB 172, 177-79 (1978) (contractual requirement that employer pay a \$2 per ton royalty if it utilizes the services of nonunion stevedoring companies satisfies the cease-doing-business element, because the required royalty is a penalty that has an inherently deterrent effect on signatory’s ability to do business with such nonunion persons); *Int’l Organization of Masters, Mates & Pilots*, 220 NLRB 164, 164 n.2, 165-66 (1975) (clause--which permits an arbitrator to award lost wages and fringe benefit contributions if signatory employer fails to require purchasers of its ships to execute union contract--satisfies the cease-doing-business element, because it permits the doing of business only under onerous conditions).

In still other cases where the challenged agreement does not expressly require the employer to refrain from, or cease, doing business with other persons, the agreement-to-cease-doing-business element is satisfied because (1) a party takes action establishing the cease-doing-business nature of the challenged agreement or (2) the charged party in effect admits that the clause does constitute an agreement to cease doing business. *See, for example, Bakery Wagon Drivers and Salesmen, Local 484 v. NLRB*, 321 F.2d 353, 354-55, 356-57 (D.C. Cir. 1963) (allegation that challenged terms violated Section 8(e) was “substantiated” by evidence that union demanded that the party to the challenged agreement either fulfill its obligation to compel subcontractor to comply with union contract, or

“start making arrangements to do its own delivering”); *NLRB v. Bangor Bldg. Trades Council*, 278 F.2d 287, 289-90 (1st Cir. 1960) (court found that contractual provision at issue was unlawful based on party’s implicit concession that under the terms of the parties’ agreement, the subcontractor “must be compelled to unionize or he must be ‘displaced’”); *Northeast Ohio District Council of Carpenters (Alessio Construction)*, 310 NLRB 1023, 1025 n.8 (1993) (Board notes that respondent invoked the “construction industry proviso, which comes into play only if a clause would otherwise violate Sec[ti]on 8(e)”).

In determining whether a challenged agreement violates Section 8(e), the Board interprets a clause not clearly unlawful on its face to require no more than what is allowed by law. *Ets-Hokin Co.*, 154 NLRB 839, 840-41 (1965), *enforced*, 405 F.2d 159 (9th Cir. 1968). “If a clause is ambiguous, the Board in a Section 8(e) proceeding will not presume [the] unlawfulness [of the clause], but will consider extrinsic evidence to determine whether the clause was intended to be administered in a lawful or unlawful manner.” *Id.* at 841. Absent extrinsic evidence that the parties intended an ambiguous clause to require the employer to cease doing business with another person, the clause should be deemed lawful. *NLRB v. Local 32B-32J, SEIU*, 353 F.3d 197, 202 (2d Cir. 2003).

It is well settled that the Board’s General Counsel has the burden of proving the elements of an unfair labor practice (*NLRB v. Transportation Management*

Corp., 462 U.S. 393, 401 (1983)), “and if he fails to meet this burden the Board is required . . . to dismiss the allegation.” *Allbritton Communications Co. v. NLRB*, 766 F.2d 812, 817 (3d Cir. 1985) (citation omitted). Where, as here, the Board finds that the challenged conduct does not violate the Act, and accordingly dismisses complaint allegations, judicial review is extremely limited. A Board conclusion that a party did not violate the Act ““must be upheld unless it has no rational basis”” (*District 65, Distributive Workers of America v. NLRB*, 593 F.2d 1155, 1164 (D.C. Cir. 1978) (citation omitted)), or unless the only inference that could reasonably be drawn from the record is one that “require[s]” the Board to find the violation. *Amalgamated Clothing Workers of America v. NLRB*, 334 F.2d 581, 581 (D.C. Cir. 1964).

The Board’s construction of the Act is entitled to affirmance if it is “reasonably defensible,” and a reviewing court may not displace the Board’s conclusion merely because it might prefer another view of the statute. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496-97 (1979). This is particularly true here because the Board’s determination as to the legality of a particular agreement under Section 8(e) of the Act “involves ‘the Board’s . . . special function of applying the general provisions of the [NLRA] to the complexities of everyday life.’” *Sheet Metal Workers, Local Union No. 91 v. NLRB*, 905 F.2d 417, 421 (D.C. Cir. 1990) (citation omitted).

The Board's underlying findings of fact are "conclusive" if they are supported by substantial evidence on the record as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)). A reviewing court may not displace the Board's choice between two fairly conflicting views of the facts, even if the court "would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951).

As we now show, the Board had a rational basis for dismissing the 8(e) allegation, because the General Counsel failed to show that Sections 2 and 3 of the Heartland Agreement constitute an agreement to cease doing business.

B. The Board Had a Rational Basis for Finding that the General Counsel Failed To Show that Sections 2 and 3 Constitute an Agreement, Express or Implied, To Cease Doing Business with a CBE that Refuses To Be Bound By the Side Letter and Framework

The Board plainly had a rational basis for finding that the General Counsel failed to show that Sections 2 and 3 of the Heartland Agreement constitute an agreement, express or implied, to cease doing business. To begin, those provisions do not expressly prohibit the Company from forming a business relationship in the first place with any other person. Sections 2 and 3 do not impose any condition whatsoever that must be met before the Company can invest in or acquire a business. The sections certainly do not expressly provide that the Company may not invest in or acquire a business enterprise unless that enterprise first agrees to be bound by the Side Letter and Framework. In sum, as the Board found (A. 267), on

their face Sections 2 and 3 “do not limit [the Company’s] discretion to invest in or acquire any company it chooses.”

