

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

STEIN, INC.

and

Case 09-CA-215131
09-CA-219834

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA (LIUNA), LOCAL 534

INTERNATIONAL UNION OF OPERATING
ENGINEERS (IUOE) LOCAL 18
(Stein, Inc.)

and

Case 09-CB-215147

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA (LIUNA), LOCAL 534

COUNSEL FOR THE GENERAL COUNSEL'S ANSWER TO RESPONDENTS'
EXCEPTIONS TO JUDGE GOLLIN'S DECISION

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I. INTRODUCTION.

These cases are before the Board upon exceptions filed by Stein, Inc. (Respondent Stein) and the International Union of Operating Engineers (IUOE) Local 18 (Respondent Local 18) to the Decision of Administrative Law Judge Andrew Gollin that issued on January 24, 2019. Judge Gollin properly concluded that as of January 1, 2018, Respondent Stein was a legal 9(a) successor to the slag reclamation/slag removal work at AK Steel's facility in Middletown, Ohio that, as of December 31, 2017, was being operated by TMS International (TMS). Having appropriately concluded that Respondent Stein was a successor to TMS' operation at AK Steel, Judge Gollin found that Respondent Stein committed a litany of Section 8(a)(1), (2), (3), and (5) violations of the Act, including: (1) failing to recognize and bargain with Laborers' International Union of North America (LIUNA), Local 534 (Laborers Local 534) as the exclusive bargaining representative of its laborers (laborers unit); (2) failing to continue the terms and conditions of employment set forth in the TMS/Laborers Local 534 collective-bargaining agreement; (3) unilaterally changing mandatory subjects of bargaining including the existing terms and conditions of employment enjoyed by the laborers under TMS; (4) unlawfully discharging employee Kenneth Karoly pursuant to the unilaterally changed probationary period; (5) unlawfully informing TMS employees in November 2017 that once Respondent Stein commenced operations on January 1, 2018, all jobs would fall under Respondent Local 18, i.e. Respondent Stein had no intention of recognizing Laborers Local 534 as the exclusive bargaining representative of its laborers; (6) unlawfully recognizing a minority union – Respondent Local 18 – as the exclusive bargaining representative of the laborers unit at a time when Respondent Local 18 did not represent an unassisted and uncoerced majority of that unit; (7) unlawfully entering into a collective-bargaining agreement with Respondent Local 18, and applying the terms of that agreement, including the union security and dues-checkoff provisions,

on employees in the laborers unit at a time when Respondent Local 18 did not represent an unassisted and uncoerced majority of that unit; (8) unlawfully granting assistance and support to Respondent Local 18 when Respondent Local 18 did not represent an unassisted and uncoerced majority of the laborers unit; and (9) threatening or otherwise coercing employees in the laborers unit to join and pay dues and fees to Respondent Local 18 when Respondent Local 18 did not represent an unassisted and uncoerced majority of that unit.

For its role in Respondent Stein's unlawful scheme to rid itself of its statutory bargaining obligations to Laborers Local 534, Respondent Local 18 was correctly found by Judge Gollin to have committed numerous violations of Section 8(b)(1)(A) and 8(b)(2), including: (1) accepting recognition from Respondent Stein as the exclusive bargaining representative of the employees in the laborers unit when it did not represent an unassisted and uncoerced majority of that unit; (2) entering into, maintaining, and enforcing the terms of the collective-bargaining agreement with Respondent Stein and receiving dues and fees from employees in the laborers unit when it did not represent an unassisted and uncoerced majority of that unit; (3) threatening employees in the laborers unit that they would be removed from the work schedule if they did not join and pay fees and dues to Respondent Local 18 when it did not represent an unassisted and uncoerced majority of that unit; and (4) receiving assistance and support from Respondent Stein by being allowed on the jobsite to distribute membership applications and dues-checkoff authorization cards to employees in the laborers unit.

In sum, Judge Gollin properly found that the totality of the evidence unequivocally showed that Respondent Stein – with the assistance of Respondent Local 18 – embarked on an unlawful journey to avoid its statutory bargaining obligations to Laborers Local 534. In response to Judge Gollin's Decision, Respondents rely heavily on case law that is inapplicable and

distinguishable to the instant cases and, contrary to the overwhelming case law cited by Judge Gollin in support of his Decision, Respondents maintain that this Board should overturn or limit the application of decades worth of Board law so that it may escape the remedies that Judge Gollin appropriately ordered. Counsel for the General Counsel respectfully requests that this Board not condone Respondents' deceitful and unscrupulous actions here, and instead reject Respondents' exceptions in their entirety.

II. RESPONDENT STEIN'S BRIEF IN SUPPORT OF EXCEPTIONS DOES NOT COMPORT WITH THE BOARD'S RULES AND REGULATIONS.

Section 102.46(a)(2)(ii) of the Board's Rules and Regulations requires that any brief filed in support of exceptions shall contain "[a] specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate." Respondent Stein's brief in support of its exceptions entirely failed to follow the Board's directive in Section 102.46(a)(2)(ii). Consequently, Respondent Stein has put the General Counsel in the unenviable position of making assumptions as to which exceptions are being argued, and which specific questions outlined in Respondent Stein's brief in support correspond to the filed exceptions. For the foregoing reasons, the undersigned requests that Respondent Stein's brief in support of exceptions be rejected. Notwithstanding that request, Counsel for the General Counsel will attempt to match, as best as possible, Respondent Stein's exceptions to the questions presented in its brief in support of exceptions. ^{1/}

^{1/} In this regard, Counsel for the General Counsel can find nowhere in Respondent Stein's brief in support that it argued its Exception 22 or 24. As a result, those exceptions must be summarily rejected.

