

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STEIN, INC.,	)	CASE NOS.
	)	09-CA-215131
Respondent,	)	09-CA-219834
	)	
and	)	CASE NO.
	)	09-CB-215147
LABORERS' INTERNATIONAL UNION OF	)	
NORTH AMERICA (LIUNA) LOCAL NO. 534,	)	
	)	
Charging Party,	)	
	)	
and	)	
	)	
INTERNATIONAL OPERATING ENGINEERS	)	
(IUOE) LOCAL 18,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
LABORERS' INTERNATIONAL UNION OF	)	
NORTH AMERICA (LIUNA) LOCAL NO. 534,	)	
	)	
Charging Party.	)	
	)	
	)	
	)	

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RESPONDENT STEIN, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
ITS MOTION FOR RECONSIDERATION, RE-HEARING OR RE-OPENING OF THE RECORD

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February 3, 2020

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## I. INTRODUCTION.

This post-decisional motion is a jurisdictional predicate<sup>1</sup> to Stein, Inc.'s ("Stein" or "the Company") right to appeal that discreet portion of the National Labor Relation Board's ("NLRB") January 28, 2020 Decision and Order, holding that the Company violated §§ 8(a)(1) and (5) of the Act through its probationary-period discharge of Mr. Ken Karoly.<sup>2</sup> The NLRB, for the first time in this long-running dispute,<sup>3</sup> advanced a rationale for sustaining the § 8(a)(5) discharge-challenging claim against Stein that: (1) was never made or advanced in the unfair labor practice charge filed on behalf of Karoly; (2) was never made or advanced in the General Counsel's Second Amended Consolidated Complaint; (3) was not advanced or argued by counsel for the General Counsel at any point in time during the four day hearing of this matter; (4) was not a rationale analyzed or adopted by the Administrative Law Judge<sup>4</sup>; and (5) is factually incorrect based upon admitted and uncontested documents, and Karoly's own testimony.

Under these circumstances, not only is reconsideration, re-hearing, and re-opening of the record appropriate, denying such is very likely to result in circuit reversal. *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 116-117 (D.C. Cir. 1996); *Collective Concrete, Inc. v. NLRB*, 786 F. Appx. 266, \*\*266-267 (D.C. Cir. 2019).

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<sup>1</sup> Where, as here, the NLRB decides a case, or a portion of a case, on a basis not previously raised or argued, a motion for reconsideration or re-hearing is a condition precedent to circuit review. See, *Ladies' Garment Workers v. Quality Mfg.*, 420 U.S. 276, 281, n. 3, 95 S.Ct. 972 (1975).

<sup>2</sup> *Stein, Inc.*, 369 NLRB No. 10, slip op. p. 4, n. 12 (2020). The parties stipulated that Karoly's discharge did not violate § 8(a)(3) of the Act (Jt. Stip. ¶¶ 32, 33).

<sup>3</sup> Mr. Karoly's unfair labor practice charge was filed back on May 8, 2018 (G.C. Exh. 1, passim).

<sup>4</sup> In its Decision and Order, the NLRB stated that it was analyzing and sustaining Karoly's NLRA-challenging termination of employment claim "...under a different rationale than the [Administrative Law] Judge". *Stein, Inc.*, 369 NLRB No. 10, slip op. p. 4.

## II. STATEMENT OF FACTS.

### A. The Charge and Second Amended Consolidated Complaint.

The pre-hearing unfair labor practice charge filed on behalf of Mr. Karoly made no claim or allegation, express or implied, that his probationary-period termination from Stein was § 8(a)(5)-violative because, allegedly, Stein had somehow altered the probationary period under which Karoly was discharged from the Burns<sup>5</sup>-imposed initial terms and conditions of employment lawfully implemented by Stein (G.C. Exh. 1, et seq.). In fact, Karoly's unfair labor practice charge made no mention whatsoever of a November 9, 2018 Stein employee communication that the NLRB determined "...set forth the wages, holidays, and seniority that would apply to employees hired by Respondent Stein and stated that '[a]ll prospective employees will be subject to a 90-day probationary period, a physical, and a background check'". Stein, Inc., 369 NLRB No. 10, slip op. p. 1.

In Stein's charge-response position statement submitted to Region 9 of the NLRB,<sup>6</sup> Stein touted its Burns' rights -- rights the NLRB ultimately determined to be inviolate and the basis for reversing the Administrative Law Judge<sup>7</sup> -- and made it perfectly clear that the November 9 employee communication set forth a 90 working day probationary period:

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<sup>5</sup> NLRB v. Burns Int'l. Sec. Svc., 406 U.S. 272, 92 S.Ct. 1571 (1972).

<sup>6</sup> Stein's June 18, 2018 charge-responding position statement submitted to Region 9 of the NLRB is appended hereto at Tab "A".

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The Judge found that because Respondent Stein forfeited its right to set the initial terms and conditions of employment for Laborers' Local 534 unit employees, Respondent Stein unlawfully applied a probationary period longer than what was in the expired Laborer's Local 534 collective-bargaining agreement with its predecessor. However, as we have already found, Respondent Stein had the right to set the initial terms and conditions of employment of the Laborers Local 534 unit employees.

Stein, Inc., 369 NLRB No. 10, slip op. p. 4.