As the Board further found (A. 267, 269), Sections 2 and 3 on their face also do not expressly require the Company to terminate a business relationship it already has with another person. To be sure, Sections 2 and 3 do require the Company to cause a business it has invested in to execute the Side Letter and Framework if the business qualifies as a CBE and if the Union requests that the Company do so no sooner than 6 months after the Company’s investment in the business. But, as the Board explained (A. 267-68), Sections 2 and 3 “do not--on their face--require [the Company] to sever its relationship with a CBE that does not become bound by the Side Letter and Framework.”³

The General Counsel also failed to show that Sections 2 and 3 constitute an implied agreement to cease doing business with another person. Thus, Sections 2

³ In claiming (Br. 14) that Section 2(b) of the Heartland Agreement is an “express agreement to ‘cease doing business’ under §8(e)”, the Petitioner simply ignores that Section 2(b) does *not* expressly provide the Company must refrain from, or cease, doing business with a CBE that refuses to be bound by the Side Letter and Framework. Although, as shown, an agreement that does not expressly require an employer to cease doing business with another person can still, given sufficient evidence, violate Section 8(e), such an agreement is referred to as an implied cease-doing-business agreement. *See, for example, Sheet Metal Workers, Local Union No. 91 v. NLRB*, 905 F.2d 417, 422 (D.C. Cir. 1990); *Building and Construction Trades Council v. NLRB*, 328 F.2d 540, 541-42 & n.1 (D.C. Cir. 1964).

and 3 do not impose any penalty on the Company if it chooses to invest in a business before the business signs the Side Letter and Framework. As the Board also noted (A. 267), Sections 2 and 3 likewise do not impose any penalty on the Company if it fails to sever its relationship with a CBE if the CBE refuses to become bound by the Side Letter and Framework. And the Petitioner fails to offer any extrinsic evidence showing that the purpose and effect of the challenged provisions is to cause the Company to cease doing business with another person.

C. The Petitioner's Contentions Lack Merit

1. The possibility of an arbitration proceeding did not compel the Board to find that the challenged provisions require the Company to cease doing business with CBEs that refuse to be bound by the Side Letter and Framework

The Petitioner argues (Br. 7, 14-18) that, if a CBE will not be bound by the Side Letter and Framework, Section 2 requires that the Company cease doing business with that CBE, or at least sell enough of its interest in the CBE so that the enterprise in question can no longer be classified as a CBE. According to the Petitioner (Br. 7, 17-18), this is so because the requirement that the Company cause a CBE to execute the Side Letter and Framework if certain conditions are met is “fully enforceable through the arbitration procedures of [the] Framework,” and thus an arbitrator could require the Company to sever its relationship with a CBE that refuses to be bound by the Side Letter and Framework.

However, as the Board noted (A. 268), Sections 2 and 3--and the dispute resolution section--do not expressly provide that an arbitrator may order the Company to cease doing business with a CBE that refuses to be bound by the Side Letter and Framework. In fact, neither Sections 2 and 3, nor the dispute resolution section, specify the remedy to be imposed if a CBE does not become bound by the Side Letter and Framework. (A. 268.)⁴ *Cf. Int'l Organization of Masters, Mates & Pilots*, 220 NLRB 164, 164 n.2, 165-66 (1975) (clause imposes a penalty on signatory, and therefore satisfies the cease-doing-business element, because it

⁴ The dispute resolution section of the Heartland Agreement provides (A. 47-48):

Any alleged violation or dispute involving the terms of this Framework Agreement may be brought to a joint committee of one representative of each of the Company . . . and the Union. If the alleged violation or dispute cannot be satisfactorily resolved by the parties, either party may submit such dispute to an Arbitrator. A hearing shall be held within ten (10) days following such submission and the Arbitrator shall issue a decision within five (5) days thereafter. Such decision shall be in writing but need only succinctly explain the basis for the findings. All decisions by the Arbitrator pursuant to this Framework Agreement shall be based on the terms of this Framework and the applicable provisions of the law. The Arbitrator's remedial authority shall include the power to issue an order requiring the Company to recognize the Union where, in all the circumstances, such an order would be appropriate.

The Arbitrator's award shall be final and binding on the parties and all employees covered by this Framework Agreement. Each party expressly waives the right to seek judicial review of said award; however, each party retains the right to seek judicial enforcement of said award.

expressly permits an arbitrator to award lost wages and fringe benefit contributions if the signatory employer fails to abide by requirement that the purchaser of the signatory's ships execute a union contract).

Accordingly, Sections 2 and 3 are not clearly unlawful on their face. The Board, therefore, "correct[ly] follow[ed] its policy [of interpreting a clause not clearly unlawful on its face] 'to require no more than what is allowed by law'" (*Building Material & Construction Teamsters Union Local No. 216 v. NLRB*, 520 F.2d 172, 178 (D.C. Cir. 1975) (citation omitted)), when it reasonably declined (A. 268) to infer that an arbitrator would order the Company to sever its relationship with a CBE that refused to become bound by the Side Letter and Framework Agreement.

To be sure, as the Board noted (A. 268), Sections 2 and 3 and the dispute resolution section do not expressly provide that the arbitrator is not empowered to order the Company to cease doing business with a CBE that refuses to execute, or be bound by, the Side Letter and Framework. However, at most, this renders the sections ambiguous. *See NLRB v. Local 32B-32J SEIU*, 353 F.3d 197, 198-202 (2d Cir. 2003) (challenged clause--providing that no employee should be required by the employer to pass picket lines established by the union in an "authorized strike"--is ambiguous for 8(e) purposes, because it is unclear whether an

“authorized strike” is any strike “authorized by the union,” or is merely a strike “authorized by law”).

