UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

STEIN, INC.,	)	**CASE NOS.**
	)	**09-CA-214633**
Respondent,	)	**09-CA-215131**
	)	**09-CA-219834**
and	)	
	)	**CASE NOS.**
INTERNATIONAL UNION OF OPERATING ENGINEERS (IUOE) LOCAL 18,	)	**09-CB-214595**
	)	**09-CB-215147**
	)	
Respondent,	)	**ADMINISTRATIVE LAW JUDGE**
	)	**ANDREW GOLLIN**
and	)	
	)	
TRUCK DRIVERS, CHAUFFEURS AND HELPERS LOCAL UNION NO. 100, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,	)	
	)	
Charging Party,	)	
	)	
and	)	
	)	
LABORERS' INTERNATIONAL UNION OF NORTH AMERICA (LIUNA) LOCAL 534,	)	
	)	
Charging Party.	)	
	)	

RESPONDENT STEIN, INC.'S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION.

This is a Burns successor dispute where Region 9 of the National Labor Relations Board ("NLRB") seeks to stretch existing NLRB precedents beyond their limited holdings;[1] seeks to ignore still other well-settled NLRB precedent;[2] and ultimately seeks to side-step Burns' holding, adopted by the NLRB,[3] that federal labor law successorship principals should have no application where "…because [the successors'] operational structure and practices differed from those of [the predecessor], the [predecessor] bargaining unit was no longer an appropriate one". NLRB v. Burns Int'l. Sec. Srvc., 406 U.S. 272, 280, 92 S.Ct. 1571 (1972).

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[1] To date, no NLRB panel has applied Total Sec. Mngt., 364 NLRB No. 106 (2016) to the 90-day probationary period of a collective bargaining agreement. To date, no NLRB panel has applied Advanced Stretch Forming, 323 NLRB No. 84 (1997) to a Burns successor that did recognize a labor organization, even if such were deemed to be a proscribed § 8(a)(5) act. In fact, that is precisely the Burns fact pattern.

[2]

[By Counsel for the General Counsel Laite]

> Well, Board law is well-established that when you look at the unit and the appropriateness of the unit, you look at when the collective bargaining obligation attaches, and that was when they had a full compliment of employees, and they had hired a majority of the predecessor's employees….

(Tr. 297-298). But see, Paramus Ford, 351 NLRB 1019, 1023 (2007) ("The Board will normally assess whether an employer is a successor as of the time a union makes its demand for recognition and bargaining, provided the employer has already hired a substantial and representative compliment of employees").

[3] Border Steel Rolling Mills, 204 NLRB 814 (1973); Consolidated Film Indus., 207 NLRB 385 (1973); P.S. Elliott Services, 300 NLRB 1161 (1990); Indianapolis Mack Sales & Srvc., 288 NLRB 1123 (1988); Ginji Corp., 1987 WL 103432 (N.L.R.B. G.C.) (1987); Canteen Srvc. Co., 1992 WL 213830 (N.L.R.B. G.C.) (1992); Oneida Motor Freight, 1981 WL 682647 (N.L.R.B. G.C.) (1981).

For the reasons detailed infra, the Second Amended Consolidated Complaint should be ordered dismissed, with prejudice.

II. STATEMENT OF FACTS.

A. Stein, Inc.

1. The Work at the AK Steel Middletown, Ohio Mill.

The AK Steel Company ("AK Steel") owns and operates an integrated steel mill that sits on 1,100 acres of property in Middletown, Ohio (Tr. 1210, 1337).[4] Integrated steel mills produce blast furnace slag and basic oxygen furnace slag ("BOF") as a byproduct of the steel-making process (Tr. 1337). AK's blast furnace produces molten iron which is transferred via "torpedo cars" to AK's BOF furnace and, after more processing and changing, is transferred by a ladle which is later taken to a "mill scale plant", otherwise known as a "Kish plant" (Tr. 1207). Through an oxygen-introducing lance pipe at the Kish plant, the impurities from the molten iron rise to the top; are raked off; and that molten iron is transferred to a BOF processing plant where it is dumped into a pit; cooled and "fractured" with water; and the metals in that former liquid product ("ferrous material") are recovered, sold, and transferred back to AK (Tr. 1207-1209, 1338-1339). AK's BOF slag similarly exits the steel making plant in a molten state where it is then shepherded into cooling pits (Tr. 102-103, 1337). That steel impurity bonded with limestone is, again, cooled by water and hauled to a separate BF processing plant where it is then transferred into stone aggregate used to construct roadways and highways (Tr. 74-76, 1337; Stein Exh. 31).

[4] References to the hearing transcripts shall be: (Tr. __). Jointly stipulated facts and documents are cited herein as: (Jt. Exh. or Jt. Stip. __). Stein's hearing exhibits are referenced as: (Stein Exh. __). The International Union of Operating Engineers Local No. 18's exhibits are cited as: (O.E. 18 Exh. __). Counsel for the General Counsel's exhibits shall be referenced as: (G.C. Exh. __).

AK also contracts out its "lancing" and steel scraping needs (Tr. 344-345, 358-359, 829). "Lancers" cut large blocks and pieces of steel with lancing rods that are then returned to AK to be re-milled (Tr. 344-345, 359, 930). Scrapping involves cutting or burning scrap steel into smaller pieces so that it also can be re-milled at AK (Tr. 358-359).

Slag reclamation and processing, steel (iron) recovery, and lancing/burning is work that AK[5] has outsourced to independent service providers for over forty (40) years (Jt. Exh. 17, ¶ 3).

2. <u>Stein/AK's Predecessors</u>.

Slag reclamation, steel recovery, and lancing/burning as an adjunct to steelmaking is a highly competitive business (Tr. 1193). The contracts to provide these services are competitively bid (Tr. 184, 767-768, 771; Jt. Stip. ¶ 14). The original provider of these services at AK Middletown was the McGraw Construction Company (Jt. Stip. ¶ 7). Subsequent bid letting by AK resulted in the following entities performing metal recovery/slag reclamation at the AK Steel Middletown worksite: International Mill Service ("IMS") in September 1997; Olympic Mill Services ("OMS") in 2000; Tube City in 2002; Tube City/IMS through a corporate merger in 2010; and then TMS International, LLC (Tr. 762-763). TMS International runs some sixty-eight slag reclamation/metal recovery operations for steel mills throughout North America (Jt. Stip. ¶ 7; Tr. 762-773). All of the above-entities are competitors to Stein (Tr. 771), and except for the intra-corporate transactions involving a merger and initial public offering, all were competitors with each other (Tr. 768, 771). Each of the above entities ran the slag reclamation/metal recovery operations at the AK Steel Middletown, Ohio facility through three unions – Truck Drivers, Chauffeurs, and Helpers Local

[5] AK Steel originated in Middletown, Ohio in 1899 as the American Rolling Mill Company ("ARMCO"), and after entering into a limited partnership with Kawasaki Steel Corporation in 1993, renamed itself AK Steel (Jt. Stip. ¶ 5).

No. 100 ("Teamsters 100"), Laborers' International Union Local No. 534 ("Laborers 534"), and the International Union of Operating Engineers, Local No. 18 ("O.E. No. 18") (Jt. Stip. ¶ 7; Tr. 762). Of TMS' sixty-eight operations across North America, AK Middletown is the only location where the work was jurisdictionally segregated as between three separate unions (Tr. 773). Similarly, at Stein's twelve slag reclamation/metal recovery operations on steel mill sites in North America, only one other[6] operates with more than one bargaining unit and one union (Tr. 1188-1192).

Although alleged in the Second Amended Consolidated Complaint, neither the General Counsel nor the Charging Party Unions – Teamsters 100 and Laborers 534 –could account for how they purportedly achieved § 9(a) representational status at AK Middletown. One thing is certain: Any purported § 9(a) claimed representation status was not secured through an NLRB-conducted election (Tr. 109, 272, 362, 489, 563-64, 764-65, 1179). Moreover, when McGraw Construction Company transitioned its servicing operations to IMS, none of the three unions then in operation at the worksite presented recognitional authorization cards to that company (Tr. 765-766). Pre-trial subpoenas issued to the Charging Party unions requesting either external (i.e. NLRB) or internal representational documents surfaced nothing (Jt. Exhs. 23, 24; Tr. 38).

Respondent O.E. 18, in marked contrast, was able to produce evidence of its § 9(a) representational stature at AK Middletown (O.E. 18 Exh. 1; Tr. 693-694). On the heels of McGraw Construction losing the AK Middletown contract, O.E. 18 produced authorization cards that demonstrated its majority status to OMS (Id.). O.E. 18 later proved, once again, its § 9(a) status to Stein after Stein commenced operations at the AK Middletown worksite (O.E. 18 Exh. 3: "I

[6] Stein's Cleveland, Ohio operation is stratified as between the Teamsters, United Steelworkers, Operating Engineers Local 18, and Laborers (Tr. 1191-1192). There is just one Teamster employee at that worksite (Tr. 1192).

understand that this card may be used to obtain recognition for my current or future employer without an election. This authorization is non-expiring, binding, and valid until such time as I revoke it in writing").

B. TMS' Wages, Hours, and Terms and Conditions of Employment.

1. The TMS Labor Agreements.

As the slag/scrap entity immediately preceding Stein, TMS negotiated nearly identical labor agreements with its three unions (Jt. Exhs. 6, 7, 8, passim).[7] All three labor agreements have identical "**DEFINITION OF WORK**" clauses (Jt. Exh. 6, p. 4; Jt. Exh. 7, p. 3; Jt. Exh. 8, p. 6). All three contracts provide for a 21-turn work schedule (Id.; Jt. Exh. 8, p. 8). All three contracts afford a 35 cent shift differential (Jt. Exh. 6, p. 5; Jt. Exh. 7, p. 3). All three contracts have identical overtime/premium pay clauses (Jt. Exh. 6, p. 5; Jt. Exh. 7, p. 4; Jt. Exh. 8, p. 12). All three contracts recognize the same holidays, and payment for such (Jt. Exh. 6, p. 5; Jt. Exh. 7, p. 4; Jt. Exh. 8, pp. 12-13). All three contracts have the same tiered scale for vacation benefits, and payout thereof (Jt. Exh. 6, p. 8, Jt. Exh. 7, p. 6, Jt. Exh. 8, pp. 13-14). All three contracts have identical funeral leave provisions (Jt. Exh. 6, p. 10; Jt. Exh. 7, p. 9-10; Jt. Exh. 8, pp. 17-18). All three contracts have identical 60-day probationary periods (Jt. Exh. 1, p. 12; Jt. Exh. 7, p. 9, Jt. Exh. 8, p. 4). All three contracts have identical jury duty leave and pay provisions (Jt. Exh. 6, p. 11; Jt. Exh. 7, p. 11; Jt. Exh. 8, p. 18). All three contracts have identical timelines for marshalling grievances, and use the

[7] This fact is not only highly relevant in bargaining unit determination cases examining whether a "community of interest" exists, it is also highly relevant when undertaking a Burns successor analysis. Border Steel Rolling Mills, 204 NLRB 814, 821 (1973). "A unit might, for instance, be only marginally appropriate prior to the [successor] transaction, in which event relatively small changes following the transfer of ownership could push it into the category of an inappropriate unit." Deferiet Paper Co. v. NLRB, 235 F.3d 581, 584 (D.C. Cir. 2000).

Federal Mediation and Conciliation Service ("FMCS") as the source for arbitrators (Jt. Exh. 6, pp. 11-12; Jt. Exh. 7, pp. 10-11; Jt. Exh. 8, pp. 16-17). All three contracts afford twenty-minute paid lunches (Jt. Exh. 6, p. 4; Jt. Exh. 7, p. 3; Jt. Exh. 8, pp. 11-12).

The TMS/Laborers 534 labor agreement calls for the use of that union's hiring hall:

> All employees required by the employer shall be furnished and referred to the employer by the union. The employer shall advise the union of the number of applicants needed and any requested skill sets. The employer shall have the right to reject any applicant referred by the union. The employer and the local union shall post in appropriate places all provisions relating to the referral arrangement set forth in this agreement.

(Jt. Exh. 6, p. 3). A similar hiring hall provision exists in the TMS/Teamsters 100 labor agreement:

> Section 2. Additional Employees. When the employer needs additional employees, he shall give the local union forty-eight (48) hours to provide suitable applicants, but shall not be required to hire those referred by the union. The names and addresses of all new employees shall be furnished to the office of the union no later than the first pay period after hiring. If the union is unable to provide applicants within forty-eight (48) hours, the employer may employ applicants from any source.

(Jt. Exh. 7, p. 2).[8]

Finally, none of TMS' three labor contracts have the sort of § 9(a) recognitional language that the Board has found necessary to give rise to an evidentiary presumption that § 9(a) status was achieved and exists (Jt. Exh. 6, p. 2; Jt. Exh. 7, p. 1; Jt. Exh. 8, p. 1).

[8] As demonstrated infra, these clauses are plainly illegal if, as contended, the agreements in question are § 9(a) non-construction contracts, as opposed to § 8(f) contracts. NLRB v. Nat'l. Maritime Union, 175 F.2d 686, 688-689 (2nd Cir. 1949), affirming, 78 NLRB No. 137 (1948). And: "one basic concept is that the Government will not lightly assume someone has broken the law". Pekowski Ent., 327 NLRB 413, 424 (1999).

2. **TMS' Integrated Work at AK.**

Not only could neither Charging Party union explain just how it was that they became the purported § 9(a) representative of their units at AK Middletown,[9] they could not explain how they managed to create segregated craft units for unskilled laborers performing integrated, non-construction work processes.[10]

TMS' slag/metal recovery work at AK had, daily and consistently, its Laborers, Teamsters, and Operating Engineers working in close proximity to each other, while in constant contact with each other (Tr. 117-119, 128-129, 135-136, 278-283, 423-427, 567-569, 822-829). The work to be performed in the form of slag recovery, metal recovery and slag production was incapable of being achieved without each craft worker performing his/her tasks and duties (Id.). The work at TMS' blast furnace recovery point of operation illustrates the hourly, if not minute-by-minute work integration:

---

[9] "[P]roof of majority status is peculiarly within the special competence of the union". Stoner Rubber Co., 132 NLRB 1440, 1445 (1959). "It would seem that the burden of coming forward with proof of its alleged majority status was upon the union". NLRB v. Downtown Bakery Corp., 330 F.2d 921, 927 (6th Cir. 1964).

[10] "We find it particularly inappropriate to carve out a disproportionately small portion of a large, functionally integrated facility as a separate unit". Publix Supermarkets, 343 NLRB 1023, 1027 (2004) (reversing Regional Director § 9(b) unit determination). "It is well established that the Board does not approve fractured units, i.e. combinations of employees that are too narrow in scope or that have no rational basis". Seaboard Marine, 327 NLRB 556, 556 (1999).

(Stein Exh. 1). As both Teamsters 100 and Laborers 534 witnesses testified, the yellow-hued front end loader in Stein Exh. 1 was exclusively operated by the O.E. 18 craft at TMS (Tr. 118, 426-427, 509-510, 519-520, 569, 827, 931, 1029). The off-road, green-hued haul trucks in Stein Exh. 1 were operated exclusively by Teamsters 100 workers at TMS (Tr. 118-119, 239, 278, 281-282, 361, 426-427, 486-487, 567-568, 794-795, 841, 931, 939, 1029, 1036). The worker spraying cool water into the pit area as depicted in Stein Exh. 1 was work performed exclusively by a Laborer 534 worker

(Tr. 120, 280-283, 423-427, 569, 827, 931, 1029). That Laborer 534's job was not only to cool down the hot pits with water so that they could be loaded into the haul trucks by the large front-end loaders, but also to cool off the tires of both the haul trucks and loaders so that they would not catch fire as they drove on and through the slag pits (Tr. 280-283, 401, 423, 425, 1029). That Laborer 534 worker would also act as a "spotter" for the O.E. 18 loader operator and Teamster 100 haul truck driver as they maneuvered their equipment, to ensure they did not run into other equipment, the pits, or the AK blast furnaces (Tr. 129, 360, 401, 424, 443, 512, 931). Finally, that Laborer 534 safety lookout also spotted the Teamsters haul truck drivers to ensure their beds were not overloaded (Tr. 136, 401, 423).

The slag reclamation/metal recovery functions were performed by all three trade persons being in constant contact with each other via two-way radios (Tr. 128, 136, 281-283, 424). Once the large haul trucks (a/k/a Terex, Euclid, Hitachi) were loaded, they would move and unload the slag to nearby stock piles where the material would later be processed into road-base aggregate, and the entire process would repeat itself over, and over, and over again each hour, each day, and each shift (Tr. 74-75, 78, 128, 135, 281, 283, 334-335, 423, 427, 531-532, 559, 568).

TMS' work at its BOF worksite (See, Stein Exh. 31) was similar in nature to that BF site, in that all three trades were working in conjunction, and in close proximity to each other to ensure that the loaders filled the heavy duty haul trucks safely (Tr. 1212). An additional Laborer 534 safety person known as a "knock out" was staffed at the BOF worksite of TMS (Tr. 285, 343-344, 402, 514, 824). The molten iron and slag would arrive at the BOF plant in large pots, and remnants would remain in the pots after the molten iron was dumped into the pits (Tr. 285, 401, 514-515). The pot used for transportation would literally have to have remnants "knocked out" from the

pot, and a Laborer 534 safety person was at the BOF site to ensure all of this occurred safely, while O.E. 18 loader operators and Teamsters 100 truck drivers operated and also watched (Tr. 285, 401-402, 421, 513-516).

