

**UNITED STATES OF AMERICA  
THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON, D.C.**

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STEIN, INC.

Case No. 09-CA-214633

*Respondent; and*

INTERNATIONAL UNION OF  
OPERATING ENGINEERS, LOCAL 18

Case No. 09-CB-214595

*Respondent; and*

TRUCK DRIVERS, CHAUFFEURS AND  
HELPERS LOCAL UNION NO. 100

*Charging Party.*

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**RESPONDENT INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL  
18'S RESPONSE TO THE GENERAL COUNSEL'S LIMITED CROSS EXCEPTIONS**

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Pursuant to Section 102.46 of the Board's Rules and Regulations, Respondent International Union of Operating Engineers, Local 18 hereby submits its Response to the General Counsel's Limited Cross Exceptions to Administrative Law Judge Andrew Gollin's January 24, 2019 Decision.

Respectfully Submitted,

*/s/ Timothy R. Fadel*

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## **I. INTRODUCTION**

As its Exceptions to the Administrative Law Judge's Decision make clear, Respondent International Union of Operating Engineers, Local 18 ("Union" or "Local 18") maintains that at all material times a majority of the employees performing slag reclamation work at the AK Steel facility located in Middletown, Ohio were card carrying members of Local 18 and that each of those members specifically authorized Local 18 to act as their bargaining representative as it pertains to the terms and conditions of employment at the AK Steel Middletown facility. The Union also maintains in its Exceptions that it was properly recognized by Respondent Stein, Inc. ("Stein") as the duly authorized bargaining agent for those employees after it presented evidence of majority support in the bargaining unit in the form of signed union authorization cards. Thus, the Union disputes that portion of the Administrative Law Judge's Decision which found that it was improper for the Union to circulate membership applications and dues authorization forms amongst Stein's employees performing slag reclamation work at the AK Steel facility. Subject and subordinate to those and other arguments raised in its Exceptions, the Union offers the instant Response to the General Counsel's Limited Cross Exceptions.

The General Counsel's limited cross exceptions take issue with a purportedly inadvertent oversight by the ALJ to include in his Decision a provision enjoining the Union from further distributing membership applications and dues-checkoff authorization cards to employees performing slag reclamation work at Stein. According to the General Counsel, placing such a restriction upon the Union is necessary in order to enforce that portion of the ALJ's ruling that found Local 18's distribution of membership applications and dues-checkoff authorization cards to be a "discrete" violation of the Act and separate from Respondent Local 18's other violations of Section 8(b)(1)(A). Such an argument, however, makes no sense as the simple circulation of

membership applications and dues authorization forms is not, in and of itself, a violation of the NLRA. The General Counsel's argument that the ALJ's decision somehow prohibits Local 18 from circulating membership applications and dues authorization forms is based upon a distorted interpretation of the ALJ's actual findings. Moreover, any attempt to limit the Union ability to freely speak and communicate with employees performing slag reclamation work for Stein would unlawfully infringe upon Local 18's constitutionally protected free speech rights. Accordingly, the General Counsel's Limited Cross Exceptions should be rejected.

## **II. ARGUMENT**

Contrary to the General Counsel's claim, The ALJ did not find that "Local 18's distribution of membership applications cards was a *discrete* violation of the Act[.]" (GC Cross Exceptions pg 2-3.) (Emphasis added). Instead, the ALJ incorrectly found that Local 18 violated the Act when it was permitted access to Stein's facilities and purportedly obtained union membership forms and paperwork from employees in accordance with the union security clause contained in the Union's agreement with Stein. Specifically, after reiterating his previous finding that Local 18 violated the Act when it threatened "Gary Wise that he would be taken off the schedule if he did not join Local 18", Judge Gollin went on to find that by permitting Local 18 access to the facility distribute membership applications and dues-checkoff authorization cards at a time when Local 18 did not have majority support, Stein and Local 18 violated the Act. Thus, the ALJ's ruling that Local 18 violated the Act is not a "discrete" determination that the Act prohibits a union from distributing membership applications and dues-checkoff authorization cards to employees in bargaining units where that union lacks majority support. Rather, the ALJ simply found that it was unlawful for Stein to permit Local 18 access to the jobsite in order to

distribute membership applications and dues-checkoff authorization cards subject to the enforcement of the union security clause contained in the agreement between Local 18 and Stein.