III. COUNSEL FOR THE GENERAL COUNSEL’S ANSWER TO RESPONDENTS’ EXCEPTIONS.

A. Judge Gollin properly concluded that Respondent Stein is a successor to TMS as the slag reclamation/slag removal employing entity. [Respondent Stein Exceptions 1-6, 21, 26-31; Respondent Stein’s Specific Questions A-F; Respondent Local 18 Exceptions 1, 2, 4-13]

The test for determining successorship under *NLRB v. Burns International Security*

Services, Inc., 406 U.S. 272 (1972) is well established:

An employer, generally, succeeds to the collective-bargaining obligation of a predecessor if a majority of its employees, consisting of a “substantial and representative complement” in an appropriate bargaining unit are former employees of the predecessor and if the similarities between the two operations manifest a “substantial continuity” between the enterprises.

Hydrolines, Inc., 305 NLRB 416, 421 (1991) (quoting *Fall River Dyeing & Finishing Corp. v.*

NLRB, 482 U.S. 27, 43, 52 (1987); see also *Ready Mix USA, Inc.*, 340 NLRB 946, 946-947

(2003). The “triggering” fact for the bargaining obligation occurs when the successor employs—as a majority of its workforce in a substantial and representative complement—employees of the predecessor. *Fall River Dyeing*, 482 U.S. at 46-47. “If the new employer makes a conscious decision to maintain generally the same business” and to hire, as a substantial and representative complement of its workforce, “a majority of its employees from the predecessor, then the bargaining obligation of § 8(a)(5) is activated.” *Id.* at 41.

Respondents’ exceptions to Judge Gollin’s conclusion that Respondent Stein succeeded TMS as the slag reclamation/slag removal operator focus entirely on his finding that the three distinct units – i.e. laborers, drivers, and operators – remained appropriate for purposes of collective bargaining. In other words, Respondents do not specifically except to Judge Gollin’s conclusion that Respondent Stein employs a substantial and representative compliment of former TMS employees or that its operation evinces a substantial continuity with TMS’ former

operation. Instead, Respondents argue that the three separate units no longer remain appropriate for purposes of collective bargaining. Their arguments fail.

Respondents bemoan the fact that Judge Gollin – and the case law on point – places upon them a “heavy evidentiary burden” to persuade the Board that the three distinct units here are no longer appropriate for bargaining, however, that remains the standard, and Judge Gollin’s application of that standard to this instance was appropriate. (ALJD, p. 18, ll. 11-19) ^{2/} “The Board places a heavy evidentiary burden on a party attempting to show that historical units are no longer appropriate.” *Banknote Corp. of America*, 315 NLRB 1041, 1043 (1994). Indeed, “... ‘the Board has long held that it will not disturb an established bargaining relationship unless required to do so by the dictates of the Act or other compelling circumstances.’” *Columbia Broadcasting System, Inc.*, 214 NLRB 637, 642-643 (1974), quoting *Great Atlantic & Pacific Tea Co., Inc.*, 153 NLRB 1549, 1550 (1965). Judge Gollin, then, accurately invoked the test for meeting this heavy burden as articulated in *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111 (D.C. Cir. 1996), enfg. 318 NLRB 738 (1995). And as Judge Gollin concluded, Respondents failed to meet that burden.

While Respondents draw attention to certain similar terms and conditions of employment shared by all three crafts – i.e. a shared lunch room/facilities, similar hours, similar supervision – Respondents significantly downplay the stark differences with respect to each crafts’ conditions of employment. For one, each craft is tasked with exceedingly distinct job duties. The operators

^{2/} Citation to Judge Gollin’s Decision will be designated as (ALJD, p. ____); citations to Respondent Stein’s Brief in Support of Exceptions will be designated as (R. Stein Br. Supp., p. ____); citations to Respondent Local 18’s Brief in Support of Exceptions will be designated as (R. Local 18 Br. Supp., p. ____); citations to the hearing transcript will be designated as (Tr. ____); citations to General Counsel’s hearing exhibits will be designated as (G.C. Ex. ____); citations to the joint hearing exhibits will be designated as (J. Ex. ____); and citations to Respondent Stein’s hearing exhibits will be designated as (R. Stein Ex. ____).

have historically manned heavy machinery that requires specialized knowledge and skill to accomplish safely, so much so that Respondent Local 18 has an entire training complex dedicated to training operators on how to effectively and safely operate the heavy machines. (ALJD, p. 4-5) Additionally, operators have also historically engaged in maintenance of the various pieces of machinery used in the slag reclamation/slag removal process, again, possessing specialized knowledge not required of the other trades. *Id.*