Nor did the General Counsel or Petitioner offer any extrinsic evidence showing that an arbitrator could impose an order requiring the Company to cease doing business with a CBE that declined to be bound by the Side Letter and Framework, or, more generally, that the parties intended Sections 2 and 3 to prevent the Company from doing business with an enterprise that would not agree to be bound by the Side Letter and Framework. In fact, as the Board noted (A. 269), the only evidence on point was that the challenged clauses have “no impact whatsoever” on the Company’s investment decisions.⁵

The Petitioner complains (Br. 17-18) that the Board failed to state what alternative outcomes are possible if the Union files a grievance over a CBE’s

⁵ Thus, the union official who negotiated the Heartland Agreement testified that it was not the Union’s purpose to limit the Company’s investment choices; that there is nothing in the Side Letter or Framework that would require the Company to sever its relationship with a CBE; and that the Heartland Agreement does not impose any penalty on the Company if one of its CBEs refuses to enter into the Side Letter and Framework. (A. 144-45, 156, 158, 169.) Similarly, Daniel Tredwell, the Company’s senior managing director, testified that the Company’s purchase agreements do not contain provisions allowing the Company to sever its relationship with a CBE if the CBE refuses to be bound by the Side Letter and Framework; that there is “no mechanism” in the Heartland Agreement for the Union to limit the Company’s investment decisions; that the Heartland Agreement does not limit, and is irrelevant to, such decisions; and that the Company does not even think about the Heartland Agreement when deciding whether to invest in a business. (A. 267, 278; 174-75, 183-84, 185-86, 191.)

refusal to be bound by the Heartland Agreement. According to the Petitioner (Br. 18), no other outcome--other than the arbitrator's ordering the Company to cease doing business with such a CBE--is permissible under the language of the Heartland Agreement.

The Board acknowledged here (A. 269) that, if a CBE executed the Side Letter and Framework but thereafter violated its provisions (by, for example, failing to recognize the Union upon a majority showing), the Union could submit the dispute to an arbitrator. But, as the Board explained (A. 269), there simply is no requirement that liability for such a violation be imposed on the Company, rather than on the CBE. Indeed, there is little reason to think that the Union would even file a grievance against the Company; instead, the Union presumably would merely file a grievance against the CBE for violating its own agreement with the Union. And, what language there is in the agreement suggests that the remedy would be imposed on the CBE, rather than on the Company, because the Agreement's dispute resolution provision provides that the Arbitrator shall have the power to order the CBE to recognize the Union. (A. 47.)

In the circumstances, the Board reasonably found (A. 268-69 n.6) that under the Petitioner's theory any nexus between the challenged provisions and cessation of business between the Company and a CBE "is too attenuated to justify a finding that the clauses are unlawful on their face." Thus, the following lengthy chain of

contingencies would have to occur before a cease-doing-business object could be found on the basis urged by the Petitioner: (1) the Company acquires an entity that qualifies as a CBE; (2) at least 6 months later, the Union invokes the Framework and Side Letter; (3) the Company asks the CBE to execute the Framework and Side Letter; (4) although the CBE executes the Side Letter and Framework, it refuses to abide by it; (5) the Union demands arbitration; (6) the arbitrator finds a contract violation; and (7) the arbitrator orders, or effectively requires, that the Company divest itself of the CBE as a remedy.⁶ *See Manufacturers Woodworking Ass'n of Greater New York*, 345 NLRB No. 36, slip op. at 4-5, 2005 WL 2102984 *5-*6 (NLRB) (Aug. 27, 2005) (finding that a similar chain of contingencies was too speculative to establish that an arbitration demand seeking to enforce an allegedly unlawful clause would interfere with employee rights in violation of the Act). *Cf. Westinghouse Electric Corp. v. NLRB*, 369 F.2d 891, 892, 897 (4th Cir. 1966) (rejecting as too remote the

⁶ As the Board also noted (A. 268-69 & n.6), a similar lengthy chain of contingencies would have to occur for the Company to cease doing business with a CBE as a result the CBE's refusing to execute the Side Letter and Framework: (1) the Company acquires an entity that qualifies as a CBE; (2) at least 6 months later, the Union invokes the Framework and Side Letter; (3) the Company asks the CBE to execute the Framework and Side Letter; (4) the CBE somehow manages to refuse to execute the Side Letter and Framework even though the Company, by definition, controls a CBE and can require the CBE to execute the Side Letter and Framework; (5) the Union demands arbitration; (6) the arbitrator finds a contract

possibility that the Board's order--requiring the employer to bargain with union over the cafeteria prices charged to employees by a third-party contractor--could eventually require the employer to agree to cease doing business with that third party in violation of Section 8(e), where union has not asked, and Board has not ordered, the employer to agree to cease doing business, and other alternatives are possible), *overruled on other grounds*, 387 F.2d 542 (4th Cir. 1967) (en banc);⁷

In finding that Sections 2 and 3 do not, on their face, violate Section 8(e), the Board acted consistently with this Court's admonition, voiced in the Section 8(a)(1) context, that the Board should refrain from sustaining facial challenges to provisions not clearly violative of the Act on their face, when the statutory interests at issue can be adequately protected by waiting to see how the challenged

violation; and (7) the arbitrator orders, or effectively requires, the Company to divest itself of the CBE, as a remedy.

⁷ The Petitioner also argues (Br. 9, 15-17) that certain "logical precepts," which it failed to invoke before the Board, compel a conclusion that Section 2 of the Side Letter requires the Company to cease doing business with a CBE that declines to be bound by the Side Letter and Framework. The Petitioner's argument is unpersuasive because, unlike the syllogisms in the Petitioner's brief, Section 2(b) does *not* expressly state that, "if [the Company] does business with a CBE, then the CBE must execute a USW contract," and because, as shown, there is no evidence that an arbitrator could issue an award requiring the Company to sever its relationship with a CBE that refuses to be bound by the Side Letter and Framework.

provisions are applied in practice. *See Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209, 213 (D.C. Cir. 1996).⁸

2. The challenged provisions do not present the Company with a Hobson's Choice

The Petitioner also claims (Br. 15-16) that the challenged provisions violate Section 8(e) because they present the Company with a "Hobson's Choice." To be sure, an agreement that permits an employer to do business with another person "but only under extremely onerous conditions" does constitute an implied agreement to cease doing business (*Int'l Organization of Masters, Mates & Pilots*, 220 NLRB at 164 n.2), because such an agreement gives the employer "no real choice" but not to do business with the other person. *ILA Local 1410*, 235 NLRB at 179.