Work integration at TMS was prevalent in virtually all aspects[11] of its AK slag reclamation/metal recovery operations, albeit with rigid craft jurisdictional lines drawn. Teamsters 100 drivers exclusively ran dust suppression water trucks for TMS, so that all of the trades could safely travel on AK property (Tr. 111, 239, 281, 593, 790, 838, 937-38, 1034, 1093, 1152; Stein Exh. 25). A combination fuel/lube truck operated exclusively by O.E. 18 operators travelled throughout TMS's worksite to re-fuel and lubricate equipment and vehicles being operated by the Teamsters and O.E. 18 operators (Stein Exh. 22; Tr. 112, 510, 785, 836, 936, 1033, 1150). The equipment used to move the slag, or the end product aggregate, such as bobcats (Stein Exh. 17), backhoes (Stein Exh. 24), and front end loaders (Stein Exh. 1) were exclusively run by Operating Engineers at TMS (Tr. 85-86, 116-117, 279, 305-306, 361, 510, 569, 594, 703-704, 774-775, 788-789, 831-832, 837-838, 932, 937, 1030, 1304, 1089, 1093, 1147, 1297). The operating plants used to transform the slag into road aggregate were operated exclusively by O.E. operators at TMS (Stein Exh. 18; Tr. 283, 372-374, 510, 694, 776-777, 832, 932-933, 1030, 1089-1090, 1147-1148). Telehandlers, a large forklift-like piece of equipment with retractable forks that was used to lift and move arriving and departing equipment and deliveries at TMS were

[11] The only arguable, non-fully-integrated tasks and duties were the Laborer 534 "Lancer", and Teamsters 100 pickup drivers who left the worksite on occasion to retrieve parts and other materials needed at TMS' operations (Tr. 130, 243, 343-345, 486-487, 829, 1178). By contract, off-site parts running tasks and duties were within the exclusive jurisdiction of Teamsters 100: "The company agrees that if the need to run for parts or materials used on site arises, the company recognizes that under the scope of authority of the Teamsters, this work will be performed by a Teamsters member" (Jt. Exh. 7, p. 3).

exclusively operated by O.E. 18 operators (Stein Exh. 21; Tr. 704-705, 782-784, 834-835, 935-936, 1033, 1091, 1149). A TMS portable hydraulic crane affixed with a magnet for the scrap dismantling by Laborer 534 scrappers (i.e. the "Liebherr") was exclusively operated at TMS by O.E. 18 personnel (Stein Exh. 20; Tr. 781, 833-834, 935, 1032-1033, 1090, 1149). Large cranes that either dropped a metal ball to smash coagulated slag, or were affixed with a magnet to recover AK metal from the Kish plant (Stein Exh. 23) were exclusively run by O.E. 18 operators at TMS (Tr. 510, 694, 703, 786-787, 837, 936, 1033-1034, 1092, 1150). TMS O.E. 18 mechanics were responsible for maintaining and repairing all of the site equipment and would have frequent interaction with the Teamsters and fellow O.E. 18 operators who would report issues with the equipment that they exclusively ran and operated (Tr. 86, 244, 510, 703, 848,[12] 999, 1066-1070).

Even the use of a shovel by TMS Laborers to clean the belts and tail pulleys of the aggregate-making plants were jurisdictionally relegated exclusively to Laborers 534:

> [BY TMS TEAMSTER 100 DRIVER GARY WISE]
>
> Q. And then as far as when it was TMS, what generally would the operators do?
>
> * * *
>
> A. And [the operator's] job is if something stops or gets too much material on the belt, he shuts it down, and they clean the plant, and they call a Laborer in and he comes to clean it up.
>
> * * *
>
> Q. In your interview for your position – your potential position with Stein – do you remember Mr. Huffnagel telling you that everyone is going to have to grab a shovel from time to time?
>
> A. Yes.

[12] See, Stein Exh. 28, #1326.

Q. And at TMS, that type of work was Laborer work, was it not, sir?

A. Yes.

* * *

[BY TMS LABORER OVA VENTERS]

Q. And then you said other Laborers tasks and duties, so what are the other Laborers tasks and duties that Ova Venters may be doing?

A. It could be like a plant belt overloads, stop, might bury. You got to go clean it.

Q. And how would you do that, sir?

A. With a shovel or a fire hose, water hose.

* * *

Q. And was it part of your responsibilities as a Laborer to operate the backhoe during that [TMS] timeframe?

A. No, but I wish we could.

Q. I'm curious with that answer.

A. A lot of shovel work.

Q. Oh, I get it. Because as a Laborer you were using a shovel –

A. Yeah.

* * *

[BY TMS O.E. 18 MIKE KINGERY]

Q. Is any of that [Stein] work different than what – than the work you performed when you were with TMS?

A. Like I said, I didn't run a haul truck and I wasn't able to shovel or be a laborer.

Q. But you could do that now?

A. If needed.

(Tr. 510, 588, 825, 838, 1320).

3. <u>TMS' Management</u>.

The top TMS Manager for AK Middletown was Mr. Bob Huseman who was Vice-President of Operations (Tr. 760-761). Mr. Huseman began supervising at AK Steel Middletown in 1997 when IMS took over the slag reclamation/metal recovery work from the McGraw Construction Company (Tr. 761). When IMS lost the AK bid in 2000, Mr. Huseman went to a different TMS facility, only to return to AK Middletown in late 2001 as General Manager for Tube City/OMS (Tr. 767-770). Mr. Huseman was head of operations for TMS International at the point in time that the slag reclamation/metal recovery work transitioned to Stein (Tr. 772). Just below Huseman in the TMS International managerial hierarchy was Mr. Chuck Cooke, who was the then-Site Superintendent (Tr. 87). TMS International Shift Supervisors at AK Middletown included Mr. Chad Bare, Mr. Willie Huseman, and Mr. J.R. Cement (Tr. 87-88). These TMS International Shift Supervisors supervised and managed all three of the three trade unions at AK Middletown (Tr. 90-91, 132-133). There was, then, common TMS supervision and management for the three trade unions (Id.).

4. <u>Other TMS Integration Factors</u>.

The TMS O.E. 18 Operators, Teamsters truck drivers and Laborers all worked the same 21-day turn, work shift (Tr. 148, 168). All three TMS trades shared the same TMS locker room (Tr. 276, 1274). At TMS, all three union trades used the same lunch room (Tr. 276, 1274). At TMS, all three trades used the same shower facility (Tr. 275-276, 1274). At TMS, all three trades used the

same parking lot (Tr. 1274). At TMS, all three trades participated in the same morning (daily) and monthly safety meetings held by TMS (Tr. 276, 524-525).

5. <u>The IMS/OMS/Tube City/TMS Source of Workers</u>.

The Teamsters 100 and Laborers 534 collective bargaining agreements have long contained hiring hall provisions for staffing up slag reclamation/metal recovery services at AK Middletown (Jt. Exhibit 4, p. 2; Jt. Ex. 6, p. 3; Jt. Ex. 7, p. 2; Tr. 352-353, 468, 803, 822-823, 928, 996, 1053, 1055, 1088-1089, 1142-1144). These hiring halls were limited exclusively to Teamsters 100 and Laborers 534 members (Id.).

C. <u>Stein Wins the AK Steel Slag Reclamation/Metal Recovery Contract</u>.

At the point in time that the Teamsters 100 and Laborers 534 TMS collective bargaining agreements at AK Steel were set to expire,[13] AK put out for bid its slag reclamation/metal recovery service contract (Tr. 184). At this juncture, the overwhelming majority of slag reclamation/metal recovery workers at the AK Middletown work site were O.E. 18 operating engineers (Jt. Stip. ¶¶ 17-23). TMS had just fifteen Teamsters 100 drivers (Jt. Stip. ¶17), and just fourteen Laborers 534 workers (Id. ¶18). TMS, on the other hand, had forty-two (42) O.E. 18 members (Jt. Stip. ¶19). Those O.E. 18 members had executed recognitional authorization cards that stated:

[13] The TMS/Laborers 534 labor agreement was set to expire August 31, 2016 (Jt. Ex. 6, p. 15), but the employee's collective bargaining representative neglected to send the re-opener notification in a timely fashion (Jt. Ex. 9), and so that labor contract actually carried an expiration date of August 31, 2017 (Id). Because of TMS' uncertain future at AK Middletown, TMS and Laborers 534 extended their agreement until December 31, 2017 (Jt. Ex. 11) after Laborers 534 had properly re-opened the agreement on May 27, 2017 (Jt. Ex. 10). The TMS/Teamsters 100 labor contract expired by its terms December 31, 2017 (Jt. Ex. 7, p. 1). The O.E. 18 labor agreement with TMS (f/k/a Tube City IMS) was not set to expire until September 30, 2018 (Jt. Ex. 8).

> I hereby authorize the International Union of Operating Engineers Local No. 18 and its branches to represent me for the purpose of collective bargaining in matters of wages, hours and conditions of employment, with my current employer, as well as all other employers for whom I may become employed after this date, on all present and future job sites.
>
> I understand that this card may be used to obtain recognition from my current or future employer without an election.
>
> This authorization is non-expiring, binding, and valid until such time as I revoke it in writing.

(O.E. 18 Exh. 3, passim).

With TMS' seniority rosters in-hand, Mr. Dave Holvey, Vice-President and Chief Financial Officer of Stein, arranged an August 2018 "meet and greet" with O.E. Local 18 representatives Justin Gabbard and Jeff Powell (G.C. Exhs. 4-5; Tr. 185-186). Because Stein knew that it would running the AK Middletown facility, were it to obtain the bid, in a markedly different fashion than TMS, Holvey apprised O.E. 18 representatives that Stein wanted just one bargaining unit at the work site (Tr. 186-188).

Meanwhile, Stein Area Manager Doug Huffnagel began visiting the AK Middletown work site to observe TMS' operations beginning in October of 2017 (Tr. 210-213). By November 2017, Huffnagel was stationed at the TMS/AK Middletown work site as much as four days a week observing TMS operations and its workforce (Tr. 214, 194, 1261, 1285-1287). Huffnagel witnessed stark inefficiencies in terms of how TMS was running its operations (Tr. 1194-1195, 1247, 1285). Material handling processes, work flow, and on-site travel at TMS were a mess (Tr. 1194). Because of the rigid three-craft jurisdictional lines that TMS assented to, Teamsters 100, Laborers 534, and O.E. 18 employees spent large blocks of their time standing around watching the other trades perform their tasks and duties (Tr. 1194-1195). Union "featherbedding" was

rampant as 2 or all 3 trades played small roles in performing what was just one person's job (Tr. 1194-1195). Huffnagel was also watching for the work ethic of the three trade unions at AK Middletown employed by TMS, including whether workers were apt to follow safety protocols, or even knew their jobs (Tr. 1195, 1198-1199). One particular TMS Teamsters 100 employee, Mr. Robert Tracey, couldn't answer Huffnagel's questions, even though he was a purported Teamster "Lead" (Tr. 1199). Indeed, Mr. Tracey couldn't even tell Huffnagel the names of his co-workers (Id.).

On November 9, 2017, Huffnagel held a meeting in the TMS Health & Welfare Office at AK Middletown with all three union trades (Jt. Stip. ¶16; Tr. 214-215; Jt. Ex. 13). Huffnagel's pre-prepared document was read out loud to those in attendance, and was available for the taking by those attending the meeting (Tr. 94-96, 137-140, 286-287, 431-434, 529). In that meeting, which occurred before Stein hired a single worker, the workers in attendance understood perfectly well that their wages, hours, and terms and conditions of employment at Stein would be different than those they enjoyed as TMS employees working as Teamsters, Operators, or Laborers (Tr. 141-143, 289-290, 364, 432-434, 470, 570-573). Moreover, those in attendance understood perfectly well there would be no guarantee of employment at Stein, and that they would have to go through a process that entailed interviewing, a background check, a physical examination, and a drug screen (Tr. 143-144, 288, 362-364, 429-431, 578, 907, 1197).

In the later occurring Stein job interviews conducted by Huffnagel,[14] he made it perfectly clear that the union craft jurisdictional boxes that the interviewees were in at TMS would not continue at Stein:

[BY FORMER TMS TEAMSTER 100 EMPLOYEE GARY WISE]

Q. In your interview for your position – your potential position with Stein, do you remember Mr. Huffnagel telling you that everyone is going to have to grab a shovel from time to time?

A. Yes.

Q. And at TMS, that type of work was laborer work, was it not, sir?

A. Yes.

* * *

[BY FORMER TMS LABORER OVA VENTERS]

Q. In the interviewing process, what was said by Mr. Huffnagel in relation to the type of work you would be performing for Stein?

A. I can't remember word for word. I mean, he mentioned cross-train. There will be times you'll be getting cross-trained to run equipment. Various equipment, actually. Something like that.

* * *

[BY STEIN AREA MANAGER DOUG HUFFNAGEL]

Q. How long did the interviews last?

A. Anywhere from five minutes to 45 minutes depending on who you're talking to.

Q. And then the interviewing process – did you communicate any information to the applicants about what they would be doing for Stein?

[14] At times, other Stein managers/supervisors participated in the TMS employee interviews, including Stein Illinois Area Manager Alan Medford, AK Site Superintendent Jeff Porter, and AK Shift Supervisor Jason Westover (Tr. 1196-1197).

A. Yes.

Q. What did you tell them?

A. I told them that they would be cross-training. They'll be working on other pieces of equipment. Everybody's going to do everything whether it's from a shovel to a crane to a water truck to a Euclid [haul truck].

(Tr. 528, 906-907, 1198).[15]

D. <u>Stein's Work at AK Middletown</u>.

The first NLRB complaint in this dispute issued on April 19, 2018 (Tr. 395). The first unfair labor practice filed by either of the two Charging Party unions was lodged on February 20, 2018 (Tr. 395). The first demand for recognition by Teamsters 100 directed to Stein was drafted and sent via regular U.S. mail on January 10, 2018 (Jt. Stip. ¶ 24; Jt. Exh. 14). The first demand for recognition by Laborers 534 directed to Stein was through an email communication of February 20, 2018 (Jt. Stip. ¶ 27; Jt. Exh. 17). With these timeframes in mind, the following facts paint the picture of Stein's operations at AK Middletown through March of 2018.[16]

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[15] At the evidentiary hearing, Counsel for the General Counsel sought to impeach Mr. Huffnagel with his NLRB investigative affidavit, the text of which said: "We like guys who know how to do more than one thing" and did not expressly use the term "cross-training" (Tr. 1255-1260). Stein submits that informing job applicants that they will need to "do more than one thing" connotes the very same idea and notion as the term "cross-training".

[16] At the evidentiary hearing, this Administrative Law Judge held that the cross-training and in-fact operation of equipment and performance of laborer tasks across the former three TMS trade unions was "irrelevant" for time periods post-dating May 31, 2018 (Tr. 299, 314; Stein Exh. 6). Later, this Administrative Law Judge ruled that evidence of such would be admitted into the non-rejected record file only through March of 2018, with the burden then shifting to the Counsel for the General Counsel to place into evidence the absence of cross-training, or cross-performance of work after that date (Tr. 894-901). Stein's counsel voiced objections to these seemingly inconsistent evidentiary rulings based solely on a claim of "relevancy" by Counsel for the General Counsel (Tr. 187). As demonstrated infra, Counsel for the General Counsel did not meet their shifted burden of proof as imposed by this ALJ's Solomon-like evidentiary ruling, notwithstanding

Only one of TMS' on-site supervisors (Mr. Bare) matriculated to employment with Stein (Tr. 293-294). Bob Huseman, Ty Reynolds, and J.R. Cement were never hired by Stein (Id.).[17] Neither was Chuck Cook (Tr. 435). Additionally, although Stein through an arms-length transactions acquired some of the equipment formerly owned and operated by TMS at AK Middletown, much of it was "junk" (Tr. 583-584). Three of TMS' heavy duty cranes are non-operational at Stein (Tr. 583). Stein also added to the AK Steel site heavy-duty cranes, Euclid haul trucks and front-end loaders that were not the former property of TMS (Tr. 583-584).

Once Stein took possession of operations at AK Middletown effective January 1, 2018, it immediately began cross-training all of the former three segregated trades at TMS. Such cross training of the three former TMS craft units had never occurred at either IMS, OMS, Tube City/IMS, or TMS (Tr. 379-380, 808-809).[18] By January 3, 2018, former TMS Laborer Mr. Ova Venters was running bobcats for Stein at AK Middletown (Tr. 844-845; Stein Exh. 28, #1304). By January 17, 2018, that same former TMS Laborer was running backhoes for Stein at AK Middletown (Tr. 847; Stein Exh. 28 #1326). By January 23, 2018, Mr. Venters had been trained on operating the work site's water truck – a former exclusive Teamsters TMS job – and by the next day, he was running that vehicle, on-site (Tr. 850-851; Stein. Exh. 28 #1334). On several

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their possession of some 14,000 detailed, employee-specific Stein Operator Reports (Tr. 1276-1278).

[17] One Stein supervisor, Mr. Jason Westover, was at a historical point in time formerly employed by TMS at AK, but he was not employed at TMS at the time the slag reclamation/metal recovery operations transferred to Stein on January 1, 2018 (Tr. 585).