The other two trades have also performed separate and discrete tasks at the slag dump for the long line of predecessor employers. The drivers have historically been tasked with transporting various materials, including molten slag, in large, off-road dump trucks that themselves require specialized skill and training to operate. *Id.* at 4. Moreover, the drivers are also required to operate water trucks for dust suppression, and act as parts runners. *Id.* Finally, the laborers have historically held boots-on-the-ground-like positions, including acting as fire watch and safety attendants, manual cleaning including the use of shovels for cleaning various plants, and operating specialized lancers and torches to cut steel – job duties and skills not required by any of the other trades. *Id.*

Additionally, prior to Respondent Stein's acquisition of the slag reclamation/slag removal work at the AK Steel facility, all three trades enjoyed many other different terms and conditions of employment. Each craft was paid differing hourly wages. (J. Exs. 6-8) Each craft had a different pension fund in which its health and welfare benefits were paid, with different level of contributions. *Id.* Different call-out procedures existed between the crafts, as did contractual funeral leave policies. *Id.* The three crafts also enjoyed differences in their contractual training requirements, work hours and schedules, holiday pay provisions, seniority guidelines, and grievance procedures. *Id.*

Judge Gollin has not “perpetuated” “micro-units” that are “repugnant to Board policy” as Respondent Stein contends. (R. Stein Br. Supp., p. 51) On the contrary, Judge Gollin recognized that the three historical units that have operated separately for multiple decades have discernible identities such that they each remain separately appropriate for purposes of collective-bargaining. (ALJD, p. 17-20) Each craft possesses markedly different skill sets and enjoyed distinctly different terms and conditions of employment. As such, the individual units cannot credibly be proscribed as “repugnant” or impermissible micro-units, nor can it be said that they no longer conform to the Board’s contemporaneous standards of appropriateness. Equally, Respondents proffered zero evidence to support its contention that continuation of the three separate crafts “hampered employees” in any way; indeed, the decades-long bargaining history through a succession of employing entities with zero evidence of labor strife suggests the separate craft units co-existed quite well and lends further support to the notion that they remain appropriate.

Finally, Respondents fall woefully short in arguing that “compelling circumstances” exist such that the separate units no longer are appropriate for purposes of collective bargaining. Respondents begin with the mistaken premise that the historical units recognized by TMS and its predecessors were “at best ‘marginally appropriate.’” (R. Stein Br. Supp., p. 56) However, as shown above, the craft units as constructed pre-Stein were far more appropriate and suitable for purposes of collective bargaining than Respondents choose to recognize. Thus, the *de minimis* changes – unlawful changes, lest we forget – to a few employees’ duties in the months after it succeeded TMS do not remotely rise to the level of compelling circumstances such that it was justified in refusing to recognize and bargain with Laborers Local 534.

Respondents proffered scant evidence that either of the other crafts were assigned cross-training or cross-jurisdictional work on such a regular basis that the three separate units were no longer appropriate for bargaining. And, as Judge Gollin accurately stated, “those assignments did not occur on such a regular and widespread basis as to alter the appropriateness of the three historical units.” (ALJD, p. 19, ll. 1-3) ^{3/} The record was left with evidence showing that prior to January 10, 2018, ^{4/} there were zero examples of truck drivers being assigned cross-jurisdictional work; prior to February 7, there were only 28 records of only 4 laborers performing non-traditional work, out of universe of approximately 2,166 daily work assignments; and prior to February 20, there were only 43 records of only 4 laborers showing some form of cross-unit work out of a universe of 2,907 daily work assignments. (Tr. 844, 913, 1038, 1096, 1119, 1154, 1297, 1313; J. Ex. 17; G.C. Exs. 23, 24; R. Stein Ex. 28) During this same time period, there were zero daily time sheets entered into the record to show operators or drivers performing cross-unit work. It is clear that the vast majority of evidence suggests that at the time Respondent Stein’s bargaining obligations attached, all three crafts continued to perform their traditional, historical job duties. Indeed, there is such a complete dearth of record evidence to

^{3/} Respondent Stein contends that Judge Gollin instituted a burden-shifting paradigm such that it was incumbent on the General Counsel to put nearly 14,000 records into evidence to show that employees were not being assigned to non-traditional and non-historical job duties. (R. Stein Br. Supp., p. 32) Nothing could be further from the truth. Judge Gollin refused to allow Respondent Stein to introduce documents beyond March of 2018 because those documents – based on settled law as cited by Judge Gollin – are irrelevant to the determination of whether the units remained appropriate at the time that the bargaining obligations attached. (ALJD, p. 19, n. 20) It was Respondents’ burden to show that the units no longer remained appropriate for bargaining at the time that the bargaining obligations attached, and it attempted to do so, albeit unsuccessfully, by introducing a few assignment sheets to show some cross-jurisdictional work. Judge Gollin did not shift the burden to General Counsel to then introduce the remaining documents, and any such reading of the transcript by Respondents further highlights their throw-everything-at-the-wall-and-hope-something-sticks approach to this litigation.

