

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

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.

**RESPONDENT INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL
18'S REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS**

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Respondent International Union of Operating Engineers, Local 18 hereby submits its Reply Brief in Support of its Exceptions to Administrative Law Judge Andrew Gollin's January 24, 2019 Decision.

Respectfully Submitted,

/s/ Timothy R. Fadel

TIMOTHY R. FADEL (0077531)

Fadel & Beyer, LLC

The Bridge Building, Suite 120

18500 Lake Road

Rocky River, Ohio 44116

(440) 333-2050

tfadel@fadelbeyer.com

*Counsel for Respondent International Union
of Operating Engineers, Local 18*

I. Introduction

The Answering Brief submitted by the Counsel for the General Counsel (“General Counsel”) glosses over the long history of collective bargaining between Respondents Stein, Inc. (“Stein”) and the International Union of Operating Engineers, Local 18 (“Local 18” or “Union”). For decades, Stein and Local 18 have been parties to a series of collective-bargaining agreements (“CBAs”). Pursuant to those agreements, Local 18 was recognized as the duly authorized bargaining agent for all Stein employees performing slag reclamation work anywhere in the state of Ohio. (TR 773, 1188-1193.) Stein’s slag reclamation business is built upon the expectation each employee is able to perform whatever task is necessary to get the job done.

In the summer of 2017, Stein announced that it was the winning bidder for slag reclamation contract at a steel manufacturing plant located in Middletown, Ohio (“Middletown Facility”). Previously, slag reclamation work at the Middletown Facility was performed by Stein’s competitor, TMS International, LLC (“TMS”). Under TMS, slag reclamation work at the Middletown Facility was performed utilizing three different CBAs with three separate labor organizations: Local 18, Charging Party Laborers’ Local 534, and Charging Party Teamsters Local 100.

The gravamen of the dispute in this case centers on questions of successorship under *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972). Here, there is no question that Stein employs a substantial number of former TMS employees to perform slag reclamation work at the Middletown Facility. The central issue raised in this case asks whether those TMS employees hired by Stein to perform slag reclamation work at the Middletown Facility are doing the same jobs, in the same working conditions, under the same supervisors, and utilizing the same production process. It is the Union’s argument that by setting initial terms of employment that merged the three bargaining units and required the employees therein to perform all duties associated with the slag reclamation process and not just those duties they

traditionally performed, the TMS employees hired by Stein were not doing the same jobs, in the same working conditions, and utilizing the same production process. The Union also argues that Stein is absolved of any recognition or bargaining obligations to the Charging Parties because the General Counsel failed to prove that the relationship between Charging Parties and TMS was predicated on Section 9(a) of the Act.

II. Law & Argument

- A. Stein was not obligated to recognize or bargain with Laborers' Local 534 because Stein was not a Burns successor to TMS. [Exception Nos. 2-12.]

Stein's good faith business decision to merge the three units at the Middletown facility so radically changed the way the slag reclamation process was done under TMS that it was no longer appropriate for Stein to recognize the three separate units. Specifically, the Union asserts that because the work tasks that were previously assigned to one of three balkanized bargaining units are now assigned to employees in a single merged unit, the TMS employees hired by Stein are not doing the same jobs, in the same working conditions, under the same supervisors, and utilizing the same production process. In response to the Union's argument, the General Counsel's Answer asserts that the Union failed to carry the "heavy burden" of showing that the merger of the three separate bargaining constituted "compelling circumstances" sufficient to overcome the established bargaining relationship and justify the abandonment of the three units historically maintained by TMS. According to the General Counsel, the "stark differences" between the work tasks traditionally performed by the three units under TMS' balkanized business model demonstrates that the maintenance of three separate units is appropriate and that Stein's decision to merge those units and their respective work tasks was inappropriate. Such an argument, however, cuts both ways as the "stark differences" between the work tasks that the General Counsel so readily cites in its Answer actually demonstrate that Stein's business

decision to merge those work tasks into one unit drastically changed the slag reclamation operations at the Middletown Facility and provided compelling circumstances that overcome the established bargaining relationships between TMS and Charging Parties.