But, as the Board noted (A. 267), the challenged clauses in this case do not--on their face--present any such dilemma for the Company. Put simply, because Sections 2 and 3 of the Heartland Agreement do not impose any penalty on the Company if it does business with a CBE that refuses to be bound by the Side Letter and Framework, they do not present the Company with a Hobson's Choice of (1)

⁸ The Board emphasized (A. 268 n.6) here that its finding that Sections 2 and 3 are not unlawful on their face "does not preclude [it] from finding a violation of the Act if they are subsequently applied in an unlawful manner." *See Building Material & Construction Teamsters Union Local No. 216 v. NLRB*, 520 F.2d 172, 174-75, 177-78 (D.C. Cir. 1975) (Board found that clause was valid on its face, but unlawful as applied).

on the one hand, ceasing to do business with a CBE that refuses to be bound by the Side Letter and Framework, or (2) on the other hand, doing business with a CBE that refuses to be bound by the Side Letter and Framework but only under extremely onerous conditions.

The Petitioner conflates two different elements of a Section 8(e) violation to the extent it suggests (Br. 15) that the relevant inquiry is whether the challenged agreement is “calculated to cause a significant change in the CBE’s business.” As this Court noted in *Sheet Metal Workers, Local Union 91 v. NLRB*, 905 F.2d 417 (D.C. Cir. 1990), in order to find a violation of 8(e), “the Board must find ‘an agreement, express or implied, . . . to cease doing business with another person’” *and*, that the agreement, is “‘secondary’ in nature, [t]hat is, . . . designed not solely to ‘improve[e] the [signatory’s] employees’ . . . working conditions,’ but also ‘to satisfy union objectives elsewhere.’” *Id.* at 421 (citation omitted).

As shown, the inquiry into whether the cease-doing-business element is satisfied focuses on the agreement’s likely effect on a signatory’s willingness to establish, or continue, a business relationship with another person--i.e., whether it literally requires the signatory employer to cease doing business with another person or imposes onerous conditions on the signatory if he does business with that person, thereby giving him no real choice but not to do business. *See Sheet Metal Workers Local Union No. 91*, 294 NLRB 766, 771 (1989) (integrity clause forces a

cessation of business with a nonunion firm, and thus requires the signatory to change its own affiliation with the nonunion firm), *enforced in pertinent part*, 905 F.2d 417, 418-22 (D.C. Cir. 1990). By contrast, the inquiry into whether the agreement satisfies the secondary-in-nature element of a Section 8(e) violation focuses on the agreement's impact on the second, nonsignatory employer's relationship with its employees.

The fact (Br. 15) that the Company's "forcing" a CBE to execute the Side Letter and Framework may cause a significant change in the CBE's affairs with respect to its employees--while relevant to the secondary-nature element of a Section 8(e) violation--does not suffice to establish a violation here, because Sections 2 and 3 do not explicitly or implicitly require the Company to cease doing business with a CBE that refuses to be bound by the Side Letter and Framework. In sum, as the Board noted (A. 269), while the requirement that the Company, at the Union's request, cause a CBE to execute the Side Letter and Framework, also "affects" [the Company's] business because it requires [the Company] to take that action, [w]e cannot say on this record that a 'foreseeable result' of that requirement is that [the Company] will cease doing business with anyone."⁹

⁹ By contrast, these two elements of a Section 8(e) violation were satisfied in *Sheet Metal Workers, Local Union 91 v. NLRB*, 905 F.2d 417 (D.C. Cir. 1990). Thus, as shown, although the challenged integrity clause did not expressly require the signatory to cease doing business with a nonunion firm, the integrity clause

3. The Board reasonably found that the text of Section 8(e) contains nothing that would justify its finding a violation of the Act, even assuming that Sections 2 and 3 will make antiunion owners of businesses less likely to do business with the Company

The Petitioner argues (Br. 18-22) that Section 8(e) of the Act renders the challenged provisions unlawful because they will cause antiunion business owners to refuse to accept the Company's offers to purchase their businesses. The Petitioner's argument amounts to a claim that Section 8(e) is violated when an entity that is *not* party to an agreement with a union refuses to do business with another person.¹⁰ But, the text of Section 8(e) undermines the Petitioner's argument. Thus, as the Board noted, "Section 8(e), by its terms, only prohibits agreements between a union and an employer 'whereby *such employer . . .* agrees to . . . cease doing business with any other person . . .'" (A. 269 quoting 29 U.S.C. § 158(e)) (emphasis added). In other words, Section 8(e) only addresses

satisfied the cease-doing-business element because it imposed a severe penalty on the signatory--loss of its union contract-- if it did do business with the nonunion firm. *Id.* at 421-22. Moreover, as this Court noted, the challenged integrity clause also had a secondary object since it tied the rescission penalty to the failure of a second employer to provide its employees wages and working conditions consistent with the union agreement. *Id.* at 422.

¹⁰ After all, an entity that opposes unionization to the extent that it will not allow itself to be acquired or controlled by the Company (on account of the Company's Heartland Agreement with the Union) is hardly likely to be party to an agreement with a union that requires it to cease doing business with another person.

the actions of an employer who has entered into a cease-doing-business agreement with a union.

In sum, the Board was hardly compelled to find a violation of Section 8(e) even assuming, for purposes of argument, that a potential target of the Company refuses to do business with the Company (i.e. be bought by the Company) on account of the Company's agreement with the Union.¹¹ Indeed, as the Board noted (A. 269), there is *no* precedent for the Petitioner's novel theory that 8(e) can be violated absent an agreement between a union and the employer that refuses to do business with another person.¹²

¹¹ Moreover, the Petitioner's argument presumes that *before* the Company acquires a business, the owners of that business know about the Company's Heartland Agreement with the Union. However, the record undermines that premise. Thus, as shown, the Company's senior managing director testified (A. 272, 278; 183-85) that the Company does not inform potential CBEs about the Heartland Agreement until *after* it has acquired the CBE. Moreover, as Petitioner acknowledges elsewhere in its brief (Br. 7), the parties agreed that the terms of the Heartland Agreement are "non-public."