^{4/} Hereinafter all dates occurred in 2018, unless otherwise noted.

show that Respondent Stein's operation is any more functionally integrated than TMS' operation, there can be no question that Judge Gollin's rejection of Respondents' "compelling circumstances" defense was proper. ^{5/}

The cases cited by Respondents are inapposite. *Border Steel Rolling Mills, Inc.*, 204 NLRB 814 (1973) involved the "addition of a new classification of employees who performed truck maintenance and repair to an existing facility-wide unit . . ." (ALJD, p. 19, ll. 27-28) The instant situation is clearly distinguishable, as the three historically separate units were not added to an existing Stein operation, but instead comprised the entire operation acquired by Respondent Stein. Likewise, *P.S. Elliot Services, Inc.*, 300 NLRB 1161 (1990), involved the addition of a maintenance unit into a much-larger maintenance operation with significant employee interchange among buildings and employees that had identical terms and conditions of employment. As discussed above, prior to Respondent Stein's unlawful co-mingling of employee job duties, there has been no history of employee interchange amongst the three crafts, and employees enjoyed very distinct terms and conditions of employment.

In *Indianapolis Mack Sales and Service, Inc.*, 288 NLRB 1123, 1127 (1988), the fact that the predecessor, for all intents and purposes, treated two separate units as one for decades, along

^{5/} Judge Gollin also appropriately discredited the testimony of Respondent Stein's Area Manager Douglas Huffnagel that he informed all job applicants in interviews that they would be cross-trained. (ALJD, p. 9-10, n. 13) The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). No such evidence exists here, as Huffnagel's testimony was vague, self-serving, and not worthy of belief. The weight of the record evidence, as Judge Gollin correctly summarized, further cast doubt of the credibility of Huffnagel's testimony. In this same vein, there is zero evidence that Respondent Stein had articulated, or even planned, a "timetable for achieving fuller functional integration" as argued by Respondent Local 18, either before Respondent Stein took over TMS' operation or by the time the bargaining obligations attached. (R. Local 18 Br. Supp, p. 28) Nothing of substance is offered to substantiate that contention.

with the fact that the two units shared nearly identical terms and conditions of employment, contributed to the ultimate finding that the units no longer remained appropriate, especially where the successor instituted measures to “strengthen the mutual interests” of the two units. Those measures included significant employee interchange and the discontinuance of a number of employee classifications in favor of fewer classifications. *Id.* at 1124-1125. Unlike in *Indianapolis Mack*, here there is no evidence of employee interchange prior to the bargaining obligations attaching (Respondents’ few examples of cross-unit assignments do not change that fact); Respondents maintained the discrete craft-based job classifications; and under the predecessors, the three crafts historically maintained very different terms and conditions of employment. Finally, Respondents’ reliance on Division of Advice memoranda are of no consequence, as such Advice opinions are not binding on Administrative Law Judges nor the Board. ^{6/}

Based on the foregoing, Judge Gollin correctly concluded that the three historical units remained separate, distinct, and appropriate for purposes of collective-bargaining. ^{7/} As such,

^{6/} As will be discussed below, Judge Gollin also properly rejected Respondents’ attempt to use its unlawful co-mingling of the separate crafts – unlawful unilateral changes to mandatory subjects of bargaining – as evidence that the units no longer remained appropriate for bargaining. (ALJD, p. 18, 26, n. 27) Where an employer makes unlawful unilateral changes such that it is “impossible to determine whether the [predecessor] unit[s] would have maintained sufficiently unique characteristics to remain an appropriate unit for bargaining,” an employer cannot rely on those changes to defeat an “appropriate unit” finding. *Dodge of Naperville, Inc.*, 357 NLRB 2252, 2254 (2012). Especially in light of a long history of collective bargaining representation. *Id.*

^{7/} Respondent Stein’s initial argument that Judge Gollin applied an impermissible “unit appropriateness” test is misguided and must fail. It is clear that Judge Gollin applied the appropriate “heavy burden” test to Respondents’ disruption of three historical units. This “heavy burden” and “compelling circumstances” test remains appropriate for determining whether a successor has justification for casting aside long-standing bargaining relationships, and the Board need not revisit the well-grounded principles justifying continued application of that test.

and as found by the Judge, Respondent Stein was a successor to the slag reclamation/slag removal operation formerly operated by TMS.

B. Judge Gollin correctly determined that TMS' bargaining relationships with the three Unions were governed by Section 9(a) of the Act, not 8(f). [Respondent Stein Exceptions 10, 11, 32, 33; Respondent Stein's Specific Questions J, K; Respondent Local 18 Exception 14]

As Respondents did in their initial arguments to Judge Gollin, they continue “to ignore their evidentiary burden” in torturously arguing that these units under TMS were derivative of Section 8(f) agreement rather than Section 9(a). (ALJD, p. 21, ll. 32-33) Respondent Stein yet again advances the outrageous theory that Laborers Local 534 likely intended a violative Section 8(f) arrangement with the long line of predecessor employers at the slag dump; “likely” being the operative word, because Respondent Stein cannot muster an ounce of proof to support its far-fetched theory. Indeed, a quick examination of its purported “support” is unimpressive: a 1970's-era Board decision finding that Teamsters Health & Welfare Fund I's actions ran afoul of the Act when it required membership in Local 100 as a condition of employment in the absence of a valid union-security agreement ^{8/}; a 1961 Board decision where McGraw Construction Company entered into a Section 8(f) covering work “performed by it in constructing additions to the steel mills” at what is now the AK Steel property ^{9/}; and contractual language in the