[18] The complete absence of cross-training prior to Stein was established through the testimony of Stein competitor Bob Huseman, who began managing the AK slag reclamation/metal recovery work when it initially transitioned from McGraw Construction Company (Tr. 761-762, 809).

occasions, Mr. Venters operated multiple pieces of equipment that formerly were in the exclusive work jurisdiction of either Teamsters 100 or Laborers 534 (Tr. 850-851, 855; Stein Exh. 29 #1363). By the first week of February, for entire weeks, Mr. Venters was running backhoes at Stein, a former exclusive O.E. 18 function at TMS (Tr. 856-860; Stein Exh. 29 ##1366, 1369, 1374, 1379). By early February of 2018 (2/9/18), Mr. Venters was making off-site parts and material runs – a former exclusive task and duty relegated to Teamsters 100 at TMS (Tr. 861-863, 866, 867-868; Stein Exh. 29 ##1380, 1390, 1404, 1408, 1411). Throughout February 2018, Mr. Venters continued to run and operate backhoes and bobcats (Tr. 854-868). And, Mr. Venters operation of the site's water truck did not begin and end with his training on January 23, 2018, and initial operation of that vehicle beginning January 24, 2018 (Tr. 850-851). Throughout March of 2018, Mr. Venters continued to run the worksite's water truck (Tr. 880-882, 884-885; Stein Exh. 30 ##1425, 1429, 1432, 1447, 1452, 1457, 1462). By mid-March 2018, Mr. Venters was running off-road Euclid haul trucks for Stein at the AK Middletown site (Tr. 886-889; Stein Exh. 30 ##1479, 1482, 1486, 1493, 1503). Throughout March 2018, Mr. Venters also continued to run backhoes and make off-site parts runs (Tr. 871-872, 878, 880, 882).

Pursuant to this ALJ's evidentiary ruling that involved both the creation of a testimonial evidentiary presumption, and the shifting of the burden of proof to the General Counsel (Tr. 894-900), Mr. Venters –an adverse witness to Stein – provided the following testimony:

[BY FORMER TMS LABORER OVA VENTERS]

Q. All right. Mr. Venters, we've gone through several documents that show you operating different pieces of equipment at Stein.

A. Yes.

Q. And the operation of that equipment, I think you testified, is different than what you did for the predecessor employers?

A. Yes.

Q. And in terms of the operation of that equipment, did it continue on and does it continue on today in terms of your driving either a Terex [haul truck] or a backhoe or different vehicles, the Telehandler? Do you continue to do that, sir?

A. Yes.

Q. Okay. All right. And is it more than unlike – I'm just trying to get numerically. Does it happen on a weekly basis where you would operate pieces of equipment?

A. Every day.

Q. Every day now?

A. (nodding head).

Q. Okay.

ADMINISTRATIVE LAW JUDGE: Let me ask you this – I'm following up on that question.

We've gone through some of these reports that go through the first three months of the year.

Was there a period of time this year where, alright, the first three months it was a little slow, I was only doing it a couple days and then it got more? Was is pretty steady that you would do it a couple days a week? From your perspective, as far as dealing with operation of these vehicles that – let me take a step back so I'm clear.

Prior to January of this year, did you operate any of this equipment that you've talked about here today?

THE WITNESS: No.

ADMINISTRATIVE LAW JUDGE: Okay. And so that started in January of 2018 moving forward once you started working for Stein?

THE WITNESS: Yes.

ADMINISTRATIVE LAW JUDGE: Okay. So we have the evidence in from January through March.

My question is, from April moving forward, did you operate the machinery that you talked about the same, more, or less than you did the first three months?

THE WITNESS: More.

ADMINISTRATIVE LAW JUDGE: And on a weekly basis?

THE WITNESS: Yes.

(Tr. 901-904).

Mr. Tim Wilhoite, who had worked at the AK site for eleven years prior to becoming employed by Stein, similarly was craft cross-trained, and began operating equipment that was formerly in the exclusive jurisdiction of one of TMS' three craft trades (Tr. 925-927). By January 9, 2018, Mr. Wilhoite was running the Mustang/Telehandler at the AK mill on behalf of Stein (Tr. 942-943; Stein Exh. 28 #1314). By mid-February 2018, Mr. Wilhoite was fully trained on, and running bobcats at AK Middletown on behalf of Stein (Tr. 947-949; Stein Exh. 29 #1394, 1396). By the end of February (2/27/18), Mr. Wilhoite had been fully trained on, and was operating the heavy duty front-end loaders that were formerly in the exclusive jurisdiction of O.E. 18 under TMS (Tr. 949-950; Stein Exh. 29 #1406). Mr. Wilhoite also began making off-site parts runs for Stein (Tr. 951-952; Stein Exh. 29 #1410). By early March 2018 (3/6/18), Mr. Wilhoite was fully trained, and began operating Stein's aggregate-making plants wherein he concurrently ran bobcat equipment (Tr. 953-954; Stein Exh. 30 #1416). Mr. Wilhoite had never before run the portable plants at AK Middletown in the eleven years of his employment at that site for Stein's predecessors (Tr. 955-956). Mr. Wilhoite's operation of both portable plants and bobcat

equipment continued unabated throughout March (Tr. 957-962, 965, 969-970; Stein Exh. 30 ##1419, 1420, 1426, 1430, 1433, 1448, 1453, 1458, 1463, 1473). Mr. Wilhoite also became fully trained, and began operating backhoes and the Mustang Telehandler on behalf of Stein at AK Middletown (Tr. 970-976; Stein Exh. 30 ##1490, 1494, 1498). Adhering to the ALJ's evidentiary ruling, Mr. Wilhoite – an adverse witness -- provided the following testimony:

> [BY FORMER TMS LABORER TIM WILHOITE]
>
> Q. Sheets post-March – we've gone through March.
>
> A. Right.
>
> Q. Would sheets post-March show Tim Wilhoite continuing, on occasions, to operate the portable plant from April, May, June, July, August, September, all the way up to today?
>
> A. Yes.
>
> Q. Okay. Would it be fair to say that they would primarily show you operating the portable plant on those months for those days?
>
> A. Yes, primarily.
>
> Q. And in the operation of that portable plant, would you also operate the skid steer?
>
> MS. LAITE: Your Honor, I know we've talked about this, but I would object to this testimony relating from April on.
>
> ADMINISTRATIVE LAW JUDGE: Overruled. Overruled. Go ahead.
>
> BY MR. PRYATEL:
>
> Q. Mr. Wilhoite.
>
> A. Could you repeat yourself?
>
> Q. Sure. Same question relates to when you're operating the portable plant, are you operating the skid steer to operate the portable plant?

ADMINISTRATIVE LAW JUDGE: I think that is – I'm sorry. That's confusing for even me.

So you talked about that you continued to use the portable plant and operated in the months from April moving on.

THE WITNESS: Right.

ADMINISTRATIVE LAW JUDGE: I think what he's asking – and he can certainly follow up if he doesn't think that I'm asking it correctly, but did you continue in the months from April forward also operating the skid steer?

THE WITNESS: We either used the backhoe or the skid steer to clean down there, but the majority of the time it was the skid steer.

(Tr. 977-978).

Mr. Michael Young was a former Laborer 534 member at TMS (Tr. 1026-1027). By early March 2018, Mr. Young was operating bobcats on behalf of Stein at AK Middletown (Tr. 1039; Stein Exh. 30 #1421). On March 6, 2018, Mr. Young spent ten hours running and operating Euclid haul trucks while in-training, and by March 8, 2018 was operating by himself the heavy haul Euclid trucks formerly relegated to the Teamsters at TMS, for entire Stein shifts (Tr. 1040-1052; Stein Exh. 30 ##1427, 1434, 1442, 1459, 1469, 1480, 1483, 1494, 1499, 1500, 1504, 1505). Consistent with the ALJ's evidentiary ruling, Mr. Young – and adverse witness – testified:

[BY MICHAEL YOUNG – FORMER TMS LABORER]

Q. Mr. Young, if we were to look at what you've been doing at Stein post-March, 2018 – we've gone through forms of March 2018 – what would be the predominant task you've been performing at the AK Steel facility on behalf of Stein?

A. Since March?

Q. Since March. From March all the way up to today.

A. It would be primarily driving a Euclid [heavy haul] vehicle; a haul truck.

Q. Have you operated any other equipment other than the haul trucks?

A. Yes, I have.

Q. What other equipment have you operated post-March of 2018?

A. I've operated the bobcat, I've operated the backhoe, I've operated the – I call it an Awl, I can't remember what you guys called it. It was a mustang [telehandler] and I was starting to get trained on the loader.

Q. Have you operated a loader? Just answer my question. Have you or have you not operated the loader yet?

A. Yes.

(Tr. 1052-1053).

Mr. Chris Michaels was a former TMS Laborer at AK (Tr. 1086-1087). By January 8, 2018, Mr. Michael was running a backhoe for Stein at AK Middletown (Tr. 1096-1098; Stein Exh. 28 #1013). By January 9, 2018, Mr. Michaels was running skid steers at the AK site for Stein (Tr. 1099-1100; Stein Exh. 28 ##1312, 1318, 1320). Mr. Michaels' operation of skid steers and backhoes on behalf of Stein at AK Middletown – work exclusively within O.E. 18 jurisdiction at TMS – continued unabated throughout January 2018 (Tr. 1102-1107; Stein Exh. 28 ## 1321, 1324, 1327, 1330, 1345, 1346). By February 11, 2018, Mr. Michaels had been trained on, and was operating for full shifts the Mustang Telehandler for Stein (Tr. 1108; Stein Exh. 29 #1384). Mr. Michaels continued to operate and run backhoes, skid steers, and the Telehandler (Mustang) throughout March 2018 (Tr. 1109-1115; Stein Exh. 30 ##1445, 1450, 1460, 1470). By mid-March 2018 (3/16/18), Mr. Michaels had been trained, and was operating heavy haul Euclid trucks at AK Middletown on behalf of Stein for entire work shifts (Tr. 1112-1116; Stein Exh. 30 ##1465, 1467). Consistent with this ALJ's evidentiary ruling, Mr. Michaels – and adverse witness – testified:

[BY FORMER TMS LABORER CHRIS MICHAEL]

Q. We've gone through a number of these forms through March that relate to you and your performance of work on behalf of Stein at the AK plant.

And my question for you is, if we would carry that forward from April – the months of April, May, June, July, August, September to today, have you continued to operate these pieces of equipment we've talked about in your testimony?

A. Same types. Not necessarily the same ones.

Q. Meaning they could have a different number [Stein internal] to them?

A. Yes, sir.

Q. All right. So have you continued to – I know you said you didn't think you were trained at that point, but it does appear that you were trained in the Terex [heavy haul] in March, right?

A. Yes, sir.

Q. Have you continued to operate the Terex through the months of May, June, July, August, September and October?

A. Yes, sir.

Q. Have you continued to operate the backhoe during those months?

A. Yes, sir.

Q. Have you continued to operate the bobcat during those months?

A. Yes, sir, when needed.

(Tr. 1115-1117).

Mr. Troy Neace was been a Laborer at the AK Middletown site since 1992 (Tr. 1141), and has been functioning in slag reclamation/metal recovery work at that site since 2004 (Tr. 350). By late January 2018, Mr. Neace was making off-site parts runs on behalf of Stein (Tr. 1154-1155; Stein Exh. 28 #1343). Later that same month, Mr. Neace began running backhoes for Stein at AK

Middletown (Tr. 1156-1157; Stein Exh. 28 #1344). In early February (2/7/18), Mr. Neace began his training to run Stein's aggregate-making plants at AK Middletown (Tr. 1158-1159; Stein Exh. 29 #1372). After just eight hours of training, on February 7, 2018, Mr. Neace thereafter began operating Stein's plants for entire work shifts (Tr. 1160-1162; Stein Exh. 29 ##1372, 1378). Thereafter, Mr. Neace predominately worked on behalf of Stein running its operating plants at AK Middletown (Tr. 1163-1178; Stein Exh. 29 ##1378, 1381, 1385, 1409, 1412; Stein Exh. 30 ##1415, 1422, 1423, 1424, 1428, 1437, 1443, 1461, 1468, 1471, 1477, 1492, 1497, 1502). In March 2018, Mr. Neace had already been fully trained to run bobcats on behalf of Stein, and water trucks as well (Tr. 1167, 1170, 1177; Stein Exh. 30 ##1167, 1169, 1170, 1177). Mr. Neace had already been trained and began running the water truck at AK Middletown for Stein (Tr. 1172; Stein Exh. 30 #1441). Mr. Neace also continued to make off-site parts runs (Tr. 1171; Stein Exh. 30 #1437). Consistent with the ALJ's evidentiary ruling, Mr. Neace – an adverse witness to Stein – then gave the following testimony:

> [BY FORMER TMS LABORER TROY NEACE]
>
> Q. All right, we've gone through 3 months of your timesheets – Operator Reports – Mr. Neace.
>
> A. Yes, sir.
>
> Q. And if I would carry-forward that what you're doing for Stein through the months of April, May, June, July, August and September, October to today, what is your predominant task out there? What do you predominantly do?
>
> A. Run the BOF plant.
>
> Q. And do you operate other pieces of equipment, too, from time-to-time?
>
> A. Yes, sir.
>
> Q. What pieces of equipment would you operate from time to time?

A. Backhoe, water truck, man lift, mustang, telehandlers, cutting torch.

(Tr. 1177-1178).

Mr. Michael Kingery was a former O.E. 18 operator for TMS (Tr. 1294-1296). By early March 2018 (3/9/18), Mr. Kingery had been fully trained, and was operating the heavy haul Euclid dump trucks for Stein at AK Middletown (Tr. 1298-1299; O.E. 18 Exh. 4 #1436). With just one day's training on the haul trucks under his belt, Mr. Kingery thereafter routinely drove and operated haul trucks for Stein at AK Middletown (Tr. 1300-1307; O.E. 18 Exh. ##1440, 1449, 1454, 1484, 1487, 1490). Consistent with the ALJ's evidentiary ruling, Mr. Kingery then gave the following testimony:

[BY FORMER TMS O.E. 18 OPERATOR MIKE KINGERY]

Q. Proceeding forward from March until the present day, are you continuing to perform haul truck duties?

A. From time-to-time. There is no given what I might do.

Q. So some days you might be doing operating a loader and some days you may be driving a haul truck?

A. Yes, sir.

Q. Any other jobs that you perform between that period – between end of March and now?

A. It could be anything that needs done as far as running the equipment or maybe grab a shovel.

Q. Is any of that different than what – than the work you performed when you were at TMS?

A. Like I said, I didn't run a haul truck and I wasn't able to shovel or be a laborer.

Q. But you can do that now?

A. If needed.

(Tr. 1320).

So, as demonstrated supra, from its inception of commencing work at AK Middletown, TMS' former Laborers have been trained in, and have been performing former TMS Operating Engineer and Teamsters 100 work; former TMS Operating Engineers have been trained in, and have been performing former TMS Laborer 534 and Teamsters 100 work; and former TMS Teamsters 100 employees have been trained to perform former TMS Operating Engineer work (Tr. 1283, 1291).[19] As former Teamsters 100 TMS truck driver Robert Tracy testified, in his twenty-eight years of on-site presence at AK Middletown, none of the above had ever happened (Tr. 115-117). Mr. Robert Huseman, the former IMS/OMS/Tube City/TMS Manager at AK Middletown corroborated this fact (Tr. 809). Neither the Teamsters nor Laborers had ever before run the operating plants at AK Middletown (Tr. 777). Neither the Teamsters nor the Laborers had ever before operated skid steers (a/k/a bobcats) at the AK Middletown (Tr. 774-775). Neither the Teamsters nor the Laborers had ever before run the Telehandler (Mustang) at AK (Tr. 782-784). Neither the Teamsters nor the Laborers had ever before run backhoes at AK Middletown (Tr. 788-789). Neither the Operating Engineers nor the Laborers had ever before run the water trucks at AK Middletown (Tr. 790-791).

E. <u>Ken Karoly</u>.

Mr. Ken Karoly ("Karoly") was a former TMS Laborer 534 member, functioning largely as a "Knockout Safety Attendant" at AK Middletown (Tr. 400-401). Mr. Karoly was interviewed by

[19] See also, Stein Rej. Exhs. 4, 5: Teamsters 100 Driver Bowling undergoing training on backhoes.

Stein; passed his background check; passed his physical examination; passed his drug screen, and commenced employment with Stein on January 1, 2018 (Tr. 399, 429-431; Stein Exh. 8). Mr. Karoly continued in his "Knockout Safety Attendant" position for Stein (Tr. 1215-1216).

The primary responsibilities of "Knockout Safety Attendant" are to cool down the pits upon which the loaders and large haul trucks drive so that they do not catch on fire, and to "spot" those vehicles when they are maneuvering so that they do not run into anything (Tr. 401, 1215-1216). In addition to the constant radio contact that Karoly had with the loader operators and heavy haul truck drivers at AK Middletown, beginning January 28, 2018, at the request of AK Steel, Stein provided its "Knockout Safety Attendants" with a cellular telephone (Tr. 1216-1218; Stein Exh. 10). AK Steel, Stein's new customer in Middletown, had informed Stein that at times AK could not reach the Stein Safety Attendant on the two-way radio because of the loud background noises, and they felt that a cellular telephone would help with communications (Tr. 1218). There was only one issued cell phone for the two shifts, and four Stein employees who from time-to-time worked as a Knockout Safety Attendant (Tr. 1217-1218; Stein Exh. 10).

In March of 2018, Mr. Karoly dropped the Knockout Safety Attendant cell phone and ran over it, destroying it (Tr. 411-413, 1219). Stein's Area Manager, Doug Huffnagel, learned of this property destruction by Karoly from Mr. Huffnagel's daughter, who is employed by Stein at AK Middletown (Tr. 1219).[20] This mishap occurred during Mr. Karoly's ninety-day probationary period with Stein (Jt. Exh. 16, p. 15, § 1705).