Although the three bargaining units in existence under TMS shared some common terms and conditions of employment, the changes implemented by Stein were nonetheless significant. As the General Counsel points out, slag operations under TMS were divvied up between three different bargaining units with each unit performing only a specific set of work tasks assigned to them under their respective CBA. (GC Answer p. 5-7.)¹ Under TMS' business model, only the teamsters were permitted to drive TMS trucks, only the operators were permitted to operate TMS equipment, and only the laborers were permitted to pick-up TMS' trash. (Id.) Stein, however, exercised its prerogative to set initial conditions of employment and, consistent with its practices across the state of Ohio, merged the work tasks performed by the three bifurcated groups into a single bargaining unit. In that single bargaining unit, all employees are required to perform any and all tasks associated with the slag reclamation process regardless of whether that task was within their traditional craft jurisdiction. Consistent with this change, each and every TMS employee hired by Stein was scheduled to be trained to perform all of work tasks associated with the slag reclamation process; teamsters and laborers would learn to operate equipment, operators and laborers would be trained to drive trucks, and all employees would be expected to labor in the field. (TR 303-05, 367-68, 372, 374-76589, 593-98, 1038-53, 1097-1117, 1154-11771281-84, 1290, 1299-1307, 1310-11, 1320-21; L18 Exh. 4; Emp. Exhs. 28-30)

When viewed against the backdrop of the "stark differences" between the work assignments historically performed by the three bargaining units, Stein's merger of those units and their respective work tasks is clearly a major business change that materially alters the

¹ Citations to the General Counsel's Answer to Respondents' Exceptions will be designated as (GC Answer p. ____.)

bargaining units so that the employees performing slag reclamation work are not doing the same jobs, in the same working conditions, under the same supervisors, and utilizing the same production process. Both the courts and the Board have long recognized that when bargaining units are “materially altered or extinguished based on major business changes *** the only appropriate unit following such a transition may be the post-transition combined group of employees.” *ADT, LLC*, 365 NLRB No. 77, slip op. at 10 (2017) (Chairman Miscimarra, dissenting). Under such circumstances “a union’s representative status *** should turn on whether it has majority support in the posttransition [sic] unit.” *Id.* Here, Stein’s business decision to merge the three units resulted in a material alteration to the bargaining units. As a result of this alteration to the slag operations, Local 18 stood alone as the sole union that could claim to represent a majority of the employees on the new “post-transition” unit.

General Counsel attempts to evade the consequences of this drastic and material change to the bargaining unit by arguing quantity over quality. (GC Answer p. 7-9.) Under this rubric, the fact that Stein made a dramatic qualitative change to the slag reclamation operations by merging the work tasks performed by three bargaining units is of no consequence given the alleged infrequency with which employees performed cross jurisdictional work assignments. However, in making that argument, the General Counsel, much like the ALJ, imposes arbitrary and improper cut-off dates for determining the frequency of cross-training and/or cross jurisdictional work.² Moreover, the General Counsel’s argument also once again fails to appreciate that the “stark differences” between the job assignments historically performed by the three bargaining units demonstrate why the arbitrarily imposed deadlines for demonstrating cross jurisdictional work is inappropriate. As the General Counsel points out, the slag reclamation

² Specifically, while the ALJ allowed Respondents to produce evidence of cross-training and cross jurisdictional work that occurred before March of 2018, he ultimately concluded that the degree of cross training that took place would be measured as of January 1, 2018, the day Stein took over operations at the Middletown Facility.

process under TMS was strictly segregated so that employees were isolated in their bargaining units and only performed work tasks that were assigned to their units under the governing CBA. Often, performance of the work tasks assigned to each bargaining unit required “specialized knowledge and skill” with some tasks being so intricate that they require “an entire training complex dedicated to training[.]” (GC Answer p. 5-6.) Given the complexity of these work tasks, it is no wonder that Stein was unable to immediately effectuate cross jurisdictional work. Indeed, the stark differences between the work tasks historically performed by the three bargaining units and the complexity of those work tasks necessarily dictates that it will take Stein longer than just a few months to fully cross train its new workforce. Thus, the fact that Stein was unable to have its employees fully trained in the performance of their duties within the first 90 days of their employment is of little consequence. What does matter, however, is that Stein made its initial decision to merge the units in good faith and well before it assumed operations at the Middletown Facility.