^{8/} How Respondent Stein distilled from *Teamsters Health & Welfare Fund*, 233 NLRB 814 (1977) the notion that Teamsters Local 100 was found to have “entered into a proscribed § 8(f) bargaining agreement in the non-construction setting” is puzzling. (R. Stein Br. Supp., p. 86) There is zero mention of Section 8(f) of the Act in that Decision. Respondent Stein so desperately clings to the fantasy that TMS' bargaining relationships with the three Unions involved herein were governed by Section 8(f), that it conflates 8(f) agreements with any situation where an employer and union enter into a proscribed bargaining relationship. It bears repeating; a collective bargaining agreement cannot be governed by Section 8(f) of the Act in a non-building and construction industry setting. *Engineered Steel Concepts*, 352 NLRB 589, 602 (2008).

^{9/} *Ohio Valley Carpenters District Council (McGraw Construction Co.)*, 131 NLRB 854, 856 (1961). As has been argued by the General Counsel *ad nauseum* throughout this litigation, the

TMS/Laborers Local 534 collective bargaining agreement that Respondent Stein believes is indicative of an illegal 8(f) agreement.^{10/} That is all Respondents proffered to support the notion that Section 8(f), not Section 9(a), controls here.

Fortunately, Judge Gollin did not venture down the rabbit hole nor give Respondents' incredible theory the attention it so desperately sought. This is not a *Davenport* case. There is no contention that what once were Section 8(f) agreements matured into Section 9(a) relationships. These have always been relationships governed by Section 9(a). "In these circumstances the Board presumes continued majority status in the absence of objective evidence to the contrary . . ." *Saks Fifth Avenue*, 247 NLRB 1047, 1051 (1980). The General Counsel is not burdened, here, to produce a NLRB certification or present evidence of an explicit show of majority support in order to meet its burden of showing Laborers Local 534 enjoyed Section 9(a)-representative status. As Judge Gollin relied upon, the record contains the 2010-2013 contract between TMS and Laborers Local 534, the 2013-2016 contract, and the 2016 and 2017 extensions of the 2013-2016 contract, and "[t]hese documents recognize Laborers Local 534 as the sole and exclusive bargaining agent of the laborers unit." (ALJD, p. 20, ll. 14-15)

slag reclamation/slag removal work – work that both Respondents stipulated was not building and construction work – is the only work involved herein. That McGraw Construction Company performed construction work at other parts of the steel mill, and entered into 8(f) agreements to cover that construction work in 1961, is of zero consequence to this matter.

^{10/} On this last point, contrary to Respondent Stein's reading of Judge Gollin's decision, Judge Gollin did not find that the TMS/Laborers Local 534 contract contained an exclusive hiring hall that ran afoul of the principles of Section 9(a). He merely cited to cases which stand for the proposition that one illegal provision in a contract does not invalidate the entire agreement. (ALJD, p. 21-22) More importantly, Judge Gollin noted that the presiding question when determining whether a bargaining relationship is governed by Section 8(f) or 9(a) is whether the work being done is primarily in the building and construction industry. *Id.* at p. 21. What's more, exclusive hiring halls have been upheld in non-building and construction industries. *Raymond F. Kravis Center for Performing Arts, Inc. v. NLRB*, 550 F.3d 1183 (D.C. Cir. 2008).

Each case cited by Respondents involves employers engaged in the building and construction industry. It is at this initial point that Respondents' arguments fail. It was not incumbent on the General Counsel or the Charging Parties to produce evidence of a Board certification or an overt showing of majority support in order to prove the Charging Parties enjoyed Section 9(a) status. While that may be the case in building and construction industry disputes, as has been established, this matter does not involve Section 8(f) work. Consequently, cases like *Davenport* and the others cited by Respondents are inapposite to these matters.

On the contrary, because the slag reclamation/slag removal work at issue here does not fall with the definition of building and construction work, the predecessor agreements must have been controlled by Section 9(a). As such, Judge Gollin correctly placed the onus on Respondents to prove that the prior bargaining relationships were derivative of Section 8(f), as the burden to do so rests with the party seeking to avail itself of the Section 8(f) statutory exception. (ALJD, p. 21, ll. 19-20), citing *Bell Energy Management Corp.*, 291 NLRB 168, 169 (1988); and *Hudson River Aggregates, Inc.*, 246 NLRB 192, 199 (1979), *enfd.* 639 F.2d 865 (2d Cir. 1981). They failed to do so. Respondents' belabored discussion of the hiring hall-like provision in the TMS/Laborers Local 534 agreement is nothing more than a red herring.

Lastly, Judge Gollin properly dismissed Respondents' last-ditch effort to challenge the initial recognition of Laborers Local 534 as the laborers' exclusive representative at the slag dump. Board law is clear "that a successor may not attack a union's initial recognition by the predecessor when that recognition was beyond the Section 10(b) 6-month statute of limitations period." (ALJD, p. 20, ll. 39-40) Respondents presented zero evidence that a timely challenge to the initial recognition of Laborers Local 534 had ever been mounted. And while it would have

been time-barred in any event, it is worth noting that Respondents did not present any evidence that the initial recognition of Laborers Local 534 was defective.