[20] When presented as a witness by Counsel for the General Council, Mr. Karoly claimed that he promptly reported this event to one of his supervisors, Mr. Chad Bare, and later even told Doug Huffnagel (Tr. 411-412). Mr. Huffnagel denied that this is how he first learned of the cellular

On March 19, 2018, Mr. Paul Reeds, the Section Manager for AK Steel Middletown in charge of the site's entire blast furnace, sent Mr. Huffnagel a text that: "I'm hearing from crew that they are without Stein up to 40 minutes during shift changes sometimes" (Tr. 1220, 1225; Stein Exh. 32). AK's text communication was in reference to multiple times when they could not reach the Stein Knockout Safety Attendant, because Mr. Karoly had switched the two-way radio to the wrong communication channel (Tr. 1222-1225). At the hearing, Mr. Karoly testified that communication between Stein and AK Steel was of utmost importance, and that it would occur multiple times during the course of his workday (Tr. 428-429). Also at the hearing, Mr. Karoly admitted to "accidentally" placing Stein's two-radio on the wrong channel at times, resulting in the inability of AK Steel to communicate with him (Tr. 450).[21] The only Stein Knockout Safety Attendant that AK Steel had communication issues with was Mr. Karoly (Tr. 1223-1224). Mr. Ben Wolf, AK's blast furnace Foreman, was "very irate" and yelling at Huffnagel about AK's inability to communicate with Karoly (Tr. 1224-1225). To remedy this issue with Stein's very recent, and very important customer, Stein altered its staffing procedures to have the Knockout Safety Attendant remain stationed at the blast furnace worksite until their shift-change relief arrived at the location where knockout safety was to be performed (Stein Exh. 32; Tr. 1224). This became

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phone's destruction (Tr. 1219). Counsel for the General Counsel did not subpoena Mr. Bare to testify.

[21] At the evidentiary hearing, Mr. Karoly testified that the notations on his termination write-up (GC Exh. 17) did not reference his not answering communications from AK Steel (Tr. 407). Yet, in the first under-oath affidavit that Mr. Karoly completed during Region 9's investigation, Karoly averred that his not answering his radio when summoned by AK was articulated by Mr. Huffnagel in the termination meeting (Tr. 451-452). Later on, Region 9 called Mr. Karoly back in for a second affidavit, where he then inexplicably altered this admission (Tr. 452-453).

a cost increase issue for Stein, as the Knockout Safety Attendant coming off shift had to remain at the pit location until such time as the Knockout Safety Attendant coming on shift had traveled all the way from the Stein parking lot to where this work was being performed (Tr. 1224). Again, the only Knockout Safety Attendant to have this in communication issue was Ken Karoly (Tr. 1225).[22]

On March 31, 2018, Loader Operator Bill Fletcher ran his Stein loader into the front end of the slag pit, crushing the right front fender (Stein Exh. 11; Tr. 442-443, 1227-1228). Karoly testified:

> [BY KEN KAROLY]
>
> Q: And if I understand what happened there is Mr. Fletcher was operating the loader, and he—a piece of material fell on the loader, and then he backed into a ladder? Is that what happened?
>
> A: I thought it was a ladder, because it wasn't my incident. It appears to the fender.
>
> Q: Alright. And were you the safety person when this event happened?
>
> A: Yes, I was.
>
> Q: Okay. And is that why you are down there as a witness, as a safety person?
>
> A: Correct. That was me.
>
> Q: Okay. And, of course, part of the job responsibilities as the safety person is to make sure that loader does not back into something and hit it and bend the fender?

[22] Counsel for the General Council did not produce any other witness to testify in any different fashion that the only Knockout Safety Attendant who managed to "inadvertently" change the channel to the wrong channel on the two-way radio was Ken Karoly (Tr. passim).

A: Again, I'm a hundred feet away, and I really can't see as close as the other vehicles can, and how close he is working that pile, I really can't do anything without putting my own person in harm's way if I get to close to his loader.

Q: I get it, but part of the safety person's job is to make sure that loader doesn't run into things?

A: Yes.

(Tr. 442-443).

Mr. Karoly also testified:

[BY KEN KAROLY]

Q: Is safety important in an operation like slag reclamation?

A: It's very important.

Q: And so the task and duties you had when you would perform as a safety person as a laborer, those were very important tasks and duties?

A: I would say almost the most important, yes.

Q: The most important?

A: AK has a number 1 safety policy, meaning safety is number 1. Communication is number 1. That's why all three of us tried to communicate with the other, me, the teamsters and operators, to make sure we have a safe job.

Q: Okay, and when you say AK, that's the client out there, right?

A: Correct.

Q: So the client has an emphasizer—or your understanding is they emphasize safety?

A: Correct.

Q: And that client has also emphasized the need to have communication?

A: Yes.

Q: And not only communication between your fellow employees of like TMS or Stein, but communication with AK?

A: That's correct.

(Tr. 427-428).

After destroying the safety cellular telephone; helping to damage a loader by not fulfilling his safety "spotter" responsibilities; and irritating AK Steel by having his two-way radio perpetually on the wrong communication channel, Mr. Huffnagel had seen enough and terminated Karoly on April 4, 2018 (Tr. 1228-1229; GC Exh. 17). When handed the completed GC Exh. 17 termination notice, Mr. Karoly did not dispute any incident detailed on the termination notice (Tr. 1226-1227). At the conclusion of the termination meeting, Mr. Karoly threw the termination notice at Mr. Huffnagel (Tr. 1226). Mr. Karoly's termination occurred while still in his 90-day[23] probationary period under the Stein/O.E. 18 labor contract (Jt. Exh. 16, p. 15).

It is jointly stipulated that Mr. Karoly did not engage in any protected, concerted § 8(a)(1) activity that may have resulted in his termination from Stein's employment, and similarly that Stein did not unlawfully discriminate against Mr. Karoly in his termination pursuant to § 8(a)(3) of the National Labor Relations Act (Jt. Stip. ¶¶ 32-33).

[23] The TMS/Laborers 534 collective bargaining agreement had a 60-day probationary period (Jt. Exh. 6, p. 12). As a non-"perfectly clear" successor under Burns, Stein had the legal right to unilaterally set, let alone collectively bargain, its initial wages, hours, and terms and conditions of employment. NLRB v. Burns Int'l. Sec. Srvc., 406 U.S. 272, 282-289, 92 S.Ct. 1571 (1972).

1. **The ALJ's Evidentiary Ruling**.

In addition to over 3,000 documents produced by Stein to Counsel for the General Counsel (Tr. 655) in response to a sweeping pre-hearing subpoena (GC Exh. 21), Stein produced an additional 14,000 pages of documents to Counsel for the General Counsel (Tr. 1276-1277). The 14,000 produced Operator Reports documented what Stein's employees were doing on a daily basis at AK Middletown from January 1, 2018, through August 2018 (Id). Many of the Operator Reports for January, February, and March 2018 were introduced through adverse testimonial witnesses (Stein Exhs. 28, 29, 30), and to prevent the hearing from carrying over the course of months, as witness-after-witness testified about their tasks at Stein, each and every day, the Administrative Law Judge issued an evidentiary ruling that created both a testimonial presumption, and a shifting burden of proof to the Counsel for the General Counsel:

> [BY ADMINISTRATIVE LAW JUDGE GOLLIN]:
>
> Well, I'm going to allow it through the end of March, but I think I'm going to end it at that point.
>
> I understand that there's inconsistencies with an earlier ruling as it relates to training [through May], but to - - from my perspective I understand that there was the stipulation as to when a substantial number of employees were hired. I understand also that there was a - - related to the timing of request to bargaining by one of the two units is not until February.
>
> So I think that, you know, you have the evidence in from January, February, and March as to whatever crossover or training that there was. I don't see the relevance of introducing, you know, the evidence from April moving forward.
>
> I mean, the question I guess I would have - - if your contention is that this was isolated to a few employees, then [the General Counsel] get to present that it arguably wasn't isolated to a few employees, but I don't think that gets to the point of why April, May, June, or July would be relevant to establishing this.
>
> I mean - - so like I said, I'll take it to the end of March. And obviously, you know, if the General Counsel wants to present evidence that it reverted back and they put

them back in their various positions and didn't have them have crossover work, I would think you would agree that whatever practice they put into place starting January, February, and March, they continued for the rest of the year. I don't think - - is that in dispute?

[MR. GOODE]: I mean, records - - they'll show what they show, so - - yeah.

[ADMINISTRATIVE LAW JUDGE]: Right.

[MR. PRYATEL]: I don't know what that answer is. I understand that Your Honor's trying to do - - and I respect your ruling, Judge. I understand you're saying March, Keith, is it. It's it.

[ADMINISTRATIVE LAW JUDGE]: I just don't see what the relevance of April, May, and June.

I understand what my earlier ruling was [through May], but from the point of time I only had piecemeal training documents coming in. Some coming in in February, some coming in in March, some coming in in July.

I mean, they were - - so for me I was trying to give you the benefit of being able to present some evidence, but at this point I don't see how going beyond March is going to be relevant to evaluating.

You're going to argue when I look at the third factor under Burns is whether or not the units continues to be appropriate.

[MR. PRYATEL]: Yes.

[ADMINISTRATIVE LAW JUDGE]: And you have whatever evidence you're going to try to introduce to show historically units are no longer appropriate because of the integration, or whatever term you want to use.

[MR. PRYATEL]: Yes.

[ADMINISTRATIVE LAW JUDGE]: Right?

[MR. PRYATEL]: Yes, sir.

[ADMINISTRATIVE LAW JUDGE]: OK. So tell me why April, May, June, and July is going to help you with that.

> I mean, the General Counsel's not going to concede the pattern continued if they don't need to, but I don't see why the evidence of showing the pattern continued is going to really matter.
>
> I mean, if [the General Counsel] want to argue that, no, they suddenly switched and no longer were integrating, well, then they're going to have to present evidence to establish that.
>
> I'm assuming you're going to have a management official who is going to say this is what we implemented and this is what we continued moving forward, and [the General Counsel] would have to rebut that.
>
> * * *
>
> [ADMINISTRATIVE LAW JUDGE]: Okay. Isn't it sufficient to ask this witness - - I mean, well, ask this witness to establish whether or not there was a change and whether or not that change continued?
>
> [MR. PRYATEL]: Sure.
>
> [ADMINISTRATIVE LAW JUDGE]: And going from that point?
>
> [MR. PRYATEL]: I could, yes.

(Tr. 894-901) (emphasis added).

Possessing over 14,000 Stein employee Operator Reports spanning January 1, 2018 – August 31, 2018, Counsel for the General Counsel did not introduce one single employee Operator Report at the evidentiary hearing!

III. LAW AND ARGUMENT.

A. The ALJ's Evidentiary Rulings.

Mid-hearing evidentiary rulings are, by their nature, interlocutory. They are subject to being re-visited, and this ALJ expressed a sincere willingness to re-visit limiting Stein's AK Middletown integration evidence, on a "relevancy" challenge, through March 2018 (Tr. 301, 392-

395). Stein, respectfully, asks the ALJ to re-consider all of the documents placed in the rejected exhibit file because, as demonstrated infra, they are at the very least "relevant".[24]

In the Burns successorship setting, the NLRB has often found facts and evidence post-dating the point in time when a successor's arguable bargaining obligation attached[25] as being relevant, if not outcome-determinative. In Sun Coast Foods, 273 NLRB 1642, 1646 (1985), an event that transpired sixty-one days after a Burns bargaining obligation undeniably attached was not only considered relevant by the NLRB, it was outcome-determinative in dismissing the plead allegation that the acquiring employer was a bona fide Burns successor. Id. at 1646. In Border Steel Rolling Mills, 204 NLRB 814 (1973), a Board decision issued on the cusp Burns, the Board again found successor unfair labor practice charges to be without merit, based in part on that employer's planned, future expansion of a building to house all employees in one setting, thereby demonstrating significant integration. Id. at 822 ("The physical facilities in which the MEM shop is located are being expanded to further integrate respondent's operation"). In Boston Gas Co., 235 NLRB 1354 (1978), a case involving RM and UC petitions following an employer's wholesale acquisition of a business, the Board considered as highly relevant three months of post-

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> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Fed. R. Evid. 401.

25 The point in time that an arguable Burns successor's bargaining obligation attaches is that point where both: (1) a representative complement of the successor's workforce has been hired; and (2) the union seeking recognition has made its demand to be recognized. Paramus Ford, 351 NLRB 1019, 1023 (2007). Accord, Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 52 (1987).

acquisition cross-training undertaken by the employer so as to integrate the newly acquired workforce. Id. at 1355. Albeit dicta, other Board cases state that the relevant Burns evidence should be examined as of the unfair labor practice hearing date. Ford Motor Co., 367 NLRB No. 8 (Oct. 5, 2018) ("There is little to nothing that has changed – as of the date of the hearing…); Ford Motor Co., 367 NLRB No. 8 (Oct. 5, 2018) ("In sum, in terms of the operations of the DTF at the time Ford commenced operations on April 24, through the date of the hearing in November…).

Thus, notwithstanding the ALJ's interlocutory evidentiary ruling at the hearing, and notwithstanding Counsel for the General Counsel's failure to introduce any contradictory evidence - - testimonial or documentary - - as to the manner in which Stein is operating at AK Middletown from its inception to date, all of the training records placed in the rejected exhibit file should be moved into the admissible evidence file.

B. Section 8(f) Collective Bargaining Agreements Do Not Garner Burns "Successor" Protection.

1. The Statute of Limitations Issue.

At the outset of the hearing, this ALJ re-confirmed his earlier telephonic ruling in response to Counsel for the General Counsel's Motion in limine that Stein should be prohibited from marshalling evidence that its predecessor's bargaining relationships were ones arising under § 8(f) of the Act (Tr. 19-20). Notwithstanding that twice-stated evidentiary ruling, Counsel for the General Counsel repeatedly objected at the hearing to all § 8(f)/§ 9(a) evidence, claiming that the United States Supreme Court's decision in Local Lodge No. 1424 (Bryan Mfg. Co.) v. NLRB, 362 U.S. 411 (1960) prohibited consideration of this issue because of the statute of limitations bar under § 10(b) of the Act (Tr. 69). Simply stated, Bryan Mfg. is inapposite to this case, in this setting.

Bryan Mfg. considered the issue of whether the same employer that entered into a plainly illegal § 8(f) bargaining agreement with its collective bargaining partner could challenge that relationship after the running of the § 10(b) six-month limitations period, when it wanted to disregard a later-occurring contract's union security clause. Bryan Mfg. was thus a classic case where a NLRA employer wanted to make use of "…its own illegal action/recognition of a minority union and 8(a)(2) illegal assistance – as a defense to its refusal to bargain". Bender Ship Repair Co., 188 NLRB 615, 628 (1971). That is not what is going on here. In whatever fashion the McGraw Construction/IMS/OMS/Tube City/TMS collective bargaining agreements came into existence, Stein was never a party to those predecessor labor agreements (Jt. Stip. ¶ 7; Jt. Exhs. 2, 3, 4, 5, 6, 7, 8). In the application of § 10(b) of the Act, the NLRB has time-and-time again stated: "The Board has found that the 6-month 10(b) period begins only when a party has 'clear and unequivocal' notice of a violation of the Act". United Kiser Srvcs., 355 NLRB 319, 319-320 (2010) (citing, Broadway Volkswagen, 342 NLRB 1244, 1246 (2004)). "This burden is met by showing that the Charging Party had either actual or constructive knowledge of the alleged unfair labor practice more than six (6) months before the filing of the charge". Id. at 320.

In this dispute, the minute Stein had any inkling whatsoever that the former TMS/Laborers 534/Teamsters 100 collective bargaining relationships may have had their origins in § 8(f) of the Act, it raised that defense (G.C. Exh. 24; Tr. 483-484, 493-496). In fact, when pressed with the initial Teamster's 100 recognitional demand, counsel for Stein, on the telephone with Teamsters 100's legal counsel and Business Agent Mike Lane, expressly requested the production of something – anything – to show that the TMS/Teamsters 100 bargaining

relationship was not one born of § 8(f) (Tr. 494-495). Teamsters 100 produced nothing (Tr. 495-496)! They did not locate anything! (Id.).

There is no § 10(b) statute of limitations bar to the § 8(f)/§ 9(a) issue in this case. And, Bryan Mfg. is not instructive in this Burns successor dispute. See, James Julian, 310 NLRB 1247 (1993) (allowing a petitioning union to challenge as a § 8(f) arrangement a collective bargaining agreement with an employer and another union that had been in existence for over thirty years).

2. <u>Davenport Insulation</u>.

The NLRB has consistently held:

> The situation in this case is thus clearly distinguishable from that in Burns or in Ranch-Way, where the union's contract with the predecessor employer created a valid presumption of continuing majority which carried over to the successor employer. We hold, therefore, that where, as here, a contract with a predecessor employer has been entered into pursuant to § 8(f), no duty is imposed on the successor employer to honor its predecessor's bargaining obligation unless there is independent proof of the union's actual majority and of the successor employer's unlawful refusal to bargain.

Davenport Insulation, 184 NLRB 908 (1970). The Board's position in Davenport Insulation has gained Circuit approval. Colorado Fire Sprinkler, Inc., 891 F.3d 1031, 1040 (D.C. Cir. 2018).

3. <u>Stein's Predecessors Never Achieved § 9(a) Status</u>.

Counsel for the General Counsel's theory in this dispute is that a § 9(a) NLRA relationship existed "from the get-go" when slag reclamation/metal recovery work was first performed at AK Middletown (Tr. 69-70).[26] The original slag reclamation/metal recovery employer at AK Middletown was McGraw Construction Company (Jt. Stip. ¶ 7; Tr. 124-125). As its name implies,

[26] Thus, Region 9 does not contend or allege that what was once a § 8(f) relationship evolved into a full-blown § 9(a) NLRA relationship (Tr. 70).