While the General Counsel may view the historic bifurcation of work tasks as a basis for requiring the continued recognition of the three bargaining units, the “stark differences” between the work assignments historically performed by the three bargaining units instead provide compelling circumstances that overcome the multi-unit bargaining relationship that existed at the Middletown facility under TMS. In this case, there is no doubt that Stein’s business decision to merge the three bargaining units constituted a material alteration to the status quo that existed under TMS. Nor is there any doubt that, as a result of those material alterations, the TMS employees hired by Stein are not doing the same jobs, in the same working conditions, under the same supervisors, and utilizing the same production process. Under these circumstances,

compelling evidence demonstrates that the only appropriate unit following the merger of the three units is the “post-transition combined group of employees.”

- B. Stein is absolved of any recognitional or bargaining obligations to the Charging Parties because the General Counsel failed to prove that the relationship between Charging Parties and TMS was predicated on Section 9(a) of the Act. [Exception No. 13.]

To be clear, the Union is under no obligation to prove any fact in this matter. Rather, it is incumbent upon the General Counsel to carry the evidentiary burden of proving its case. Here, the Union argues that in order to prove its case, the General Counsel must introduce sufficient evidence to support its claim that the Charging Parties collective bargaining agreements with TMS were the product of a Section 9(a) bargaining relationship. Requiring the General Counsel is to prove that TMS had a 9(a) relationship with the Charging Parties is not a novel concept as the “bargaining obligation of a ‘successor-employer’ derives from both the specific mandate of Sections 8(a)(5) and 9(a) of the Act that an employer must bargain with ‘representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes,’ and from the general acknowledgement that a mere change in ownership does not destroy the presumption of continuing employee support for a certified or voluntarily recognized union.” *Sch. Bus Serv., Inc.*, 312 NLRB 1, 3 (1993), *enfd.*, 46 F.3d 1143 (9th Cir. 1995). The General Counsel acknowledges the critical role Section 9(a) status plays in the successorship doctrine, as its Complaint specifically avers that TMS had a 9(a) relationship with the Charging Parties (Teamsters Comp. at ¶ 7; Laborers’ Comp. at ¶ 7), thus providing the basis for Stein’s purported bargaining obligation to the Charging Parties. Indeed, whether Stein had any bargaining obligations under the Act to the Charging Parties – either as a conventional or perfectly clear Burns successor – depends on whether TMS had a 9(a) relationship with the Charging Parties via Board-certified election or voluntary recognition.

Absent proof of a 9(a) relationship between a TMS and Charging Parties, Stein has no bargaining obligation under the Act.

For its part, the Union and Stein offered evidence suggesting that the bargaining relationship between TMS and the Charging Parties was, in fact, the product of a Section 8(f) “pre-hire” bargaining relationship. By arguing that the relationship between TMS and the Charging Parties was one governed by Section 8(f), the Union does not relieve the General Counsel its obligation to prove a Section 9(a) relationship. Rather, the burden to establish a valid 9(a) relationship remained, at all times with the General Counsel. The General Counsel, however, failed to carry this burden.

Here, the record lacks any evidence that TMS employees participated in a Board-conducted election for representation by either Teamsters Local 100 or Laborers’ Local 534 prior to Stein assuming operations. (TR 109, 271-72, 362-63, 500, 564, 764, 1179.) The Charging Parties’ CBAs also fail to include any language indicating that there existed a Board-certified unit. The only remaining avenue by which the General Counsel could assert a 9(a) relationship is through voluntary recognition, however, the record lacks any evidence that the Charging Parties ever conducted a card check at the Middletown Facility or otherwise presented TMS or its predecessors with evidence of majority support. (TR 501, 765-66.) Moreover, there is no evidence that TMS or its predecessors ever made “a clear and unequivocal agreement . . . to recognize the [Charging Parties] on proof of majority status[.]” *Terracon, Inc.*, 339 NLRB at 223. At best, the General Counsel and the ALJ rely upon the CBAs between TMS and the Teamsters and Laborers which merely indicate that, respectively, “[t]he Employer hereby recognizes the Union as the sole and exclusive bargaining agent for the purpose of collective bargaining in regard to wages, hours and other terms and conditions of employment for all truck

drivers employed by the Employer at its AK Steel, Middletown, Ohio facility[.]” (Jt. Exh. 3, Art. I; Jt. Exh. 4, Art. I; Jt. Exh. 7, Art. I.) or TMS “recognizes the Union as the sole and exclusive bargaining agent for the purpose of collective bargaining in regard to wages, hours, and other terms and conditions of employment for all general labor work and clean up[.]” (Jt. Exh. 2, Art. I; Jt. Exh. 6, Art. I.) Neither of those clauses, however, provide a clear and unequivocal agreement to recognize the Charging Parties based upon proof of majority status.