For the foregoing reasons, Judge Gollin correctly afforded Respondents' "Section 8(f) defense" the weight it appropriately deserved—none. The Board should do the same.

C. Having found that Respondent Stein was a 9(a) successor to TMS, Judge Gollin properly concluded that Respondent Stein's refusal to recognize and bargain with Laborers Local 534 as the laborers' exclusive bargaining representative violated Section 8(a)(5) of the Act. [Respondent Stein Exception 25; Respondent Local 18 Exceptions 7, 14]

Subsequent to his determination that Respondent Stein was a 9(a) successor to TMS' slag removal/slag reclamation operation, Judge Gollin properly concluded that Respondent Stein violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with Laborers Local 534 following its February bargaining demands. (ALJD, p. 22) Indeed Respondent Stein does not contest that it has steadfastly rebuffed Laborers Local 534 demands for bargaining as the laborers' chosen representative. In doing so, Respondent Stein relies upon its view that it is not a *Burns* successor. Having appropriately concluded that Respondent Stein is, indeed, a 9(a) successor that inherited TMS' bargaining obligations, it was incumbent upon Judge Gollin to find that Respondent Stein violated the Act by admittedly failing to honor those obligations. Judge Gollin properly did so.

D. Judge Gollin properly invoked *Advanced Stretchforming* by finding that Respondent Stein forfeited its right to set initial terms and conditions of employment, and thus appropriately found Respondent Stein to have violated Section 8(a)(5) of the Act by making unilateral changes to unit employees' terms and conditions of employment. [Respondent Stein Exceptions 7-9, 19; Respondent Stein's Specific Questions G – I; Respondent Local 18 Exceptions 22-26]

Having found that Respondent Stein was a successor to the TMS slag reclamation/slag removal work at AK Steel, it was necessary for Judge Gollin to determine whether Respondent Stein was free to set its initial terms and conditions of employment. (ALJD, p. 22 – 26) In

finding that Respondent Stein, by its unlawful actions in late-Summer and Fall of 2017, had forfeited the ordinary *Burns* right to set initial terms and conditions of employment, Judge Gollin reached the correct conclusion. *Id.* Due to the “serious nature of [Respondent Stein’s] unfair labor practices prior to January 1”, including a “sham arrangement” and an announcement to the laborers that “effectively informed [them] that Stein would unlawfully refuse its obligations under *Burns* to recognize and bargain with their chosen representative,” Judge Gollin appropriately applied the Board’s *Advanced Stretchforming* decision to the instant matters. (ALJD, p. 25) ^{11/}

Respondents advocate that this Board “no longer reflexively apply and extend *Advanced Stretchforming*” and instead “re-examine and limit or overturn” the decision. (R. Stein Br. Supp., p. 2, 77) Respondent’s dramatic prose paints a doom-and-gloom picture regarding the rights of successor employers being shunned by the Board’s *Advanced Stretchforming* line of cases, such that application of *Advanced Stretchforming* to the instant cases will “effectively overturn *Burns*.” (R. Stein Br. Supp., p. 78) Ironically, when discussing its view on the “appropriate unit test,” Respondent Stein pays ample lip service to “majority rule” and the need for employees to have the “fullest freedom” in exercising protected rights, yet simultaneously it expects this Board to sanction an employer’s ability to run roughshod over decades-long historical bargaining units with only a remedial bargaining order as a consequence. The Board, in decisions like *Advanced Stretchforming*, has appropriately decided otherwise.

^{11/} Judge Gollin’s conclusion that Huffnagel’s November announcement that all jobs would be represented by Respondent Local 18 once Respondent Stein commenced operations was clearly correct. The Board has repeatedly denounced such statements as violative of Section 8(a)(1). (ALJD, p. 25, ll. 8-12)

The guiding principles underpinning the Board's *Advanced Stretchforming* decision are well-grounded and help ensure that employees and unions affected by devious 9(a) successors – like Respondent Stein – are indeed made whole. The *Burns* right to set initial terms and conditions of employment should not be conferred “on an employer that has not conducted itself like a lawful *Burns* successor because it has unlawfully blocked the process by which the obligations and rights of such a successor are incurred.” *Slate Distributing Co.*, 282 NLRB 1048, 1049 (1987). Thus, “the *Burns* right to set initial terms and conditions of employment must be understood in the context of a successor employer that will recognize the affected unit employees’ collective bargaining representative and enter into good-faith negotiations with that union about those terms and conditions.” *Advanced Stretchforming*, 323 NLRB 529, 530-531 (1997). To find otherwise would permit employers to establish initial terms and conditions of employment in furtherance of a discriminatory scheme to rid itself of its obligations to abide by the obligations imposed by the successorship doctrine.

Contrary to Respondent Stein’s exaggerations, *Burns* is alive and well and decisions like *Advanced Stretchforming* are not the death blow that unscrupulous employers would have this Board otherwise believe. For Respondent Stein had a clear and unobstructed path towards realizing those *Burns* rights it holds in such high regard—simply refrain from engaging in an unlawful scheme to rid itself of its successor obligations to Laborers Local 534, and the ability to set its own terms and conditions of employment would have been there for the taking. Instead, Respondent Stein embarked on a deliberate, deceitful, and unlawful arrangement to avoid bargaining with the long-standing representative of the laborers’ choosing. For that, *Advanced Stretchforming* is there to make sure Respondents do not benefit from their unlawful conduct, and to guarantee that employees, and Laborers Local 534, are made whole.