McGraw Construction Company is a "construction" employer. McGraw Construction has a precedential history of entering into § 8(f) relationships with its unions. McGraw Construction Co., 131 NLRB 854, 857-858 (1961). McGraw Construction has a precedential history of entering into § 8(f) collective bargaining agreements at AK Middletown (f/k/a ARMCO Steel). Ohio Valley Carpenters' Dist. Council, 131 NLRB 854, 856 (1961). Teamsters Local 100 has a documented history of entering into illegal, proscribed § 8(f) collective bargaining arrangements with non-construction employers. Teamsters Health & Welfare Fund, 233 NLRB 814, 817-818 (1977).[27]

Witness after witness, some who had been working at the AK Middletown facility for nearly thirty years, testified uniformly that there never was an NLRB-held election for the unions that claimed to be their collective bargaining representative (Tr. 108-109, 271-272, 293, 362, 489, 563-564). Mr. Bob Huseman, who was the Supervisor and then Site Manager for IMS when it grabbed the AK Middletown slag reclamation/metal recovery work from McGraw Construction in 1997 testified that there has never been an NLRB-sponsored election at AK Middletown, even up to his status as Vice-President of Operations for TMS when the work was then handed over to Stein (Tr. 761-762, 764). During that same time period, no authorization cards of representation were ever presented by Teamsters 100 or Laborers 534 (Tr. 765-766). Neither the Teamsters 100 union, nor Laborers 534 union have a record of ever presenting majority authorization representational cards at AK Middletown (Tr. 489, 501; Jt. Exh. 23, p. 8; Jt. Exh. 24). O.E. 18, in stark contrast, established its § 9(a) status in the slag/metal recovery operations at AK Middletown when the servicing employer was Olympic Mill Services (O.E. 18 Exh. 1; Tr. 692-694).

[27] For these reasons, the joint stipulation that Stein's slag reclamation/metal recovery work is not "construction work" (Jt. Stip. ¶ 29) lends nothing to the salient analysis.

O.E. 18 later re-affirmed its § 9(a) status, in writing, in 2008 when what was then IMS merged with Tube City (O.E. 18 Exh. 2; Tr. 695-699). And, O.E. 18 established its § 9(a) majority status when Stein begin its operations at the AK Middletown facility (O.E. 18 Exh. 3, passim).

In sum, neither Teamsters 100 nor Laborers 534 produced any evidence of an NLRB-conducted election having taken place at AK Middletown or the former ARMCO Middletown facility, and neither Charging Party union possesses any representational authorization cards, or even a document purporting to present majority-based authorization cards to McGraw Construction, IMS, OMS, Tube City or TMS. "[P]roof of majority status is peculiarly within the special competence of the union". Stoner Rubber Co., 132 NLRB 1440, 1445 (1959).

If, by chance, either Laborers 534 or Teamsters 100 hopes to establish their purported § 9(a) relationship with any of Stein's predecessor employers at AK Middletown through a consent election held by the then-employer and one of those two unions, that will not do since the NLRB does not recognize such an unmonitored election for later-occurring Board disputes:

> The Petitioner, pursuant to a consent election, has since 1945 represented the clericals of the Employer's production and control division. These are the only clerical employees now represented for purposes of collective bargaining. The Petitioner urges that this bargaining history demonstrates the appropriateness of the petition for or [sic] other small units of clerical employees throughout the plant. We do not agree. It is well established that units which parties agree to for purposes of consent elections do not necessarily set a controlling pattern to be followed in cases decided by the Board.

Sperry-Rand Corp., 94 NLRB 1724, 1725 (1951). Accord, Humble Oil & Refining, 115 NLRB 1485, 1487 (1956).

There is more! Both the Teamsters 100 and Laborers 534 TMS labor contracts at AK contain text highly suggestive of a § 8(f) relationship, and both are fraught with illegality if, as now contended, they are § 9(a) agreements. In making the § 8(f) versus § 9(a) determination, the

NLRB examines the recognitional language bargained by the parties. James Julian, 310 NLRB 1247, 1250 (1993).[28] "Regardless of whether the contract in dispute is an initial or successive collective bargaining agreement, absent a Board-conducted election, the Board requires positive evidence that the union sought, and the employer extended recognition to a union as the § 9(a) representative of its employees before concluding that the relationship between the parties is § 9(a) and not § 8(f)". Id.at 1252-1253 (quoting, J&R Tile, 291 NLRB 1034, 1036 (1988)). Neither the Teamsters 100 AK collective bargaining agreement, nor Laborers 534 AK collective bargaining agreement contains recognitional language mentioning § 9(a), or even that there was at any point in time a showing of majority status (Jt. Exh. 6, p. 2; Jt. Exh. 7, p. 1).

Both Charging Party union contracts with TMS contain hiring hall provisions found almost exclusively in the construction setting (Jt. Exh. 6, p. 3; Jt. Exh. 7, p. 2). At least half of the Teamsters 100 truck drivers obtained their employment at AK Middletown through the Teamster's hiring hall in Cincinnati, Ohio (Tr. 99). TMS Laborers who testified confirmed they also obtained their AK Middletown employment through the local Laborer's hiring hall (Tr. 352-353, 803-804, 822-823, 928-929, 1053-1055). The hiring halls were exclusive to constituent union members affiliated with those two unions (Tr. 352-353). If, as now contended, the Teamsters 100 and Laborers 534 collective bargaining relationship at AK Middletown has always been one based on § 9(a), these hiring hall provisions would be plainly illegal. NLRB v. Nat'l. Maritime Union, 175

[28] The Board's decision in James Julian is a prime example of why § 10(b) and Bryan Mfg. do not act as a bar to the issues in this dispute. In that case, a collective bargaining relationship that was in existence for over thirty years between an employer and a union (the Steelworkers) was able to be attacked and challenged by a second union (Operating Engineers) asserting § 8(f) status.

F.2d 686, 688-689 (2nd Cir. 1949);[29] Const. Bldg. Materials Drivers No. 83, 243 NLRB 328, 333 (1979) ("In view of our finding that the employers signatory to the…agreements are not employers engaged primarily in the building and construction industry, it follows that the hiring hall provisions in these agreements are not protected by § 8(f)(4) of the Act"). Statutorily, it is only through § 8(f) that hiring hall provisions of this nature are sanctioned with legality:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged…in the building and construction industry with the labor organization of which building and construction employees are members…because…(4) such agreement…provides for priority and opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area.

29 U.S.C. § 158(f)(4). There is a legal presumption against the notion that parties collectively bargain in violation of the law. Pekowski Ent., 327 NLRB 413, 424 (1999).

For the foregoing reasons, Stein has no Burns successor obligations towards any of the Charging Party unions. "It is elementary that in a refusal to bargain case, the General Counsel has the burden of proving the Union's majority". Stone Rubber Co., 123 NLRB 1440, 1445 (1959). The Second Amended, Consolidated Complaint should therefore be ordered summarily dismissed.

C. <u>Stein Is Not a "Perfectly Clear" Burns Successor</u>.

The Supreme Court's Burns decision left open the limited, narrow possibility that a NLRA "successor" employer may forfeit its legal right to establish initial wages, hours, and terms and conditions of employment where before hiring the full complement of its workforce it makes it "perfectly clear" that it will be abiding by its predecessor's labor agreement. NLRB v. Burns Int'l.

[29] The illegal hiring hall provision in National Maritime Union read nearly identical to that found in the TMS/Laborers 534 contract at AK. NLRB v. Nat''l. Maritime Union, 175 F.2d at 688.

Sec. Srvc., 406 U.S. at 291. In Spruce Up Corp., 209 NLRB 194 (1974), the Board elaborated on this "perfectly clear" exception:

> We concede that the precise meaning and application of the [Burns] Court's caveat is not easy to discern. But any interpretation contrary to that which we are adopting here would be subject to abuse, and would, we believe, encourage employer action contrary to the purposes of this Act and lead to results which we feel sure the Court did not intend to flow from its decision in Burns. For an employer desirous of availing himself of the Burns right to set initial terms would, under any contrary interpretation, have to refrain from commenting favorably at all upon employment prospects of old employees for fear he would thereby forfeit his right to unilaterally set initial terms, a right to which the Supreme Court attaches great importance in Burns. And indeed, the more cautious employer would probably be well advised not to offer employment to at least some of the old workforce under such a decisional precedent. We do not wish – nor do we believe the Court wished – to discourage continuity in employment relationships for such legalistic and artificial considerations. We believe the caveat in Burns, therefore, should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer, unlike the Respondent here, has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

Id. at 195. The federal circuits have added an additional feature to this "perfectly clear" analysis: "The rare [Burns] exception is for 'instances in which it is perfectly clear that the new employer plans to retain all of the employees in the [bargaining] unit'". S&F Market Street Healthcare v. NLRB, 570 F.3d 354, 358 (D.C. Cir. 2009).

Counsel for the General Counsel utterly failed to meet either the NLRB or the federal circuit "perfectly clear" successor burdens. Every employee who testified at the hearing swore under oath that they understood when transitioning employment from TMS to Stein, their wages, hours, and terms and conditions of employment would be different from those that they enjoyed as a TMS employee at AK Middletown (Tr. 141-143, 289-290, 364, 432-434, 470, 570-573). Additionally, those same employees testified they understood perfectly well that there was no

guarantee articulated by Stein that they would even transition over in employment from TMS (Tr. 143-144, 288, 362-364, 429-431, 578, 907, 1197).

This "perfectly clear" theory of Region 9 should never have been litigated in this case, not only because Region 9 had absolutely no proof to support it, but also because Counsel for the General Counsel conceded at the hearing that the Second Amended Consolidated Complaint, on its face, does not even plead a "perfectly clear" theory (Tr. 754). This ALJ appropriately commented on the "hide and seek" pleading approach undertaken by Region 9:

> [BY ALJ GOLLIN]
>
> And I mean, from my interpretation of the evidence - - and have not re-read the record - - [Stein] communication was pretty clear back in November that there were going to be changes. Whether or not there was some confusion as to what hoops the employees would have to jump through in order to re-employed, that's a separate matter, but it seems pretty clear to me from - - I forgot the gentleman's name, when he made the statement in the meeting [and] distributed that there were going to be some changes in the terms and conditions of employment.
>
> So my reading of Spruce Up is that when Employer has not yet commenced operations and announces new terms prior to or simultaneous with the invitation of previous workforce to accept employment under those terms, we do not think it would be fairly said that the new Employer plans to retain all of the employees in the unit as the phrase was intended.
>
> So even though - - I think there was some pretty solid [Stein] communication that there was going to be at least some new terms communicated to the employees at the time. So, you know, again, I understand the General Counsel's primary theory of Advance Stretch Forming and that there were an obligation at a point in time and - - or there was a violation at a point in time, and whatever obligations triggered from that, which is separate and distinct from the successor argument, but, you know, from the representation made, it's a Burns successor case to me, so that's how I'm viewing it.
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> And, you know, if the General Counsel wants to average [sic] what it wants to argue, you know, I think that in all fairness to Respondent, that is an issue that needs to be alleged and made clear and being ambivalent about it is not [in] the spirit of I think what the General Counsel should be doing in this case.

(Tr. 757-759).[30]

To the extent Counsel for the General Counsel is, in fact, advocating for "perfectly clear" Burns successor liability in this dispute, Stein is entitled to judgment as a matter of law.

D. Stein is Not a Burns Successor.

1. Basic Burns.

A brief re-visitation of what Burns held, and what its four Supreme Court dissenters held is in order here. The seminal "successor" decision under the NLRA is, of course, NLRB v. Burns Int'l. Sec. Srvcs., 406 U.S. 272, 92 S.Ct. 1571 (1972). There, one security guard service company (Burns International) replaced a predecessor security guard company (Wackenhut Corp.) at a Lockheed aircraft manufacturing facility in Ontario, California. Just five months prior to Burns' being awarded the contractor security bid, Wackenhut's guards had voted in a NLRB-supervised election to be presented by the United Plant Guard Workers of America (the "UPG"). Id. at 275. The UPG was certified by the NLRB as the guards' representative. Id. Wackenhut and the UPG Union then entered into a collective bargaining agreement lasting for three years. Id. When Burns International was the successful bidder for renewal of the guard services contract at Lockheed, it not only hired a majority (27 of 42) of Wackenhut's former guards, but it did so during the one-year irrebutable presumption of majority status period afforded to a new bargaining relationship under the NLRA. Id. Burns, however, obtained a majority of cards from an altogether different union, the American Federation of Guards ("AFG") union, and informed the newly-hired workers

[30] 29 C.F.R. § 102.15 affords parties defending against the NLRB with fundamental due process rights.

(most of whom were former Wackenhut guards) that they henceforth would be represented by the AFG, and then it set, unilaterally, the terms and conditions of their employment. Id. at 275-276. Significantly, during the NLRB and court appeals process, Burns International never challenged the unit issue as being limited to workers at the Lockheed Ontario, California facility. Id. at 278. This undisputed fact was important to the Burns majority decision:

> It would be a wholly different case if the Board had determined that because Burns' operational structure and practices differed from those of Wackenhut, the Lockheed bargaining unit was no longer an appropriate one. Likewise, it would be different if Burns had not hired employees already represented by a union certified as a bargaining agent, and the Board recognized as much at oral argument. But where the bargaining unit remains unchanged, and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent there is little basis for faulting the Board's implementation of the express mandates of § 8(a)(5) and § 9(a) by ordering the employer to bargain with the incumbent union.

Id. at 280-281 (emphasis added). The Burns Court, nevertheless, reversed the NLRB's determination that the "successor" was obligated to apply, and could not unilaterally alter Wackenhut's former UPG labor agreement:

> Although Burns had an obligation to bargain with the union concerning wages and other conditions of employment when the union requested it to do so, this case is not like a § 8(a)(5) violation where an employer unilaterally changes a condition of employment without consulting a bargaining representative. It is difficult to understand how Burns could be said to have changed unilaterally any pre-existing terms and conditions of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit, and prior to July 1, no outstanding terms and conditions of employment from which a change could be inferred. The terms on which Burns hired employees for service after July 1 may have differed from the terms extended by Wackenhut and required by the collective-bargaining contract, but it does not follow that Burns changed its terms and conditions of employment when it specified the initial basis on which employees were hired on July 1.

Id. at 294.

Four Justices concurred in part, and dissented in part from the Burns majority opinion. Those Justices also commented on the apparent, "appropriate unit" issue:

> Unlike Wackenhut, Burns had never bargained with the union consisting of its employees in a single job location. One of the reasons for this difference was that Burns made a practice of transferring employees from one job to another, on a temporary or permanent basis. Both Burns and Wackenhut had numerous security guard job sites in Southern California; for administrative purposes, Wackenhut treated each job site as a separate unit, while Burns treated large numbers of them together.
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> Thus, in a situation where there was no evidence at the time as to the preference of a majority of the employees at the Lockheed facility as to a bargaining agent, and there was no independent finding that the employees at the facility were in an appropriate unit as to Burns, the Board nonetheless imposed the duty to bargain.
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> That is not to say that Burns would be unilaterally free to mesh into its previously recognized Los Angeles County bargaining unit a group of employees such as were involved here who already had designated a collective bargaining representative in their previous employment. Burns' actions in this regard would be subject to the commands of the Labor Management Relations Act, and to the regulation of the Board under proper application of governing principles. The situation resulting from the addition of the new element of the component workforce of an employer has been dealt with by the Board in numerous cases, and various factors are weighed in order to determine whether the new workforce component should be itself a separate bargaining unit, or whether the employees in this component shall be "accreted" to the bargaining unit already in existence. See, e.g. NLRB v. Food Employers Council, Inc., 399 F.2d 501 (9th Cir. 1968); Northwest Galvanizing Co., 168 NLRB 26 (1967).

Id. at 298, 309.

Following Burns, the NLRB itself has recognized that the "successor" principles established in Burns and its progeny have application and precedential weight only where the bargaining unit of the predecessor has been continued in existence by the successor:

> In the Burns case, we held that in normal circumstances, a successor-employer is required to take over his predecessor's collective bargaining agreement. But we there enunciated and applied the rule in a situation in which the contract had been negotiated on behalf of employees in a bargaining unit which continued in existence unaltered under the successor-employer. We plainly anticipated, in our decision, the existence of dissimilar situations in which successor-employers could not be expected to abide by this rule, and as evidenced by subsequent cases, we have refused, accordingly, to apply the rule in a mechanicalistic fashion.

In re: G.T. & E. Data Services, 194 NLRB 719, 721 (1971) (emphasis added).

Burns took note of the dual NLRB policy considerations at the forefront of its ruling: The NLRB's desire for stability in bargaining relationships and the labor peace derivative therefrom, as directly juxtaposed against the equally-important § 7 rights guaranteeing majority representational rights. NLRB v. Burns Int'l. Sec. Srvc., 406 U.S. at 287. Burns squarely held that the Board, through whatever policy choices it makes, may not simply decide to make one protected NLRA right subservient to an equally protected NLRA right: "Congress has not chosen to make the bargaining freedom of employers and unions totally subordinate to this [stability] goal". Id. And, Burns noted that the Board is well-positioned to address altered bargaining units that arise in the successor setting by turning to its developed unit determination principals, or analogous "accretion" unit principals:

> The situation resulting from the addition of a new element of the component workforce of an employer has been dealt with by the Board in numerous cases, and various factors are weighed in order to determine whether the new workforce component should be itself a separate bargaining unit, or whether the employees in this component shall be "accreted" to the bargaining unit already in existence.

Id. at 309 (Rehnquist, J.; Brennan, J.; Powell, J., Burger, C.J., concurring in part and dissenting in part).

2. Unit Determination Principals in the Burns Setting.

The NLRB has continued to invoke and apply its presumption that an employer's plant-wide unit is appropriate when applying Burns. "A plant wide unit of all employees [excluding office clerical employees, technical employees, salesmen, guards, and supervisors] is presumptively appropriate for bargaining". Border Steel Rolling Mills, 204 NLRB 814, 821 (1973). After all, "Congress expressly contemplated the plant-wide unit in Section 9(b) and we have held that '[a] plant-wide unit is presumptively appropriate under the Act, and a community of interest inherently exists among such employees'". Airco, Inc., 273 NLRB 348, 349 (1984) (quoting, Kalamazoo Paper Box Corp., 136 NLRB 134, 136 (1962)). Under traditional unit determination precedents, the Board has held: "We find it particularly inappropriate to carve out a disproportionately small portion of a large, functionally integrated facility as a separate unit". Publix Supermarkets, 343 NLRB 1023, 1027 (2004).