Both the Union and Stein attempted to fill the 9(a) evidentiary void with evidence indicating that the lack of any proof of 9(a) status between the Charging Parties and TMS was likely due to the fact that the genesis of their bargaining relationships lies in Section 8(f). In making this argument, the Union did not agree to assume the burden of disproving a Section 9(a) relationship. Rather, the Union’s presentation of evidence and arguments regarding the probable 8(f) relationships between TMS and the Charging Parties was only intended to function as foil to the General Counsel who completely failed to produce any evidence establishing a Section 9(a) bargaining relationship. Without such evidence, a 9(a) relationship by way of voluntary recognition cannot stand. *Terracon, Inc.*, 339 NLRB 221 (2003), enfd. sub nom. *Operating Engineers Local 150 v. NLRB*, 361 F.3d 395 (2004). The General Counsel has therefore failed to meet its burden in establishing proof of majority support for the Charging Parties as voluntarily recognized unions by TMS or its predecessors. *Sch. Bus Serv., Inc.*, 312 NLRB at 3.

- C. Stein did not commit any unfair labor practices under *Advanced Stretchforming Internatl.*, 323 NLRB 529 (1997), and thus did not forfeit its rights to set terms and conditions of employment. [Exception Nos. 22-24.]

The decision to set initial terms of employment that required each employee to perform all work tasks related to the slag reclamation process regardless of whether a task was the type of work traditionally performed by that employee’s bargaining unit under TMS was made well

before Stein assumed operations at the Middletown Facility on January 1, 2018. Indeed, under its pre-existing CBAs with Local 18, Stein had long utilized a single bargaining unit to perform slag reclamation work. Thus, the Union is at loss to explain or understand why the General Counsel and the ALJ claim that their merger was a “sham” or how Stein threatened employees by announcing that its slag reclamation process at the Middletown Faculty would operate in the same manner as Stein’s other slag reclamation facilities. Even assuming *arguendo* that this announcement was an actionable threat, the Board has held that if such a “statement was made at a time when the [employer] had no obligation to recognize and bargain with the Union,” even as late as “at least one week before” the successor would have any obligation to recognize the union under *Burns*, the employer’s conduct does not independently violate the Act. *Eastern Essential Servs.*, 363 NLRB No. 176, slip op. at 11 (2016). Here, however, to the extent that announcement could even implicate Stein, it was made well before Stein would have been obligated to bargain with the Charging Parties. As such, they do not constitute independent violations of Sections 8(a)(1) or (5) of the Act. *Id.*

Respectfully Submitted,

/s/ Timothy R. Fadel

TIMOTHY R. FADEL (0077531)

Fadel & Beyer, LLC

The Bridge Building, Suite 120

18500 Lake Road

Rocky River, Ohio 44116

(440) 333-2050

tfadel@fadelbeyer.com

*Counsel for Respondent International Union
of Operating Engineers, Local 18*

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 17th day of April, 2019:

Julie C. Ford
Stephanie Spanja
Doll, Jansen & Ford
111 W. First St., Suite 1100
Dayton, Ohio 45402
jford@djflawfirm.com
sspanja@djflawfirm.com
*Counsel for Charging Party
Teamsters Local 100*

Ryan Hymore
Mangano Law Offices Co., LPA
3805 Edwards Rd., Suite 550
Cincinnati, Ohio 45209
rkhymore@bmanganolaw.com
*Counsel for Charging Party
Laborers' Local 534*

Keith L. Pryatel
Kastner Westman & Wilkins, LLC
3550 W. Market St., Suite 100
Akron, Ohio 44333
kpryatel@kwwlaborlaw.com
Counsel for Respondent Stein, Inc.

Daniel Goode
Theresa Laite
National Labor Relations Board,
Region 9
John Weld Peck Federal Building
550 Main Street, Rm. 3003
Cincinnati, Ohio 45202
daniel.goode@nlrb.gov
theresa.laite@nlrb.gov
Counsel for the General Counsel

Administrative Law Judge Andrew Gollin
National Labor Relations Board,
Division of Judges
1015 Half Street SE
Washington, D.C. 20570
andrew.gollin@nlrb.gov

/s/ Timothy R. Fadel
TIMOTHY R. FADEL (0077531)