¹² Not one of the three cases cited by the Petitioner in support of its argument (Br. 20-22) stands for the proposition that an agreement between an employer and a union violates Section 8(e) if it makes a second, *nonsignatory* employer less likely to do business with the signatory employer. Rather, each case focused on whether the challenged clause was likely to cause the signatory employer to cease doing business with another person.

4. The Board did not err in considering extrinsic evidence in determining the legality of Sections 2 and 3

There also is no basis for the Petitioner's complaint (Br. 56-58) that the Board erred in considering extrinsic evidence in determining the legality of Sections 2 and 3. Because, as shown, Sections 2 and 3 do not expressly require the Company to refrain from, or cease, doing business with another employer, the only way those sections can be found to violate Section 8(e) is if, among other things, they constitute an implied agreement to cease doing business.

As shown above (pp. 15-16), in determining whether an agreement constitutes an implied agreement to cease doing business in violation of Section 8(e), the Board considers the totality of circumstances, including extrinsic evidence of the parties' intent. Moreover, in interpreting an ambiguous contractual provision, such as the dispute resolution provision here, the courts have directed that the "Board should not . . . presume[] to render the clause unlawful, but rather *should . . . s[ee]k* extrinsic evidence." *NLRB v. Local 32B-32J SEIU*, 353 F.3d 197, 202 (2d Cir. 2003) (emphasis added). In any event, the Board would not have been compelled to find a violation here even absent the extrinsic evidence.

5. The Board's Decision Is Not Inconsistent with Precedent

The Petitioner argues at length (Br. 8, 13, 22-49) that the Board's decision conflicts with Board, Circuit, and Supreme Court precedent involving the legality of certain agreements under Section 8(e). The short answer is that the record in each of those cases established the agreement-to-cess-doing-business element, whereas the record here does not. Thus, the agreement-to-cess-doing-business element was satisfied in those cases by one or more of the following: express language, a penalty clause, an explicit or implicit concession by the charged party, or other extrinsic evidence.

For example, the Petitioner indignantly claims (Br. 8, 23-28) that Sections 2 and 3 are "indistinguishable" from the clauses found unlawful in five dual shop Board decisions. But, in *IUOE Local 520 (Massman Construction Co.)*, 327 NLRB 1257 (1999), the parties' unlawful agreement contained a penalty clause making the signatory responsible if another party to the signatory's joint venture did not comply with the union agreement, thereby giving the signatory no real choice but not to establish a relationship in the first instance with a person not party to the union agreement. Thus, the parties' agreement stated: "The Employer shall require as a condition for entering into any joint venture . . . that all parties . . . agree to be bound by this Agreement," and that "[t]he Employer shall be responsible for compliance with the requirement of this provision"). *See id.* at

1257-58 n.2. Here, by contrast, the Heartland Agreement does not state that the Company must require, as a condition of acquiring a business, that the business agree to be bound by the Side Letter and Framework, and it does not provide that the Company is responsible for ensuring that a CBE abides by the Side Letter and Framework.

In *Northeast Ohio District Council of Carpenters (Alessio Construction)*, 310 NLRB 1023 (1993), the complaint alleged that the union violated the Act by insisting to impasse that the employer agree to a clause that would violate Section 8(e). *Id.* at 1023. Unlike here, however, the charged union in that case did not even contest that the cease-doing-business element was satisfied, but instead sought to salvage the proposed clause on other grounds. *See id.* at 1025 n.8 (“We note . . . that . . . [aside from the respondent’s work preservation claim, the respondent’s] brief mainly addresses the construction industry proviso, which comes into play only if a clause would otherwise violate Sec[ti]on 8(e)”).

Additional extrinsic evidence present there--but absent here--likewise established that the proposed clause was calculated to cause the employer to forebear from forming, or to sever, a relationship with a nonunion affiliate. Thus, the record in that case showed that the union originally proposed that it would grant the prospective signatory employer concessions to enable it to compete with nonunion firms only *if* it would agree to the proposed anti-dual shop clause, which

provided that if the company formed another company, then that other company shall be covered by all the terms of the contract. *Id.* at 1023-24. (“In short, at this time, the price for obtaining the reductions in pay and the more economical work rules was agreement to the anti-dual shop clause”). In the circumstances, the manner in which the union proposed the clause--requiring any “dual shop” to be covered by all the terms of the signatory’s union contract--revealed the cease-doing-business nature of it.

In each of the remaining three cases cited by the Petitioner, unlike here, the charged party took action against the signatory for doing business with a nonunion employer, and did not even dispute that the cease-doing-business element was satisfied. *See Int’l Ass’n of Bridge Structural and Ornamental Iron Workers (Southwestern Materials & Supply)*, 328 NLRB 934, 934-35, 940 (1999) (union filed a grievance and a motion for summary judgment against the signatory seeking damages for the employer’s doing business with a nonunion employer, and union sought to salvage the clause merely by claiming it had a work preservation objective and was saved by the construction industry proviso); *Central Pennsylvania Regional Council of Carpenters (Novinger’s, Inc.)*, 337 NLRB 1030, 1030, 1032-33, 1036 (2002) (same), *enforced*, 352 F.3d 831 (3d Cir. 2003); *Blasters, Drillrunners and Miners Union (RWKS Comstock)*, 344 NLRB No. 90, 2005 WL 1378570 *3, *4 (NLRB) (May 31, 2005) (same).