Most recently, the Board vacated its unit determination analysis as set forth in Specialty Healthcare & Rehabilitation Ctr. of Mobile, 357 NLRB 934 (2004), in favor of that announced in PCC Structurals, 365 NLRB No. 160 (2017). Adopting a Second Circuit analysis, the Board announced its new unit determination standard as focusing on "whether 'excluded employees having meaningful distinct interests in collective bargaining that outweighs similarities with unit members'". PCC Structurals, 365 NLRB No. 160 (2017) (quoting, Constellation Brands v. NLRB, 842 F.3d 784, 794 (2nd Cir. 2016)).[31] The Board generally disapproves of "fractured units". Seaboard Marine, 327 NLRB 556 (1999); Bergdorf Goodman, 361 NLRB 50, 51 (2014). "The community-of-

[31] The analytical change from Specialty Healthcare to PCC Structurals, and the appropriateness of what is known as "micro-units" is currently before the Board in The Boeing Co. (Charleston AFB), 337 NLRB 152 (2001).

interest test focuses almost exclusively on how the employer has chosen to structure its workplace". Bergdorf Goodman, 361 NLRB 50, 52 (2014) (quoting, Specialty Healthcare, Inc. 357 NLRB 934, 942, n. 19 (2011)). "The Board does not favor organization by department or classification". Airco, Inc., 273 NLRB 348, 349 (1984).

The existence of bargaining history – even long-term bargaining history – does not trump the relevant unit analysis in the Burns setting:

> Although the weight given to a prior history of collective bargaining is "substantial", it is not "conclusive". The Board "will not adhere to the historical bargaining unit where that unit does not conform reasonably well to other standards of appropriateness". In cases where there is no rationale basis for a unit, it will be found inappropriate, history notwithstanding.

Trident Seafoods, Inc. v. NLRB, 101 F.3d 111, 119-20 (D.C. Cir. 1996). In other words:

> If a [successor employer] were to introduce significant evidence that [the predecessor's] units had been rendered obsolete by industry shifts or developments at [the predecessor] and the Board had applied the presumption in favor of long-established units and disregarded this evidence, we would not hesitate to find the application of the presumption irrational.

Banknote Corp. of Am. v. NLRB, 84 F.3d 637, 648 (2nd Cir. 1996) (emphasis added).

What's more, even long-term bargaining history is uninstructive where the predecessor employer's recognized units were only "marginally appropriate" before the successor's acquisition:

> This is not to say that a historical unit will always be upheld in the face of "compelling evidence" of inappropriateness. [citations omitted] The most common way for a successor to meet its burden is to show that it has made significant revisions in plant operations and employee duties. [citations omitted] Even if the success or implements no significant changes, we held in Trident Seafoods that an historical unit may still be found inappropriate if it fails to "conform reasonably well to other standards of appropriateness". On occasion, both pre-acquisition factors and post-acquisition changes in plant operations will combine to render a historical unit inappropriate. [citations omitted] A unit might, for instance, be only marginally appropriate prior to the transaction, in which

> event relatively small changes following the transfer of ownership could push it into the category of an inappropriate unit.

Deferiet Paper Co. v. NLRB, 235 F.3d 581, 584 (D.C. Cir. 2000) (emphasis added). The NLRB Division of Judges has recognized: "Sufficient functional integration between the units will 'obliterate' the old historical units and create a 'new operation consolidating previously separate units of employees'". Teamsters Local Union No. 206 & Safeway, Inc., 2017 WL 5068248 (Oct. 31, 2017) (citing, Martin Marietta Co., 270 NLRB 821, 822 (1984)). See also, Consolidated Film Indus., 207 NLRB 385, 386 (1973) ("The principal justification for the separate unit is the certificate [of recognition] and the separate bargaining history. However, these factors are more than outweighed by the integration of the videotape department into the employer's operations since its acquisition from Acme").

What the Board has said with respect to non-construction[32] craft units – which is how McGraw Constructions/IMS/OMS/Tube City/TMS decided to conduct their AK Middletown businesses – is also instructive. The Board has held:

> In addition, we note that we are here confronted with a group of employees who, though craftsman, do not in the traditional sense possess strong craft identity. Thus, their skills are generally regarded as nonapprenticeable and the varied sources from which welders in the instance case have acquired skills and experience serve to distinguish them from other groups possessing such identity. Indeed, the Board, since 1955, has not recognized welders as a distinct group of craftsman in any industry other than aerospace.
>
> We are also convinced that any separate community of interest possessed by the welders has been largely submerged into the more encompassing community of interest shared by all other employees. As heretofore indicated, the Employer's Tulsa operations involve a continuous flow process, with the work of welders being performed in conjunction with that of non-welders and intimately related to the overall production effort. This, together with the frequent contacts between and the interdependence of welders and nonwelders, in performance of

[32] Jt. Stip. ¶ 29.

> their duties, common supervision of welders and non-welders, and the fact that the welders are themselves separated from each other both on a geographic and supervisory basis, support our conclusion that they have common interests with the other employees.

North American Aviation, 162 NLRB 1267, 1271 (1967).

With these controlling legal principals in mind, the long-held presumptive plant-wide unit is the only appropriate unit applicable to Stein at AK Middletown.

3. <u>Changed Units in the Burns Successor Setting</u>.

The NLRA statutorily compels the Board, through § 9(b) of the Act,[33] to determine the appropriateness of units in a Burns successor setting. NLRB v. Indianapolis Mack Sales & Service, 802 F.2d 280, 283 (7th Cir. 1986). The Board itself has recognized this statutory obligation: "Section 9(b) of the Act provides that '[t]he Board shall decide', and 'in each case' what unit is appropriate for collective-bargaining purposes". Crown Zellerbach Corp., 246 NLRB 202, 203 (1979). In fulfilling this statutory obligation under the Burns analysis, it must be remembered:

> A unit might, for instance, be only marginally appropriate prior to the [successor] transaction, in which even relatively small changes following the transfer of ownership could push it into the category of an inappropriate unit.

Deferiet Paper Co. v. NLRB, 235 F.3d 581, 584 (D.C. Cir. 2000). Furthermore, the Board operates under the presumption that only a plant-wide unit is appropriate under the Act: "Congress expressly contemplated a plant-wide unit in Section 9(b) and we have held that '[a] plant-wide unit is presumptively appropriate under the Act, and a community of interest inherently exists

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> The Board shall decide in each case whether, in order to assure employees the fullest freedom in exercising the rights guaranteed by this [Act], the unit appropriate for the purpose of collective bargaining....

29 U.S.C. § 159(b).

amongst such employees'". Airco, Inc., 271 NLRB 348, 349 (1984) (quoting, Kalamazoo Paper Box Corp., 136 NLRB 134, 136 (1962)).

The NLRB's settled community-of-interest tests evaluate the following factors when determining unit appropriateness:

> [W]hether, in relation to other employees, they have different methods of compensation, hours of work, benefits, supervision, training and skills; if their contact with other employees is infrequent; if their work functions are not integrated with those of other employees; and if they have historically been part of a distinct bargaining unit.

Banknote Corp. v. NLRB, 84 F.3d 637, 648 (2nd Cir. 1996) (citing, Kalamazoo Paper Box Co., 136 NLRB 134, 137 (1962)).

Applying these legal standards first to Stein's predecessor, TMS, it is abundantly clear that the segregated craft units that TMS had in force and effect were statutorily inappropriate, or at best "marginally appropriate". Deferiet Paper Co. v. NLRB, 235 F.3d at 584.

The contact between the Laborers, Teamsters, and Operating Engineers at TMS to perform slag reclamation/metal recovery was not "infrequent", but rather minute-by-minute, day-by-day, shift-by-shift (Tr. 74-75, 78, 128, 135-136, 281-283, 334-335, 423-424, 427, 531-532, 559, 568). The Teamsters/Laborers/OE 18 interaction included not only the three trades working in unison towards a common objective, but being in constant contact with each other via two-way radios in order to perform their work (Tr. 128, 136, 281-283, 424). The Board has defined work-integrated processes precisely as:

> The evidence indicates, and I find, that the employees at the petitioned-for-unit work in an integrated process. The evidence indicates that the Employer's work crews work together and function as a team with respect to the job operations. Regardless of their work assignment on a crew, the employees work together in close proximity in an interrelated process.

A.C. Pavement Stripping Co., 296 NLRB 206, 210 (1989).

As demonstrated supra at pp. 7-8, nearly all of the terms and conditions of employment and hours of work of the Teamsters, Laborers, and Operators were identical under TMS, notwithstanding its negotiation of three separate labor agreements. All three trades were under common supervision at TMS (Tr. 90-91, 132-133). A.C. Pavement Stripping Co., 296 NLRB 206, 209 (1989) ("All employees on a crew are under the same supervision structure"; "There is no separate supervision over employees based on their union affiliation"); In re: Federal Elec. Corp., 167 NLRB 469, 470 (1967) ("[T]hese operators…are subject to the same supervisors…")). Although, at TMS, the three separate trade unions operated different pieces of machinery and equipment, their job skills were on par with each other in light of the fact at Stein that it took only a day for one trade to learn the other's operation of that equipment (Tr. 850-851, 921, 1040-1042, 1104, 1112-1114, 1160-1162). All three TMS trades performed their work on the same plot of property within the AK Steel Mill (Stein Exh. 31; Tr. 235, 453). In re: Federal Elec. Corp., 167 NLRB 469, 470 (1967) ("Furthermore, these operators are located in the same geographical areas, are subject to the same supervision and labor policies, and share common employment benefits, working conditions, and contractual terms as the other employees in the Logistics Department unit"). All three TMS trades also shared the same parking lot, lunch room facilities, break room, and shower facilities (Tr. 275-276, 1274). Publix Supermarkets, 343 NLRB 1023, 1025 (2004) ("In addition to the above work-related content, all milk plant employees also have casual contact with Distribution employees in the cafeteria and the parking lot, when passing through the Distribution area to reach their workplace, in the break rooms and other shared areas of the

facility"; Western Elec. Corp., 268 NLRB 351, 352 ("They share the same health facilities, cafeteria, parking facilities and restrooms…").

That the former TMS workers were assigned tasks based strictly on their union designation is not determinative in the "appropriate unit" analysis. A.C. Pavement Stripping Co., 296 NLRB 206, 209 (1989) ("Painters are not hired due to their skills as painters, but are designated as such based on their union designation rather than level of expertise in the craft"; "[A]lthough painter and teamster employees receive different wages and benefits, the different wage scales are based on union affiliation and contractual mandates").

Of the Board's community-of-interests "appropriate unit" standards, that leaves only for serious debate an examination of whether the three separate TMS trades "…have historically been part of a distinct bargaining unit". Banknote Corp. v. NLRB, 84 F.3d 637, 648 (2nd Cir. 1996) (citing, Kalamazoo Paper Box Co., 136 NLRB 134, 137 (1962)). But in the Burns setting, bargaining history is plainly insufficient to overcome what is a true "appropriate unit". "Bargaining history alone [is] insufficient to support the Board's conclusion that a separate unit of service department employees was appropriate within inquiry into the parts department employees' community of interest". Indianapolis Mack Sales & Service, 288 NLRB 1123, 1124 (1988), on remand from, 802 F.2d 280 (7th Cir. 1980). See also, Consolidated Film Indus., 207 NLRB 385, 386 (1973) ("The principal justification for this separate unit is the certification [of recognition] and the separate bargaining history. However, these factors are more than outweighed by the integration of the videotape department into the employer's operation since its acquisition from Acme"). Under Burns, established bargaining units of 30, 20, and 14 years duration have been "obliterated" against continuation under a successor who takes additional steps to integrate the

predecessor's "marginally appropriate," prior units. Trident Seafoods, Inc. v. NLRB, 101 F.3d 111, n. 12 (D.C. Cir. 1996) (refusing to recognize predecessor's 20-year bargaining history); Canteen Service Co., 1992 WL 213830 (1992) (N.L.R.B.G.C.) (refusing to adhere to predecessor's 30-year bargaining history); Lennox Indus., Inc., 308 NLRB 1237, 1238 (1992) (refusing to adhere to 14-year bargaining history).

It is as if the three separate craft units formerly in place at TMS were a mere "accident". "Herein, the record shows no rationale basis exists for the two historical units other than being purely historical accidents". A.C. Pavement Stripping Co., 296 NLRB 206, 210 (1989). This will not do because "...the Board has...long held that it will not give controlling weight to a history of collective bargaining 'to the extent that it departs from statutory provisions or clearly established Board policy concerning the composition and scope of bargaining units'". A.C. Pavement Stripping Co., 296 NLRB 206, 210 (1989) (quoting, William J. Keller, 198 NLRB 1144, 1145 (1972)).

With TMS' former trade-segregated units, at best, "marginally appropriate,"[34] then "...relatively small changes following the transfer of ownership could push it into the category of an inappropriate unit". Deferiet Paper Co. v. NLRB, 235 F.3d 581, 584 (D.C. Cir. 2000). Stein's changes to the former straight-jacketed trade unions at TMS were anything but "small changes". Id.

[34] Deferiet Paper Co. v. NLRB, 235 F.3d at 584.

Stein not only continued the highly synergized work integration formerly in-place at TMS,[35] and continued common management and supervision,[36] common parking lots, lunchrooms, and shower facilities,[37] and common daily and monthly safety meetings,[38] on one piece of property[39] but it wiped out of existence the only vestige of "separateness" in place between the trades at McGraw Construction/IMS/OMS/Tube City/TMS -- the exclusive use of machinery and equipment in performance of the slag reclamation/metal recovery work at AK. See supra at pp. 21-31.

In Border Steel Rolling Mills, 204 NLRB 814 (1973), the Board rejected Burns successor status after a rebar manufacturer with representation by the United Steelworkers Union acquired the assets and employees of the semi-tractor and trailer maintenance business used to deliver its manufactured products. The acquired business had in place the Teamsters as its NLRB-certified representative for "mechanics, mechanic helpers, trailer men, tire men, fuel men, carpenters, carpenters helpers and other shop employees". Id. With the acquisition, Border Steel announced it was recognizing the Steelworkers Union for the combined units, not the Teamsters. "When the former Berman employees were hired by Respondent, Respondent immediately applied the Steelworkers contract to cover them to the extent that the contract was applicable;

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[35] Tr. 281-283, 312, 334, 368-374, 406, 425-427, 509-510, 514-516, 521, 930-931, 1028-1029, 1064, 1081-1082, 1183, 1283, 1291, 1315, GC Exh. 13; Stein. Exh. 1.

[36] Tr. 528, 1056.

[37] Tr. 328, 1214-1215.

[38] Tr. 274-276.

[39] Tr. 453.

even though the existing contract did not list specific classifications to cover the new operation". Id. at 819. Taking note of "Respondent's change of operations", the Board stated that while Berman's former employees previously only worked on Berman's truck tractors and trailers, they now were assigned to work on all of the equipment at Border Steel Mill, including "forklifts, Euclid trucks, goats, and other equipment that could be moved into the shop for maintenance or repair". Id. at 819-820. The NLRB also noted: "The pickup truck drivers for both departments often pick up parts for each other." Id. at 820. The now combined employees were set to share a "central lunch and restroom facility". Id. Rejecting Burns successor status, the NLRB first recognized the presumptiveness of a plant-wide unit: "A plant-wide unit of all employees (excluding office clerical employees, technical employees, salesmen, guards, and supervisors) is presumptively appropriate for bargaining". Id. at 820. The Board then noted: "Respondent has a single plant integrated steel making operation". Id. at 821. The Board also further recognized:

> Administratively, the MEM shop employees are completed integrated with Respondent's overall operation. Labor policy is common for all employees. At the top of the supervisory hierarchy, Executive Vice President Lupia sets policy for the entire operation. James Bray at the shop superintendent level supervises both the employees in the MEM shop and a large number of truck drivers. The working conditions for all 400 employees at the El Paso plant are regulated by the same labor policy and labor agreement.

Id. at 821. Ultimately, the Board found "…an insufficient community of interest among the shop employees in the MEM unit to warrant a separate bargaining unit for those employees; that the shop employees in the MEM department are an integrated part of Respondent's overall operation at the El Paso plant and are properly part of the 'all employee' bargaining unit represented by the Steelworkers; that the Berman bargaining unit represented by Teamsters Local 941 did not survive the transfer of the Berman equipment to Respondent; and that the

Berman bargaining unit merged with Respondent's 400-man 'all employee' bargaining unit which was represented by the Steelworkers". Id.