Proof that the ALJ did not intend to establish a blanket ban under the Act that would prohibit a union from circulating membership materials to employees in a unit where the union lacks majority support can be found in the very case law the ALJ cites. In *North Hills Office Services*, 342 NLRB 437 (2004), the Board did not specifically ban the union from circulating material in an unit where a majority of employees do not support the union. Rather, in *North Hills Office Services*, the ALJ and the Board simply found that an employer cannot assist a union in the circulation and execution of dues authorization cards subject to the enforcement of a union security clause when the union lacks majority support. *Id.* at 445.

Here, the ALJ did not find that “Local 18’s distribution of membership applications cards was a discrete violation of the Act[.]” Indeed, merely circulating an application or dues authorization cards in a bargaining unit where a majority of employees do not support the union is not, in and of itself, a violation of the Act. What the Act does forbid is an employer and union utilizing a union security clause in order to procure dues authorization cards from employees in a bargaining unit that has not demonstrated majority support for that union. In this case, while Local 18 believes the ALJ’s decision was in error on several levels, it concedes that his decision readily discerned the distinction between merely circulating union authorization cards and membership information and the unlawful procurement of dues authorization cards subject to the enforcement of a union security clause in a bargaining unit where the a union has yet to obtain majority support. Accordingly, the General Counsel’s argument that the ALJ found that Local 18 distributing membership applications and dues-checkoff authorization cards to be a “discrete”

violation of the Act is based upon an erroneous interpretation of both the Act as a whole and the ALJ's decision in this case.

Even if the ALJ's decision could somehow be stretched to include a finding that Local 18 violated the Act by distributing membership applications and dues-checkoff authorization cards to employees in the unit at a time when it purportedly lacked majority support, the ALJ's failure to order a blanket prohibition against Local 18 circulating such materials in the future was not an inadvertent oversight as the General Counsel contends. Rather, the ALJ's failure to include such an injunction was due the General Counsel's failure to request such a remedy. Indeed, prior to the closing of the record in this case, the ALJ specifically requested that the General Counsel submit a proposed order and notice; a request that the General Counsel dutifully complied with. However, the order and notice prepared and submitted by the General Counsel failed to specifically request that the ALJ include in his order a provision enjoining the Union from further distributing membership applications and dues-checkoff authorization cards to employees performing slag reclamation work at Stein. It is only now, at this late hour, that the General Counsel has decided to seek this new remedy. Such a course of action runs afoul of the Board procedures that effectively prohibit the General Counsel from utilizing an exception to an administrative law judge's decision as a means of advancing theories of violations and remedies that go beyond those previously offered. *See e.g. ATC/Forsythe & Assoc. Inc.*, 341 NLRB 501, 174 LRRM 1341 (2004).

Finally, the Union would be remiss to fail to point out that the General Counsel's request that Local 18 be permanently barred from circulating union membership and dues authorization information to employees performing slag reclamation work at Stein essentially requests that the Board infringe upon the Union's associational and free speech rights. Here,

there is no disputing that the Union and its representatives are entitled to visit Local 18 members that previously performed slag reclamation for TMS International and who now performs that work for Stein. Thus, the General Counsel does not seek to prohibit the Union from actually visiting Stein's slag reclamation employees. Instead, the General Counsel seeks to have the Board limit Local 18's speech while visiting Stein employees. However, such a prohibition would undoubtedly run afoul of the associational rights unions have long enjoyed under the United States Constitution. *Hague v. C.I.O.*, 307 U.S. 496 (1939). Indeed, "the right [to] discuss and inform people concerning the advantages and disadvantages of unions and joining them is protected not only as part of free speech but as part of free assembly." *Thomas v. Collins*, 323 U.S. 516 (1945). Accordingly, any attempt to circumscribe Local 18's right to speak freely to all those it encounters is tantamount to an unconstitutional attempt to silence the Union's free speech rights.

### **III. Conclusion**

For all the foregoing reasons, Local 18 respectfully requests that the board reject the General Counsel's Cross Exceptions in their entirety.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

A copy of the foregoing was electronically filed with National Labor Relations Board, Office of the Executive Secretary, and served via email to the following on this \_\_\_ day of April, 2019:

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