The Petitioner fares no better when it complains (Br. 35-41) that the Board's decision conflicts with *this* Court's union signatory and penalty cases. The Petitioner first claims (Br. 36) that the "law of this circuit is that union signatory clauses like Side Letter ¶¶2-3 are unlawful under 8(e)." But, the Petitioner errs in suggesting that this Court found a violation in each of the cited cases based solely on the language of the challenged clauses, which, in any event, were worded differently from the challenged sections here. Thus, in each case, either the charged party did not contest that the cease-doing-business element was satisfied or other evidence established that the language in question satisfied the case-doing-business element.

For example, the Petitioner cites (Br. 38) *Building Material & Dump Truck Drivers v. NLRB*, 669 F.2d 759 (D.C. Cir. 1981). But there, unlike here, the union informed a signatory employer that under the parties' agreement, it could not deal with nonunion operators; the employer then informed operators that they must join the union or make other arrangements; a signatory ceased doing business with another entity pursuant to the clause; and the Court noted that it was "not disputed" that the union and the signatory contactors could not lawfully enforce the provisions restricting dealings. *See id.* at 762-64. Here, by contrast, there is no evidence that the Union ever informed the Company that, under the Heartland Agreement, it could not continue to "do business" with a CBE that refused to abide

by the Side Letter and Framework; no evidence that the Company ever informed a CBE that it must abide by the Side Letter or Framework or be sold; no evidence that the Company ever severed its relationship with a CBE because the CBE refused to be bound by the Side Letter and Framework; and the Union and the Company both contended that the Heartland Agreement does not require the Company to sever its relationship with CBEs that refuse to be bound by the Side Letter and Framework.

Similarly, in *Building & Construction Trades Council v. NLRB*, 328 F.2d 540 (D.C. Cir. 1964) (*enforcing* 139 NLRB 236 (1962)), relied on by the Petitioner (Br. 36), the union's *entire* course of conduct established that the challenged provision did indeed constitute an implied agreement to cease doing business. Thus, a union representative testified that the challenged clause required the contractor to "use signatory subcontractors;" the union threatened the general contractor with picketing because a subcontractor did not meet the required terms; the union stated that the general contractor could avoid picketing by "get[ting] rid" of the subcontractor; and the union merely argued that the challenged clause was designed to protect union standards. *See Building & Construction Trades Council v. NLRB*, 328 F.2d at 540-41 & n.1 (*enforcing* 139 NLRB at 238-39).

In *Bakery Wagon Drivers and Salesmen, Local 484 v. NLRB*, 321 F.2d 353 (D.C. Cir. 1963), another case cited by the Petitioner (Br. 37), the union demanded

that the party to the challenged agreement fulfill its obligation to compel the subcontractor to comply with the union contract, and told the signatory that if it did not do so, it “had better start making arrangements to do its own delivering in compliance with” the parties’ contract, instead of using the subcontractor who did not comply with a union contract. *See id.* at 354-55. The union also told another signatory contractor that it needed to find a new carrier, because the current contractor was not in compliance. *Id.* at 335. Thus, this Court reasonably concluded that “the evidence substantiated th[e] allegations . . . that the union was seeking to reinstate the guarantee and that the terms of the guarantee violated Section 8(e)” because they would require the signatory not to subcontract to firms that did not have contracts with the union. *Id.* at 356, 357.

Similarly, in *District No. 9, IAM v. NLRB*, 315 F.2d 33 (D.C. Cir. 1962), relied on by the Petitioner (Br. 39), the union filed a grievance directly against the signatory claiming that its subcontracting work to nonunion contractors violated their agreement, which provided that the employer must give preference in subcontracting to signatory subcontractors; and the union argued that the clause was designed to preserve jobs. *Id.* at 35. And, in *Meat & Highway Drivers, Local 710 v. NLRB*, 335 F.2d 709 (D.C. Cir. 1964), the charged union actually “acquiesce[d] in the finding of the invalidity of th[e challenged] clause[s]” that the Petitioner refers (Br. 37) to in its brief. *Id.* at 712 n.5.

The remaining in-circuit cases cited by Petitioner (Br. 38) do not advance the Petitioner's cause, for much the same reasons. *See Local 814, Teamsters v. NLRB*, 512 F.2d 564, 566-67 (D.C. Cir. 1975) (union sought to enforce challenged clause against signatory and did not end its work stoppage until signatory agreed to forbid owner operators who were not covered by union agreement to load and unload; and union defended the clause merely by claiming that it was a legitimate work preservation clause and that owner-operators were employees rather than independent contractors); *Construction, Building Material, Ice & Coal Drivers, Helpers and Inside Employees Union, Local 221 v. NLRB*, 899 F.2d 1238, 1240-41, 1243-44 (D.C. Cir. 1990) (union struck a signatory until it agreed that it would not subcontract to nonunion individual truck owners; and union merely argued to the Court that it was entitled to restrict the signatory's use of truck-owner drivers); *Retail Clerks Int'l Ass'n, Local No. 1288 v. NLRB*, 390 F.2d 858, 859 n.1 (D.C. Cir. 1968) (*enforcing* 163 NLRB 817, 818 (1967)) (charged union did not dispute that cease-doing-business element was satisfied, but merely contended that the clause--providing in part that no demonstrator may perform work in employer's store unless he is on payroll of employer or party thereto, and that demonstrators shall be covered by all the terms of the agreement--was permissible work preservation clause).