Burns' successorship was again rejected by the Labor Board in Indianapolis Mack Sales & Service, 288 NLRB 1123 (1988), on remand from, 802 F.2d 280 (7th Cir. 1986). There, a purchaser (Indianapolis Mack Sales & Service) had acquired all of the assets and employees of Mack Trucks, Inc. Id. at 1124. Mack Trucks, Inc. – á la TMS – had decided to carve up its service department employees and its parts department employees into two separate bargaining units, with two separate collective bargaining agreements. Id. As the Board stated: "Both under the predecessor and the Respondent, parts and service employees shared the overall goal of servicing and repairing customers' trucks. Of course, there was a division of labor between the groups". Id. With its acquisition, however, Indianapolis Mack Sales "…abandoned these discrete [parts and service] categories". Id. The NLRB held: "The evidence indicates that Respondent assigns mechanics, skilled and unskilled, to a wide range of jobs". Id. at 1125. Further: "If their regular work schedule is slack, mechanics may be assigned temporarily to the parts department to unload new parts or pack parts under warranty for re-shipment to the factory" Id. Under the successor's operations: "Parts department employees can and do perform a variety of semi-skilled tasks usually performed by service department employees." Id. And the NLRB stated: "Joint training opportunities offered since Respondent's takeover underscore the close working relationship between the two units". Id. at 1125. "Respondent also retained the predecessor's departmental supervisory structure". Id. Furthermore: "A comparison of the parts and service [labor] contracts [of the predecessor] reveals, however, that with the exception of different job classifications and higher hourly wages for mechanics, their other terms are almost identical". Id.

at 1126. "For example, employees of both the parts and service unit share the same holidays, the same vacation policy, the same overtime and premium pay policies, and the same grievance and arbitration procedure". Id. Also, both units were: "paid according to an hourly rate, receive their paychecks on the same day, and [were] assigned to one of the three shifts over the same 8-hour time periods, use the same entrances, share locker room facilities, eat together in Respondent's lunch room at the same time and park in the same area adjacent to the facility". Id. at 1127. Rejecting Burns successorship, the NLRB held:

> Where, as here, the parts and service employees work in contiguous areas under one roof and have frequent contact, a de facto merger is all the more likely and reasonable. If a successor employer may not insist on bargaining for individual units when the merged unit remains substantially in tact after a takeover, neither may a union.
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> Since the takeover, Respondent has continued business practices of its predecessor and introduced new practices that strengthen the mutual interests of the parts and service employees. Thus, as discussed above, interaction between parts employees and mechanics occur with even greater frequency under Respondent's administration than under the predecessor's. Transfers of employees in and out of these units has also increased. As the Board stated in Harry Brown Motor Co., 86 NLRB 652, 654 (1949), "it is perfectly clear that the service departments are heavily dependent upon the parts department and in fact cannot function without [them]".
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> Apart from their functional integration, employees in both units have significant interchange through other means: they work in adjacent sections of the same building, eat lunch together, use a single locker room, the same parking area, and common entrances.

Id. at 1127. Simply stated: "The Respondent presented evidence, however, which overcame the claim that the parts and service units were separate either before or after the takeover". Id. (emphasis added).

In Ginji Corp., 1987 WL 103432 (1987) (N.L.R.B.G.C.), the Advice Division of the Board examined: "Whether a successor's operational changes in a hotel made the traditional bargaining units inappropriate and privileged the successor's withdraw of recognition from the unions that represented those bargaining units". Id. at *1. The Aladdin Hotel in Las Vegas, Nevada recognized, and entered into three collective bargaining agreements with three different unions – The Culinary Workers, The Teamsters, and The Operating Engineers. Id. When Ginji Corp. acquired the hotel, it "explicitly stated that it was not assuming any of the collective bargaining agreements to which [the predecessors] had been signatory". Id. All three predecessor unions demanded recognition. Id. There was no question but the Ginji had hired a majority of unionized workers from the three separate trades. Id. Under the predecessor's operation of the Aladdin Hotel, "there was relatively little integration of operations among the various employee groups". Id. at *3. "The labor agreement set forth specific prohibitions guarding against any interchange in duties and responsibilities". Id. "The requirements, duties and responsibilities of all represented job classifications were clearly delineated". Id. "For example, the valet parking attendants, who were represented by the Teamsters, could not interchange duties with the Bellmen or the Door Handlers, who were represented by the Local Joint Executive Board, even though all of these employees had as one of their duties greeting and escorting customers into the hotel". Id. The NLRB Advice section expressly observed: "Under Ginji management, personnel operations have been centralized, and there is more interchange in job functions". Id. at *4. Ginji contended that Burns was not applicable because it now had: "Extensive integration of duties, similar terms and conditions of employment and sharing of the maintenance and operations functions with housekeeping and other departments [thereby] precluding findings that (1) the

separate and distinct units proposed by the Teamsters and Operating Engineers are appropriate, and (2) Ginji is obligated to bargain with the Charging Parties". Id. at *6. The Advice section of the Board held:

> As a successor to N&T, Ginji was free to set the initial terms and conditions under which it hired employees, including former Ginji employees. Therefore, because Ginji made such significant changes in the facilities' "operational structure and practices" as to make the predecessor bargaining units inappropriate, Ginji is not obligated to recognize and bargain with the Charging Party Unions that had represented the N&T employees, even though former N&T employees constitute a majority of the employees in the historical bargaining units represented by those unions.
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> Furthermore, N&T operations were relatively unintegrated. The collective bargaining agreements contain restrictions on interchanges in employee duties and responsibilities. Transfer procedures were also described in and limited by the labor agreements. Finally, there was little work contact and interaction among employees in the various bargaining units. Contacts between the various departments appear to have been limited to communications, from one department to the front desk, reporting the need for work to be done by another department. Thus, for example, the housekeeping department would report maintenance problems to the front desk, which would then inform the maintenance department of the problems.
>
> However, Ginji operations are far more centralized than those of N&T. All personnel decisions are made by the Human Resources Department. This department also either has established or is developing uniform wage and benefit packages, work rules, and an in-house grievance procedure. Job vacancies are filled on a hotel-wide basis and are not subject to the restrictions that were contained in the collective bargaining agreements between N&T and various unions.
>
> Moreover, Ginji employees in various departments regularly coordinate work schedules and assignments and work together. Thus, whereas, N&T housekeeping employees reported necessary repairs to the front desk, which then communicated them to the maintenance department, Ginji housekeeping employees themselves perform minor repairs and report major repairs directly to the maintenance departments. These two departments regularly coordinate their schedules; when necessary, housekeeping and maintenance employees work side-by-side. Such joint work and employee interaction is also characteristic of employees in other

> departments. Moreover, there is no evidence that any group of Ginji employees possess skills or experience so unique as to distinguish them from the other employees. Thus, it appears that employees involved in the instant case have a broad, rather than the old, limited community of interest.
>
> * * *
>
> We note that it could be argued that Ginji was obligated to recognize and bargain with respect to the traditional units that had been voluntarily recognized by predecessor employers because to the Unions' majority status in those units, even though those units would not now be certified by the Board. However, the voluntary recognition was extended by a different employer at a time when the recognized units were arguably appropriate. The instant case involves a new employer who operates the enterprises that markedly changes the units. In these circumstances, the prior bargaining history does not require a bargaining obligation herein.

Id. at **6-8 (emphasis added).[40]

Burns successorship was also rejected in Oneida Motor Freight, 1981 WL 682647 (1981) (NLRB Advice Memorandum). The acquiring employer Oneida Motor Freight purchased a separate freight transportation company having its own mechanics that were represented by a collective bargaining agreement with the Machinists' union. The purchaser had in place a collective bargaining agreement with the Teamsters. After the acquisition, the two formerly separate units came under the umbrella of uniform labor relations policies and common supervision. The NLRB Division of Advice held:

> Recommending dismissal of the Machinists' union refusal-to-bargain against the purchaser, the Division of Advice ruled that the purchaser had no duty to bargain with the Machinists, since the retained mechanics' former unit merged with the purchaser's existing unit and did not survive as a separate unit. It was noted that the former unit consisted of mechanics only, while the purchaser's unit consisted of both drivers and mechanics in a multi-employer unit, so that the retained mechanics constituted a relatively small, related operation that was merged by

[40] The Ginji analysis cited with approval the Sixth Circuit's decision in the The Westin Hotel, 738 F.2d 765 (6th Cir. 1984), which reversed an erroneous unit determination decision made by Region 9 of the National Labor Relations Board, and reported at 277 NLRB No. 172 (1986).

> the purchaser into a unit with a larger group of employees, with both groups of mechanics performing the same duties with the same skills and equipment. It was concluded that those and the following facts established that the retained mechanics constituted an accretion to the purchaser's unit: (1) the integration of operations; (2) the centralization of managerial and administrative control; (3) the geographical location between the two affected locations; (4) the similarity of working conditions, skills and functions; (5) the centralized labor relations; and (6) the interchangeability between the two groups of employees.

Id. at *1 (emphasis added). The NLRB Advice Division reasoned:

> Thus, as noted above, the unit including the Oneida mechanics did not consist of only these Appollo Drive mechanics, but included employees at other locations and of other employers. Moreover, Oneida's mechanics, also like the mechanics in Border Steel, interchanged on a daily basis, performing the same work using the same skills and equipment. In addition, Oneida's mechanics were subject not only to centralized labor relations, but also to common supervision. Under these circumstances, there is an insufficient community of interest among the former Dorn mechanics to warrant their continued existence in a separate bargaining unit.

Id. (citing, Stroehmann Bros., 252 NLRB 988, n. 6 (1980)).

Burns was once again rejected in P.S. Elliot Services, 300 NLRB 1161 (1990). There, the NLRB, reversing its ALJ, held that the predecessor's separate unit represented by an altogether different union was inappropriate given the post-successor integration and changes in operation:

> On the record as a whole, and particularly in light of the facts that the Respondent's personnel policies and employee benefits are uniform and centrally administered, that the Respondent's operation is highly integrated and centralized, that there is frequent employee interchange, and that there are no on-site supervisors so that all employees are commonly supervised out of the central office, we find that the employees at the Brisbane Building do not have a community of interest sufficiently distinct and separate from the Respondent's other employees to warrant the establishment of a separate appropriate unit.

Id. at 1162 (emphasis added).

In Rock-Tenn, 274 NLRB 772 (1985), the NLRB reversed its Regional Director's § 9(b) unit clarification analysis after a paper mill owned by Clevepak was sold to Rock-Tenn. Id. Under

Clevepak, the United Paperworkers Union had a fourteen year history of bargaining, after NLRB certification, on a two-plant basis. Id. In siding with the acquiring employer that a two-plant unit was no longer appropriate given the integration that Rock-Tenn introduced, the Board adopted Rock-Tenn's position that: "While bargaining history is accorded weight, it is of limited significance when the unit does not conform to other standards of reasonableness". Id. Rock-Tenn's changed "personnel functions," "day-to-day control," "employee [hourly] wage rates," "employee interchange," and "functional integration" rendered the former 14-year two-plant unit inappropriate. Id. at 773-774. Rock-Tenn had also argued, successfully, that the former Clevepak unit "…was inappropriate prior to the change in ownership". Id. at 772.

All of the above anti-Burns decisional case law should be viewed in tandem with the Board's admonishment that "micro-units" are not appropriate in single-plant operations. To avoid the § 9(b) presumption that a plant-wide unit is appropriate, the burden is on the party advocating against that presumption: "The standard is the same but the burden is on the [party] to demonstrate that the interests of a given classification are so disparate from those of other employees that they cannot be represented in the same unit". Airco, Inc., 273 NLRB 348, 349 (1984) (emphasis added). "The Board does not favor organization by department or classification". Id. And, it is also settled: "That the Board does not approve fractured units (i.e., combinations of employees that are too narrow in scope or that have no rational basis"). Seaboard Marine, 327 NLRB 550, 556 (1999). This NLRB law comports with the Board's new unit appropriate analysis: "[W]hether excluded employees have meaningful distinct interests in collective bargaining that outweighs similarities with unit members". PCC Structurals, 365 NLRB No. 160 (2017).

It is also important to remember that Stein's post-acquisition integration was not limited to union trade cross-training and union trade cross-performance of work. The former TMS shower facilities that were eliminated ten years ago (Tr. 328), were rebuilt and refurbished by Stein (Tr. 988, 1214). Employees receive the exact same rate of pay, no matter what their TMS pay rate was previously, when operating the same piece of equipment and machinery or performing laborer work (Tr. 1318). Stein uses one, single time clock (Tr. 1275-1276). Stein's Laborers received hourly pay increases from that at TMS (Tr. 416). The "industry practice"[41] is to have one, plant-wide unit in steel-making slag operations (Tr. 773, 1188-1192). Finally, that counsel for the General Counsel put on one former Teamsters 100 TMS driver miffed that he will no longer accrue service towards his Central States pension (Tr. 643), that is irrelevant to the analysis. "'Employee desires', an additional factor frequently included in other circuits is not a relevant factor in this circuit". Armco, Inc. v. NLRB, 832 F.2d 357, 362 (6th Cir. 1987).

Stein, then, was not obligated to recognize either Teamsters 100 or Laborers 534 as a purported Burns, non-perfectly clear "successor". This distinct aspect of the Second Amended Consolidated Complaint should, therefore, be ordered dismissed.

4. **The Remedy: Region 9's Effort to Water Down Burns by Misapplying Advanced Stretch Forming.**

Assuming, arguendo, that Counsel for the General Counsel can successfully sidestep Davenport Insulation and the § 8(f) successorship bar, and assuming still further that Counsel for the General Counsel can somehow sustain its burden of proof that Stein is a Burns successor staring down the barrel of "appropriate" once highly-segregated craft units that have now been

[41] "Industry shifts" are a factor. Banknote Corp. of Am. v. NLRB, 84 F.3d at 648.

fully integrated, it is nevertheless clear that Region 9's efforts to extrapolate Advanced Stretch Forming so as to obliterate Stein's Burns rights is without credible legal support.

Advanced Stretch Forming Int'l., 323 NLRB 529 (1997) was a NLRB decision that delicately tip-toed around Burns and its perfectly clear exception under Spruce Up, and socked a successor employer with a make whole remedy as opposed to an affirmative, remedial bargaining order. Advanced Stretch Forming relied on the Board's decision in U.S. Marine Corp., 293 NLRB 669 (1989), where a Burns successor was deemed to have forfeited its Burns right to set initial terms and conditions of employment because it had rigged its numerical hiring of the predecessor's employees through § 8(a)(3) discrimination. Id. at 672. Under such circumstances, the Board held that the employer "…forfeited any right they may have had as a successor to impose initial terms when they embarked on their deliberate scheme to avoid bargaining with the Union by their discriminatory hiring practices". Id.[42] Advanced Stretch Forming thereafter expanded the limited holding in U.S. Marine Corp. to a setting where a bona fide Burns successor altogether abrogates its Burns obligations and announces that it is simply not going to recognize any union as the successor to its predecessor's former business:

> A statement to employees that there will be no union at the successor employer's facility blatantly coerces employees in the exercise of their § 7 right to bargain collectively through a representative of their own choosing and constitutes a facially unlawful condition of employment. Nothing in Burns suggests that an employer may impose such an unlawful condition and still retain the unilateral right to determine initial terms and conditions of employment. A statement that there will be no union serves the same purpose as a refusal to hire employees from the predecessor's unionized workforce. It "block[s] the process by which the obligation and rights of such a successor are incurred".

[42] Significantly, it is stipulated here that Stein did not commit any arguable § 8(a)(3) unfair labor practices in the method and manner in which it vetted the former TMS workforce, and then made its final hiring decisions (Jt. Stip. ¶ 33).

Advanced Stretch Forming, 323 NLRB at 530-531.

Here, Stein did not commit any § 8(a)(3) discriminatory hiring infractions á la U.S. Marine Corp. and did not stubbornly refuse to recognize any union whatsoever when it took over the slag reclamation/metal recovery service contract at AK Middletown á la Advanced Stretch Forming. So what Counsel for the General Counsel is seeking here is yet another expansion of Advanced Stretch Forming, similar to the expansion of the foundational § 8(a)(3) doctrine first recognized in U.S. Marine Corp. To do so, however, would effectively overturn Burns.

The factual background in Burns was that the successor employer, Burns International Security Services, acquired the service contract to provide plant guards at a Lockheed aircraft factory in Ontario, California. NLRB v. Burns Int'l. Sec. Srvc., 406 U.S. at 274. The predecessor guard company, Wackenhut Corp., following a union-monitored election with the results certified by the NLRB, had just entered into a collective bargaining agreement with the United Plant Guard Workers ("UPG") union before Wackenhut lost the guard service contract. Id. at 275. When Burns International assumed the Lockheed guard service contract, it admittedly hired a substantial complement of the former UPG workers, but it then proceeded to provide those employees with mandatory union membership cards of an altogether different union, the American Federation of Guards ("AFG"). Id. Burns informed the former Wackenhut guard workforce "…they had to become AFG members to work for Burns, that they would not receive uniforms otherwise, and that Burns 'could not live with' the existing contract between Wackenhut and the union". Id. at 275-276. The predecessor's union, UPG, thereafter demanded that Burns International recognize it as the collective bargaining representative, and similarly

demanded that Burns International honor the former, negotiated Wackenhut collective bargaining agreement. Id.

Reversing the NLRB, the United States Supreme Court held not only that Burns International had the right to establish all of its initial wages, hours and terms and conditions of employment for its Lockheed, California workforce, but also that it did not have to honor the former Wackenhut/UPG labor contract that was still in force and effect.[43] Notwithstanding the stubborn refusal of Burns International to afford recognition to the former UPG on-site union – a clear and determined violation of § 8(a)(5) of the Act – the Burns Supreme Court nevertheless held that Burns International had the unalienable right to establish its initial wages, hours, and terms and conditions of employment, and for that reason was not subject to a "make whole" monetary remedy.[44] The Burns Supreme Court was crystal clear that the make whole remedy ordered by the NLRB "must be set aside".

This dispute is positioned identically to that in Burns in terms of the NLRA available remedial analysis. Like Burns International, Stein accorded recognition to a union that the Board now believes to be the wrong union and therefore a violation of § 8(a)(5) of the Act. The remedy,

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[43] The setting in Burns was actually more favorable for the possible application of a "make whole" remedy than that here, where both the TMS/Laborers 534 and TMS/Teamsters 100 collective bargaining agreements expired before Stein began its operations at AK Middletown (Jt. Exh. 7, p. 11; Jt. Exh. 9).

[44] The Burns Supreme Court expressly rejected the underlying NLRB remedial order mandating that Burns International " 'give retroactive effect to all the clauses of said [Wackenhut] contract and, with interest of 6% make whole its employees for any losses suffered by reason of Respondent's [Burns'] refusal to honor, adopt, and enforce said contract'". NLRB v. Burns Int'l. Sec. Srvc., 406 U.S. at 283.

as mandated by Burns and its reversal of the NLRB's make whole remedy in that case, is an affirmative bargaining order, not a "make whole" economic remedy.