Furthermore, Judge Gollin’s decision to apply *Advanced Stretchforming* to the instant cases should be affirmed. While *Advanced Stretchforming* involved a successor’s statement that a formerly union operation would henceforth be run non-union, the application of such decision to the instant matter is obvious. The Board found that “[a] statement to employees that there will be no union at the successor employer’s facility blatantly coerces employees in the exercise of their Section 7 right to bargain collectively through a representative of their choosing . . .” *Advanced Stretchforming*, 323 NLRB at 530 (emphasis added). Further, as noted above, the Board in *Advanced Stretchforming* articulated that the ordinary *Burns* rights must be viewed within the context of a successor that recognizes “the affected unit employees’ collective-bargaining representative and enter into good-faith negotiations with that union about those terms and conditions.” *Id.* at 530-531 (emphasis added).

The above-cited language in *Advanced Stretchforming* makes its application to the instant cases clear. Even more apparent is the Board’s unwillingness to limit *Advanced Stretchforming* only to cases where a successor employer chooses to run a formerly union operation non-union. Here, Respondent Stein – in no uncertain terms – informed employees in the laborers unit that should they choose to work for Respondent Stein, they would do so without their long-standing, chosen bargaining representative acting as their representative. The effect of such statement is indistinguishable from the successor’s statement in *Advanced Stretchforming*.

Accordingly, Judge Gollin’s application of *Advanced Stretchforming* to the instant cases must be affirmed. It follows, then, that Respondent Stein’s admitted refusal to apply the terms of the TMS/ Laborers Local 534 agreement to the laborers and its unilateral changes, as found by Judge Gollin, to employees’ terms and conditions of employment, also ran afoul of Section 8(a)(5) and (1) of the Act.

E. Having found that Respondent Stein forfeited its right to set initial terms and conditions of employment, Judge Gollin properly found that Respondent Stein unlawfully discharged employee Kenneth Karoly pursuant to the unilaterally changed probationary period. [Respondent Stein Exceptions 14, 15, 36; Respondent Stein Specific Questions N, O; Respondent Local 18 Exception 32]

As a result of Judge Gollin's determination that Respondent Stein forfeited its right to set initial terms and conditions of employment, Respondent Stein was required to continue in existence the terms and conditions of employment the laborers enjoyed while working for TMS, and refrain from making unilateral changes to mandatory subjects of bargaining, until such time as Respondent Stein recognized and bargained with Laborers Local 534. (ALJD, p. 25-26)

Judge Gollin specifically found that Respondent Stein unilaterally – and unlawfully – changed the laborers' probationary period that existed in the most recent TMS/Laborers Local 534 collective-bargaining agreement, a mandatory subject of bargaining. (ALJD, p. 26, ll. 7, 43-46, p. 27 ll. 1-5)

Respondents do not contest Judge Gollin's determination that Respondent Stein changed the laborers' probationary period. Nor do they dispute that Respondent Stein discharged employee Kenneth Karoly pursuant to Respondent Stein's unilaterally enacted 90 work-day probationary period. Respondents simply argue that because, in their view, Respondent Stein was not a *Burns* successor, or alternatively that Respondent Stein did not forfeit its right to set initial terms and conditions of employment, Respondent Stein had the legal right to alter the laborers' probationary period. (R. Stein Br. Supp., p. 96; R. Local 18 Br. Supp., p. 48)

Accordingly, it necessarily follows from Judge Gollin's proper determination that Respondent Stein did, in fact, forfeit its right to set initial terms and conditions of employment, that Respondent Stein acted unlawfully when it discharged employee Kenneth Karoly pursuant to the unlawfully implemented probationary policy. See *San Miguel Hospital Corp.*, 357 NLRB 326,

326-327 (2011).^{12/} In order to fully remedy Karoly's unlawful discharge, Judge Gollin properly ordered Respondent to make Karoly whole, including reinstating him to his former position.

(ALJD, p. 29-30)

F. Judge Gollin correctly concluded that Respondent Stein's collective-bargaining relationship with Respondent Local further violated Sections 8(a)(1), (2), and (3) of the Act, and found Respondent Local 18 to have violated Sections 8(b)(1)(A) and 8(b)(2) of the Act for its part in the unlawful scheme. [Respondent Stein Exceptions 12, 13, 16-18, 20, 23, 34; Respondent Stein Specific Question's L, M; Respondent Local 18 Exceptions 3, 15-21, 27-31]

Following Judge Gollin's proper conclusions that Respondent Stein was the statutory successor to the TMS laborers unit, and Laborers Local 534 was the 9(a) exclusive collective bargaining representative of that unit, Judge Gollin correctly found concomitant violations of Section 8(a)(1), (2), and (3) by Respondent Stein, and violations of Section 8(b)(1)(A) and 8(b)(2) by Respondent Local 18. (ALJD, p. 26) Respondents contest the veracity of these findings solely on the grounds that Respondent Stein was not a *Burns* successor and therefore had no bargaining obligation to Laborers Local 534. Neither Respondent contests the well-settled law regarding unlawful actions between employers and minority unions.