Nor does this Court's decision in *Truck Drivers Local No. 413 v. NLRB*, 334 F.2d 539 (D.C. Cir. 1964) advance the Petitioner's cause (Br. 36). The subcontracting clause at issue there plainly satisfied the cease-doing-business element because it expressly required the signatory to refrain from establishing a business relationship in the first place with certain persons. The challenged clause stated: "The Employer agrees to refrain from using the services of any person who does not observe the wages and hours and conditions of employment established by labor unions . . ." *Id.* at 548. The Court's discussion with respect to the legality of the clause focused on whether it was secondary or whether it was designed to preserve the standards of the signatory's employees. *See id.*

The Court may swiftly dispose of the Petitioner's contention (Br. 35, 39-41) that the Board's decision conflicts with this Court's decisions regarding penalty clauses. After all, the Petitioner cites (Br. 39-40) only one in-circuit case, which is distinguishable for the obvious reason that the challenged provision in that case explicitly imposed a penalty on the signatory if it did business with an employer with whom the union had a dispute, whereas the Heartland Agreement does not impose any penalty on the Company if it does business with a CBE that refuses to abide by the Heartland Agreement. *See Sheet Metal Workers, Local Union No. 91 v. NLRB*, 905 F.2d 417, 418-22 (D.C. Cir. 1990) (contract provided that union was

entitled to rescind its contract with signatory employer if the signatory employer affiliated with a nonunion employer).¹³

The Petitioner is equally unpersuasive in claiming (Br. 45-49) that the Board's decision contravenes two Supreme Court precedents. Put simply, the Petitioner omits (Br. 45-47) critical facts that explain why the Supreme Court concluded in *NLRB v. Local 825 IUOE (Burns & Roe)*, 400 U.S. 297, 300, 305 (1971), that IUOE Local 825's demand that general contractor Burns & Roe ("Burns") sign a contract could result in Burns' terminating its subcontract and ceasing to do business with White Construction Co. ("White"), which had declined to assign certain jobs to Local 825.

Thus, as the Court noted, the contract that Local 825 demanded that general contractor Burns sign explicitly stated that "[t]he Employer [i.e. Burns] agrees that he will not subcontract any of his work . . . to any subcontractor, unless said subcontractor agrees in writing to perform said work subject to all terms and conditions of this Agreement between the Employer and the Union" *Id.* at 300 n. 3. Local 825 then struck for several days, and, upon returning, threatened

¹³ The Board cases cited (Br. 40) by the Petitioner are distinguishable for the same reason; each of the challenged clauses at issue there by its terms, or as applied, imposed a penalty on the signatory employer if it did business with another employer.

general contractor Burns and all the subcontractors with another work stoppage unless the contracts were signed. *Id.* at 301.

Given Local 825's strike in support of its demand that Burns sign a contract that explicitly stated that Burns "*agrees that [it] will not subcontract any of [its] work . . . to any subcontractor, unless said subcontractor agrees in writing to perform said work subject to all terms and conditions of this Agreement,*" the Court had ample grounds for concluding that the "clear implication of [IUOE Local 825's] demands was that Burns would be required either to force a change in White's policy or to terminate White's contract," and thereby cease doing business with White. *Id.* at 305.¹⁴ Accordingly, the Court's holding in *Burns & Roe* does not advance the Petitioner's case here, where the challenged sections do *not* state that the Company will not acquire or maintain an investment in a CBE unless that CBE agrees to be bound by the Side Letter and Framework, and where the Union has never taken, or threatened to take, any action against the Company because of whom it has chosen to acquire.

The Petitioner also fails to show (Br. 47-49) that the Board's decision conflicts with *Connell Construction Co. v. NLRB*, 421 U.S. 616 (1975). Thus, the

¹⁴ As the Court also stated, if Burns and White refused to sign the contract and if Burns also refused to cease doing business with White, then Burns faced the injurious alternative of trying to operate under the onerous conditions of more widespread strikes. *Id.* at 305.

union in that case did not even dispute that the cease-doing-business element was satisfied. Rather it contended (421 U.S. at 620, 626) that the parties' clause--which provided "that [if] the contractor should . . . subcontract any . . . work . . . , said contractor shall . . . subcontract such work only to firms that are parties to an executed, current CBA--was explicitly allowed by the construction-industry proviso to Section 8(e), which, as the Board noted in *Alessio* (310 NLRB at 1025 n.8), "comes into play only if a clause would otherwise violate 8(e)." Here, by contrast, the challenged provisions of the Heartland Agreement do not state that the Company shall only acquire firms that are parties to an executed, current Heartland Agreement, and the Union vehemently disputes that the cease-doing-business element is satisfied.

The Petitioner further claims (Br. 29-35, 41-45), that the Board's decision also conflicts with Board leasing and union-signatory precedents and other circuits' union-signatory precedents. Those cases, however, are distinguishable for the same reasons as were the in-circuit, Supreme Court, and Board dual-shop cases discussed above (pp. 36-46).

For example, in *Hotel & Restaurant Employees, Local 531 (Verdugo Hills Bowl)*, 237 NLRB 1204 (1978), *enforced*, 623 F.2d 61 (9th Cir. 1980), one of the Board leasing precedents relied on by Petitioner (Br. 29), the challenged agreement actually imposed a penalty on the signatory employer by making the signatory

financially “liable” if its lessee “fails to comply with any provision” of the union agreement. *Id.* at 1204-05. Moreover, the Board noted there that the charged union had asserted and maintained that the challenged agreement required that the signatory must “cease doing business with [its lessee] unless and until [the lessee] became . . . bound” by terms and provisions in the union agreement. *Id.* at 1205. Not surprisingly, the charged union did not contest that the cease-doing-business element was satisfied, but instead claimed that Section 8(e) was inapplicable because the signatory’s leasing a portion of its operation was not “doing business” within the meaning of 8(e), and because the clause had a lawful work preservation objective. *Id.* at 1206.