In fact, the NLRB has not faired well in the Circuit reviewing courts with its attempts to maneuver around Burns and its progeny by stretching Advanced Stretch Forming beyond its limited factual context of an employer that refused to recognize any union. Capital Cleaning Contractors v. NLRB, 147 F.3d 999, 1010-1011 (D.C. Cir. 1998) (noting that the practical effect of the Board's incorrect analysis is always having a Burns successor bound to the terms of its predecessor's contract from the date it acquires a business), reversing, 322 NLRB 801 (1996); ARMCO, Inc. v. NLRB, 832 F.2d 357 (6th Cir. 1987), reversing, 279 NLRB 1184 (1986); Kallmann v. NLRB, 640 F.2d 1094 (9th Cir. 1981), reversing, 245 NLRB 78 (1979).

In point of fact, the Board has expressly rejected "make whole" remedies in Burns successor disputes where an employer, although exercising its Burns right to unilaterally set all initial wages, hours, and terms and conditions of employment before a union recognitional demand was made, did not thereafter make any additional unilateral changes after receipt of a recognitional demand. Trans-Lux Midwest Corp., 335 NLRB 230, 233-235 (2001) ("[A]n affirmative bargaining order is 'the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective bargaining representative of an appropriate unit of employees'"); Ports America Outer Harbor, LLC, 366 NLRB No. 76 (May 2, 2018) (same); Prof. Janitorial Srvcs. of Houston, 353 NLRB 595, 604 (2008) (same).

For the above-stated reasons, the only non-punitive remedy that is proper in this case, assuming Counsel for the General Counsel meets their burden of establishing Burns successorship, is an affirmative bargaining order.

E. Ken Karoly's Termination Was Not Protected By the National Labor Relations Act.

1. Total Security Management Provides No Shield to Karoly.

Stipulating that Mr. Ken Karoly's termination by Stein amidst his 90-day probationary period was not protected by either §8(a)(1) as far as professed "concerted activity", or by §8(a)(3) as far as prohibiting NLRA "discrimination", [45] counsel for the General Counsel, once again, argues that existing NLRB precedent in the form of Total Security Management, 364 NLRB No. 106 (2016) should be extended beyond its limited factual context.

Total Security Management, in a split Board decision[46], overturned existing Board law in the form of Fresno Bee, 337 NLRB 1161 (2002), and held that in the timeframe between a union's initial recognitional right and effective collective bargaining that produces the parties' first labor agreement, an employer may not exercise its discretion to terminate an employee without first negotiating with its collective bargaining partner. The context in which Total Security Management arose was one foundation for the Board's decision: "Courts have recognized that employees are particularly vulnerable to unfair labor practices when the bargaining relationship is new and the parties are negotiating for an initial contract". Id. at n. 23. The Total Security Management Board noted the unique context in which the issue before it arose:

> The issue arose in this case, as it typically will, after the employees voted to be represented by a union, but before the employer and union had entered into a complete collective-bargaining agreement or other agreement governing discipline.

[45] Joint Stip. ¶¶32-33.

[46] Member Miscimarra, dissenting.

Id. at *1. Claiming this new-found NLRA right and obligation was somehow derivative of §8(a)(5) of the Act, the Total Security Management Board itself stated that its holding would have no application where the bargaining parties have already negotiated either a management's rights clause, a grievance/arbitration procedure, or some other feature that addresses an employer's otherwise unfettered right to discipline (say, for instance, a negotiated probationary period). Id. at n. 22. The Board stated:

> An employer seeking a safe harbor regarding its duty to bargain before imposing discipline may negotiate with the union an interim agreement expressly waiving the union's right to pre-imposition bargaining and providing for some mutually satisfactory alternatives, such as a grievance procedure that would permit the employer to act first followed by a grievance and, potentially, arbitration, as is typical in most complete collective-bargaining agreements.
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> * * *
>
> We emphasize that, within the requirements of good-faith bargaining, parties remain free to structure their bargaining and address their issues in whatever mutually agreeable ways best suit their needs, including by reaching more limited agreements or by simply meeting their pre-imposition obligation to bargain.
>
> * * *
>
> An employer's motivation to reach an interim agreement, so as to regain flexibility that it had before its employees unionized, is no different from the employer's motivation to negotiate a management-rights clause; in both situations, the employer's choice to negotiate a provision is simply a rationale response to the legitimate incentives of the Act.

Id. at n. 22.

Unlike Total Security Management, Mr. Ken Karoly was fully protected by a collectively bargained labor agreement (GC Exh. 15, passim). That protective labor agreement contained a management's rights clause (Id. at p. 2). That collective bargaining agreement contained a grievance/arbitration procedure (Id. at p. 3). The O.E. 18 filed a grievance contesting Karoly's

termination (Tr. 455). That collective bargaining agreement contained a negotiated 90-day probationary period, in which the union waived any §8(a)(5) right that it arguably possessed under Total Security Management (Id. at p. 15 §17.05) ("Probationary employees may be laid off or discharged as exclusive [sic] determined by the company. . .. The probationary period shall be the ninety (90) days of actual work").

In a word, O.E. 18 negotiated a collective bargaining agreement "…expressly waiving the union's right to pre-imposition bargaining [for discipline] and [provided] for some mutually satisfactorily alternative". Total Security Management, 364 NLRB at n. 22. Thus, the holding of Total Security Management has no application here, in a setting that does not even involve the purportedly "vulnerable" time period between initial recognition of a union and an initial labor contract. For this reason alone, this aspect of the Second Amended Consolidated Complaint should be ordered dismissed, with prejudice.

2. <u>Stein Meets The Total Security Management Safe-Harbor</u>.

The new-right manufactured in Total Security Management is neither sweeping nor limitless. In fact, the Board itself stated that "…the bargaining obligation we impose is more limited than that applicable to other terms and conditions of employment". Id. Recognizing that exigent circumstances may exist where an employer has to discipline a worker without first negotiating with its collective bargaining partner, the Board held:

> [A]n employer may act unilaterally and impose discipline without providing the union with notice and an opportunity to bargain in any situation that presents exigent circumstances: That is, where an employer has a reasonable, good-faith belief that an employee's continued presence on the job presents a serious, imminent danger to the employer's business or personnel. The scope of such exigent circumstances is best defined going forward, case by case, but it would surely encompass situations where (for example) the employer reasonably and in good faith believes that an employee has engaged in unlawful conduct that poses

> a significant risk of exposing the employer to legal liability for the employee's conduct, or threatens safety, health, or security in or outside the workplace.

Id. at *11.

Mr. Ken Karoly's tasks and duties for Stein were all safety-related (Tr. 1215-1216). In his brief period of employment with Stein, and while still in his 90-day workday probationary period, Mr. Karoly proceeded to destroy the "Knockout Safety Attendant" cellular phone that was indispensable to providing safety communications across all three work shifts, and Mr. Karoly also managed to allow one of Stein's front-end loaders to smash into one of the slag pit walls (Tr. 411-413, 442-443; GC Exh. 17). Karoly confessed to both of these safety mishaps (Tr. 411-413, 442-443, 1219). Mr. Karoly also confessed to "inadvertently" having his Stein-issued two-way safety radio on the wrong channel, which left him incapable of having safety communications with Stein's on-site customer, AK Steel (Tr. 450). Mr. Karoly testified under oath that the necessity to communicate with AK Steel as a Knockout Safety Attendant through the two-way radio was of utmost importance to maintaining safety at the AK Middletown steel mill (Tr. 428-429). Mr. Karoly also testified that safety, coupled with AK communication, are the most important tasks and duties that he had to perform as a Safety Attendant at AK Middletown (Tr. 427-428).

Mr. Karoly, then, is exactly the sort of "exigent circumstance" that the Total Security Management Board held to be an exception to the imposition of a collective bargaining obligation prior to meting out discipline. For this secondary reason, this aspect of the Second Amended Consolidated Complaint should be ordered dismissed, with prejudice.

3. <u>The Board Should Return to Fresno Bee</u>.

Instead of continuing to adhere to the standardless, statutory-teatherless decision of the NLRB in Total Security Management, the Board should return to the rule of law laid down in Fresno Bee, 337 NLRB 1161 (2002), and for this alternative reason, sustain the termination of Mr. Karoly. Towards this end, Stein adopts and advocates, in wholesale, the dissenter's reasoning and opinion in Total Security Management. Total Security Management, 364 NLRB at ____. The overruling of Fresno Bee cannot be squared with §10(c) of the Act.[47] The decision in Total Security Management to scrap Fresno Bee is also hopelessly irreconcilable with NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975). In Weingarten, the United States Supreme Court defined the contours of a union representative's rights in the arena of disciplining employees, and clearly held that those rights are limited to attendance at a pre-disciplinary investigative meeting, and that the employer has "no duty to bargain" with a union representative that attends an employee's disciplinary meeting. Id. at 258-259. The Weingarten Court also stated that imposing discipline is among "legitimate employer prerogatives"; confirmed that the NLRB has not afforded unions "any particular rights with respect to pre-disciplinary discussions which it otherwise was not able to secure during collective-bargaining negotiations"; and that unilateral disciplinary decisions and actions by an employer is "'consistent with all of the provisions of [the] Act'" and that "'a collective bargaining course is not required". Id. at 259 (quoting, Mobile Oil, 196 NLRB 1052, n.3

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[47] No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

29 U.S.C. 160(c).

(1972) and Quality Mfg., 195 NLRB 197, 198-199 (1972)). Interestingly, the NLRB's own Weingarten advocacy brief to the U.S. Supreme Court took the position:

> The Board's position does not infringe upon any legitimate interest of the employer. The employer has the option of foregoing the interview if he prefers to not examine the employee in the presence of his representative. The employer investigation would then have the choice of either proceeding without representation, or allowing the investigation to take its course without his participation and then attempting to defend himself at the subsequent grievance stage with the benefit of representation. Moreover, even if the employer allows the employee to be accompanying by a union representative, he is free to insist on obtaining the employee's and not the representative's account of the matter under investigation. Precedents dealing with the employer's bargaining obligation in relation to the disciplinary process are not controlling here. The Board acknowledges that the duty to bargain does not arise prior to the employer's decision to impose discipline.

NLRB v. J. Weingarten, Inc., Brief for the NLRB, 1974 WL 186290 (U.S.).

Additionally, Total Security Management erroneously conflates the distinct NLRA concepts of decisional and effects bargaining. First National Maintenance Corp. v. NLRB, 452 U.S. 666, 682 (1981):

> My colleagues create a decision bargaining obligation regarding discipline, except they cannot require discipline bargaining before the employer makes the disciplinary decision because the Board in Weingarten conceded that a "duty to bargain does not arise prior to the employer's decision to impose discipline".

Total Security Management, 364 NLRB No. 106 (Miscimarra, dissenting) (citing, NLRB v. J. Weingarten, Inc., Brief for the NLRB, 1974 WL 186290 (U.S.)).

Finally, the majority's decision in Total Security Management plainly exceeds the NLRB's statutory authority under 29 U.S.C. § 158(a)(5) as circumscribed by § 8(d) of the Act. Section 8(d) of the NLRA states that the duty to bargain collectively "…does not compel either party to agree to a proposal or require the making of a concession". Id. In H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970), the Supreme Court commented that "the Act as presently drawn does not contemplate

that unions will always be secure and able to achieve agreement even when their economic position is weak". Id. at 109. The H.K. Porter Court further explained that [the] object of this Act was not to allow governmental regulation of the terms and conditions of employment", and "it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement". Id. at 103-104. The H.K. Porter Court concluded:

> It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties.... While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on the which the Act is based – private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

Id. at 107-108.

Because Total Security Management is irreconcilable with two Supreme Court decisions – Weingarten and H.K. Porter – and is additionally inconsistent with two separate sections of the NLRA -- § 10(c) and § 8(d) –, and because the Board has offered no bona fide reason for casting aside Fresno Bee, Total Security Management, and the rights afforded thereunder, should be vacated and reversed. For this separate reason, Mr. Karoly's termination should be sustained.

4. <u>Region 9 Waived, and Failed to Fulfill Prerequisites to Total Security Management</u>.

The Board in this dispute seeks to use the sword of Total Security Management without complying with its own internal processes and requirements. Memorandum OM 17-14 (Feb. 14, 2017), from the Office of the General Counsel imposes "[**b]asic action requirements of the [r]egions**" when pursuing Total Security Management litigation. The first is a check-and-balance

against a Region's improper invocation of the new-found rights manufactured by the NLRB in Total Security Management, to wit:

> In cases where the Region has determined that there was an unlawful failure to bargain, but the charged party has arguably met its burden of showing that the discipline was "for cause", the Region should submit a brief memorandum setting forth the facts of the case and a recommended course of action to the Division of Advice. A copy of the memo should also be sent to the Compliance Unit at complianceunit@nlrb.gov and the Region's AJC and DAGC.

Memorandum OM 17-14, p. 2. None of this was done and undertaken by Region 9 here. And, it cannot be credibly argued with a straight face that Stein did not meet its Total Security Management burden of showing that Mr. Karoly's discharge was "for cause", given his multiple safety-related infractions; given his admission to those infractions; given his damage and destruction of company property; and given Mr. Karoly's repeated – and convenient – failure to have his two-way radio on the correct channel so as to communicate with Stein's valued customer, AK Steel.

Not only did Region 9 inexplicably fail to follow OM 17-14 in its pre-hearing processing of this matter on behalf of Mr. Karoly in terms of Total Security Management's check-and-balance with the NLRB Division of Advice, it similarly failed to prosecute this matter as joined with compliance specification and proceedings. OM 17-14 plainly states:

> Upon a determination that the Charged Party committed a Total Security Management violation, absent settlement, Regions should consolidate the compliance proceedings with the underlying unfair labor practice proceeding, and issue a consolidated complaint and compliance specification. In view of the various kinds of violations and appropriate back pay periods that may be found under Total Security Management, the Region should contact the Compliance Unit if it has questions as to how to calculate the backpay period.

OM 17-14, p. 3.

Having failed to follow its own internal processes and procedures, and having no explanation in the record for these failures, Region 9 has effectively waived and relinquished its application of Total Security Management to Mr. Karoly and Region's request for reinstatement and backpay on his behalf. Thus, this aspect of the Second Amended Consolidated Complaint, for this alternative reason, should be ordered dismissed.

F. <u>The § 8(a)(2) Allegations</u>.

Stein cannot be a Burns successor derivative of a predecessor's § 8(f) relationship, so Stein had the right to enter into a collective bargaining agreement with its majority union, O.E. 18. Davenport Insulation, 184 NLRB 908 (1970). Additionally, since both the Teamsters 100/TMS and Laborers 534/TMS labor agreements had expired by their terms, Stein was free to walk away from the predecessor's collective bargaining agreements and the recognition afforded thereunder. John Deklewa & Sons, 282 NLRB 1375, 1377-78 (1987), enf'd. sub non., Ironworkers Local 3 v. NLRB, 843 F.2d 770 (3d Cir. 1988).

"In [the] selection of a bargaining representative, § 9(a) of the Wagner Act guarantees freedom of choice and majority rule". Int'l. Ladies Garment Workers Union v. NLRB, 366 U.S. 731, 737, 81 S.Ct. 1603 (1961). That "majority rule" guarantee must be, by statute, assessed in the "appropriate unit". 29 U.S.C. § 159(b). The only appropriate unit at Stein was the presumptively appropriate plant-wide unit at AK. PCC Structurals, 365 NLRB No. 160 (2017).

Section 9(a) statutes may be recognized at the point in time that as employer hires a "substantial, representative compliment" of its projected workforce. Klein's Golden Manor, 214 NLRB 807, 815 (1974). Stein and O.E. 18 signed their labor agreement covering the "appropriate unit" on December 22, 2017, with Stein commencing its operations on January 1, 2018 (Tr. 206;

G.C. Exh. 12). At that point, Stein knew that O.E. 18 was the majority at AK Middletown (Tr. 185-186, 217). In re: Roman Catholic Diocese of Brooklyn, 222 NLRB 1052, 1062 (1976) ("Among the indications of majority status at any given moment, and it is ordinarily a persuasive one, is payment of union dues or action towards having union dues checked off the payroll").

> [I]n every refusal to bargain – or Section 8(a)(5) – case, an essential element of proof is that which supports a finding that at the moment of improper refusal, whenever it occurred, the claiming union in fact was authorized by a majority of the employees involved to bargain on their behalf.

Id. at 1060. At the determinative Burns moment,[48] Stein had uncontroverted proof of O.E. 18's majority status (Tr. 1009-1010; O.E. Exh. 3).

The interactions of Stein and O.E. 18 prior to the December 22, 2017 signing of their collective bargaining agreement is all irrelevant noise, Mr. Holvey's statement that Stein preferred to operate with one unit was perfectly legal. Coamo Knitting Mills, 150 NLRB 579, 581 (1964). Also perfectly legal were the written negotiations of what the wages, hours, and terms would be at AK Middletown once majority status was demonstrated. Montague v. NLRB, 698 F.3d 307, 314-315 (6th Cir. 2012), affirming, 356 NLRB No. 49 (2010).

Thus, the § 8(a)(1),(2) allegations of the Second Amended Consolidated Complaint should also be ordered dismissed.

[48] "The Board will normally assess whether an employer is a successor as the time a union makes it demand for recognition and bargaining, provided the employer has already hired a substantial and representative compliment of employees". Paramus Ford, 351 NLRB 1019, 1023 (2007).

IV. CONCLUSION.

For the foregoing reasons, the Second Amended Consolidated Complaint should be ordered dismissed in its entirety, with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing Respondent Stein, Inc.'s Post-Hearing Brief to the Administrative Law Judge has been served, via electronic mail, this 17th day of December, 2018, upon the following:

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