Having properly concluded otherwise, Judge Gollin cited well-settled law standing for the proposition that an employer violates Sections 8(a)(1), (2), and (3) when it grants recognition to – and bargains with – a minority union, as well as when it enters into a collective-bargaining agreement with that minority union, and maintains and enforces the terms of that agreement including a union-security and dues-checkoff provision. Respondent Stein admittedly

^{12/} As Respondent Stein notes, Judge Gollin refrained from ruling on the General Counsel's alternate theory that Karoly's discharge violated the principals articulated in *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016). (ALJD, p. 27, ll. 7-10; R. Stein Br. Supp., p. 96) Consequently, Respondent Stein's request that the Board overturn *Total Security Management* need not be addressed, as Judge Gollin did not invoke that decision in ruling on Karoly's discharge.

recognized Respondent Local 18 as the collective-bargaining representative of the laborers unit, and entered into an agreement with Local 18 and maintained and enforced that agreement including the union-security and dues-checkoff provisions. Having correctly concluded that Respondent Local 18 was not the lawful bargaining representative of the laborers unit, Judge Gollin therefore properly found Respondent Stein to have violated Sections 8(a)(1), (2), and (3). Likewise, because it admittedly accepted recognition as the exclusive representative of the laborers unit, entered into the agreement with Respondent Stein, maintained and enforced that agreement including the union security and dues-checkoff provisions, and received dues from Respondent Stein for the laborers unit, Respondent Local 18 violated Sections 8(b)(1)(A) and 8(b)(2).^{13/}

Furthermore, as Judge Gollin noted, General Counsel's allegation that Respondent Stein's admitted supervisors Jason Westover and Jeff Porter engaged in violations of Section 8(a)(1) and (2) of the Act by threatening employees and providing unlawful assistance to Respondent Local 18 were left entirely un rebutted. (ALJD, p. 26, ll. 19-29) In that same regard, General Counsel's allegations that Respondent Local 18, through representative Justin Gabbard, accepted unlawful assistance by being given access to Respondent Stein's jobsite to distribute membership packets, and having packets distributed for him, were equally left un rebutted and properly found to have violated the Act. *Id.* at p. 26.

^{13/} Respondent Stein knew that Laborers Local 534 was the exclusive bargaining representative of the laborers unit at the time that it engaged Respondent Local 18 as the representative of the same employees. Given that Laborers Local 534 was the lawful 9(a) representative, Judge Gollin appropriately coined Respondents' subsequent unlawful bargaining and merger of the three historical units as a "sham." It was very clearly illegal for Respondent Stein to negotiate the terms and conditions of employment for the laborers unit with Respondent Local 18, a union that had zero evidence that any of the laborers had chosen it as their bargaining representative. Neither Respondent produced evidence to the contrary.

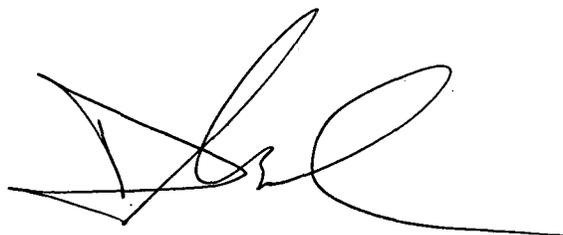
G. Remedy and Conclusions of Law [Respondent Stein Exceptions 35, 37-38; Respondent Local 18 Exception 33]

Based on the findings made by Judge Gollin, he crafted appropriate conclusions of law and a well-grounded remedial order. The undersigned respectfully requests the Board to fully adopt it as such, subject to the very brief modifications articulated in Counsel for the General Counsel's limited cross-exceptions.

IV. CONCLUSION.

Despite the lengthy transcript and a multitude of documents, this case is simple. Respondent Stein bid on the slag removal/slag reclamation contract with AK Steel knowing that the operation had a decades-long history of being operated with three craft units. Instead of abiding by its statutory obligations to recognize and bargain with the exclusive representative of each unit, Respondents chartered a course filled with repeated hallmark violations that are the very antithesis of the "majority rule" and anti-labor strife ideals Respondents promote. It should come as no shock, then, that Respondents advocate heavily for the Board to limit the application of, or outright overturn, long-standing Board decisions, for they know full well that such drastic measures are required for their unscrupulous actions to survive judicial review. Counsel for the General Counsel respectfully requests this Board to reject Respondents' exceptions in their entirety.

Dated: April 4, 2019



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CERTIFICATE OF SERVICE

April 4, 2019

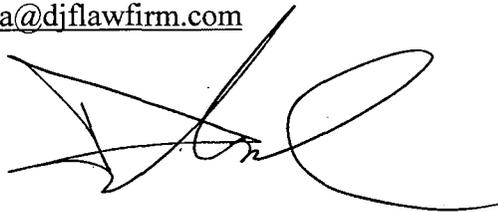
I hereby certify that I served the attached Counsel for the General Counsel's Answer to Respondents' Exceptions to Judge Gollin's Decision on all parties by electronic mail at the following addresses:

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