Similarly, in *General Teamsters’ Warehousemen & Helpers’ Union, Local 890 (San Joaquin Valley Shippers’ Labor Committee)*, 137 NLRB 641 (1962), one of the Board union-signatory cases cited by the Petitioner (Br. 31), the challenged agreements contained two sets of intertwined clauses that explicitly required the signatory to cease doing business with offending persons. Thus, the first agreement provided that, (1) if the signatory contracts any hauling of produce, employees of such contractors shall be covered under terms of the contract; *and* (2) that, if the contractor does not come into compliance with the terms of the contract within 48 hours of the union’s notifying the signatory of the subcontractor’s noncompliance, the signatory “shall terminate” its contact with the contractor. *Id.*

at 643. The parties' supplemental agreement also provided (1) that all independent truckdrivers hauling melons shall be in good standing with union; *and* (2) that shippers will, upon the union's written request, "terminate . . . the contract" of any independent trucker who ceases to be in good standing with the union. *Id.* The Board rejected the charged union's attempt to separate the plainly unlawful, explicit cease-doing-business provisions from the related provisions. In so doing, the Board construed a stipulation in that case to mean that the parties to the contracts had in fact enforced and given effect to the clauses. *Id.* at 643-44.

And in *NLRB v. Bangor Bldg. Trades Council*, 278 F.2d 287 (1st Cir. 1960), one of the out-of-circuit union signatory cases relied on by the Petitioner (Br. 42), the court regarded an assertion in the respondents' brief as an implicit concession that under the union's contract with the signatory, the subcontractor "must be compelled to unionize or he must be 'displaced.'" *Id.* at 290. The union had also picketed the general contractor who was using a nonunion subcontractor. *Id.* at 289.¹⁵

¹⁵ Similarly, the Petitioner omits (Br. 43) that in *Amax Coal Co. v. NLRB*, 614 F.2d 872, 887 (3d Cir. 1980), *reversed on other grounds*, 453 U.S. 322 (1981), the union merely defended the challenged clause by arguing that it had a lawful work preservation objective and that the types of transactions covered by the clause did not constitute "doing business" within the meaning of Section 8(e). And, as the underlying Board decision in the other Third Circuit case cited (Br. 43) by the Petitioner makes clear, the respondent employer associations had admitted that pursuant to the clause, they had agreed to cease doing business with other

6. The Board reasonably declined to rule on whether the Union could take certain action to enforce the Heartland Agreement, because there is no evidence that the Union ever did anything to enforce the Heartland Agreement

There is no merit to the Petitioner's claim (Br. 50-52) that the Board should have found an 8(e) violation because the Union allegedly would have violated another section of the Act if it had taken certain action to enforce the Heartland Agreement. Thus, the Board had no need to decide whether such union action would violate the Act, because the unfair labor practice complaint in this case did not allege that the Union had engaged in such actions. Indeed, there is no evidence that the Union has taken any steps to enforce the Heartland Agreement. Accordingly, that issue should be saved for another day. (A. 269 n.9.)

The Petitioner unfairly accuses (Br. 52) the Board of defeating the purpose of 8(e) by, in effect, refusing to strike down the challenged provisions "unless and until [the Union] attempts to enforce [them]." But, even though the Union has not attempted to enforce the Heartland Agreement, the Board was willing to, and did, rule on the facial validity of the challenged clauses under 8(e). The Board upheld the clauses as lawful because the General Counsel failed to show that the challenged clauses on their face satisfy the cease-doing-business element of a

persons, while the union merely attempted to defend the clause by claiming it had a valid work preservation objective. *See A. Duie Pyle v. NLRB*, 383 F.2d 772 (3d Cir. 1967) (*vacating* 159 NLRB 84, 92, 94-95 (1966)).

Section 8(e) violation. In so finding, the Board expressly stated (A. 269 & n.10) that the fact that the challenged provisions had not actually resulted in any cessation of business was “not determinative.”

7. The Petitioner’s policy arguments did not compel the Board to find a violation of 8(e)

The Petitioner also complains (Br. 53-54) that the Heartland Agreement promotes “top-down organizing.” The Court must decline to accept the Petitioner’s invitation to strike down Sections 2 and 3 of the Heartland Agreement on that basis, even assuming for purposes of argument that a neutrality agreement can be considered a species of top-down organizing. Thus, Section 8(e) was not designed as a catch-all section to prohibit any and all union activity designed to promote top-down organizing elsewhere; rather, as the text of the statute makes clear, Congress has prohibited under Section 8(e) only certain contract terms. *See Sheet Metal Workers, Local Union No. 91 v. NLRB*, 905 F.2d 417, 421 (D.C. Cir. 1990) (“As the text of the statute plainly states, the Board must find an ‘agreement, express or implied, to cease doing business with any other person.’”) Where, as here, no such agreement to cease doing business exists, the Board simply may not find a violation of 8(e).

Finally, the Petitioner engages in rank speculation in claiming (Br. 10, 55-56) that the Board’s decision drives a “gaping hole” in existing 8(e) law and provides a magical formula for unions to avoid 8(e)’s strictures. The Board has

long been sensitive to “planned effort[s] of draftsmanship” to get around Section 8(e)’s prohibitions, and recognizes that Congress was not concerned with simply outlawing word formulas in Section 8(e). *Amalgamated Lithographers of America*, 130 NLRB 985, 987 (1961), *enforced in part*, 309 F.2d 31 (9th Cir. 1962). The Board made clear here (A. 267-69 & n.6) that its decision was based on the record in this particular case.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should enter a judgment denying the petition for review.

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July 2007

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its proof brief contains 12,577 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 30th day of July 2007
heartland-compliance

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LINDA KANDEL, GALEN RABER, JUANITA)
MILLER AND RENATE CROLL)
)
)
) Petitioner) No. 07-1044
)
)
) v.)
)
)
) NATIONAL LABOR RELATIONS BOARD)
)
) Respondent) Board Case No.
) 34-CE-9
)
)
) &)
)
)
) UNITED STEEL, PAPER AND FORESTRY,)
) RUBBER, MANUFACTURING, ENERGY,)
) ALLIED INDUSTRIAL SERVICE WORKERS)
) INTERNATIONAL UNION AFL-CIO, CLC)
)
)
) Intervenor)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the addresses listed below:

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