Significantly, one of the initial terms and conditions of employment that Stein, exercising its Burns right, informed prospective employees that they would be subject to was a 90-day working probationary period (Doc. No. 0088).

(Attach. "A", p. 3) (emphasis in original).

To be sure, the text of Stein's November 9 employee communication did not state "90-day working probationary period", but neither did it state that the Burns-imposed terms and conditions for the successor Stein was a "90-day calendar day probationary period" (Attach. "A", p. 0088). Yet, from the inception, before there were any adverse findings of fact or conclusions of law against Stein, Stein made it abundantly clear to Region 9 of the NLRB that its Burns-imposed terms and conditions of employment included a "...90 working day probationary period" (Attach. "A", p. 3) (emphasis in original).

Region 9's Second Amended Complaint, in two different respects, conceded that Karoly was in, and subject to a 90 working day probationary period. First, Region 9 averred that Stein's Burns rights attached on "January 1, 2018" when Stein "...unilaterally implemented initial terms and conditions of the Unit" (Sec. Amend. Consolid. Compl. ¶ 11(c)). The complaint-incorporated document was Stein's labor agreement with IUOE Local 18, and it made perfectly clear the probationary period was 90 working days:

The probationary period shall be the ninety (90) days of actual work.

(Jt. Stip. ¶ 26; Jt. Stip. Exh. 16, p. 5, § 17.05) (emphasis added). Second, Region 9 plead its challenge to Karoly's discharge as one arising under Total Security Management, 364 NLRB No. 106 (2016), which would require that Karoly still be in his probationary period when terminated, and subject to Stein's discretion:

12. (a) On about April 18, 2018 Respondent Stein discharged Kenneth Karoly.
- (b) Respondent Stein engaged in the conduct described above in paragraph 12(a) based on terms and conditions of employment described above in paragraphs 11(b)(x) and (xiii).
- (c) Respondent Stein exercised discretion when it engaged in the conduct described above in paragraphs 12(a) and (b).  
\* \* \*
- (e) Respondent Stein engaged in the conduct described above in paragraphs 12(a)-(c) without prior notice to Laborers Local 534 and without affording

Laborers Local 534 an opportunity to bargain with Respondent Stein with respect to this conduct.

(Jt. Stip. Exh. 16, pp. 7-8).

**B. The General Counsel's Litigation Position at the Evidentiary Hearing.**

Counsel for the General Counsel's hearing and evidentiary position readily conceded that Stein's Burns-imposed probationary period was indeed 90 working days, because that was the only way Region 9 could fit its contest of Karoly's discharge into the litigated-basis for its legal challenge -- Total Security Management, 364 NLRB No. 106 (2016). In its post-hearing brief to the ALJ, Counsel for the General Counsel conceded ---- as it had to in order to grab the mantle of the discharge-discretion required of Total Sec. Mngmt. --- that Karoly was still in his 90-day working probationary period when terminated by Stein:

"The imposition of discipline on individual employees alters their terms and conditions of employment and implicates the duty to bargain if it is not controlled by preexisting, nondiscretionary employer policies or practices". Total Security Management, 364 NLRB No. 106, slip op. at 3.

\* \* \*

Thus, Total Security Management obligates an employer – after it is has preliminarily decided to impose serious discipline, including discharge – to “provide the union with notice and an opportunity to bargain over the discretionary aspects of its decision before proceeding to impose the discipline”. Id. at 10 (emphasis in original).

\* \* \*

In terminating Karoly, Respondent Stein did not accuse Karoly of violating specific work rules. On the contrary, Respondent Stein relied solely on the contractual probationary period to justify Karoly's termination.

\* \* \*

That Respondent relied solely on its discretion under the contractual probationary period is highlighted by its navigation of the disciplinary procedures in its contract – albeit an unlawful contract – with Respondent Local 18. Article 17.05 states that “[p]robatinary employees may be laid off or discharged as exclusive [sic] determined by the Company...” (J. Ex. 16, p. 15).

\* \* \*

Respondent Stein's sole reliance on the contractual probationary period – how it easy it may have been – exposes its decision for what it really was: the ultimate use of discretionary discipline.

\* \* \*

For the reasons discussed above, Respondent Stein violated Section 8(a)(5) of the Act by failing or refusing to notify and bargain with Laborers Local 534 prior to using its discretion to terminate Karoly.

(G.C. Post-Hearing Brief to ALJ, pp. 29-32) (Attach. "B").

Relying solely on Total Security Management as its § 8(a)(5) predicate basis to upset the probationary-period discharge of Karoly, not once did Counsel for the General Counsel contend, assert, or argue that Stein had purportedly and impermissibly altered its Burns-imposed terms and conditions of employment from 90 calendar days, to 90 working days.

When the proverbial shoe has been on the other foot, and it is has been the employer that has failed to advance a theory or argument before a Board ALJ, the circuit courts have held that the doctrine of waiver will not allow the reviewing circuit to base its analysis and ruling on a new-found theory never advanced before the administrative law judge:

The court is unable to address petitioners' second challenge because it was not presented to the ALJ and the petitioners' point to no extenuating circumstances that might excuse this failure. See, Trident Seafoods, Inc. v. NLRB, 101 F.3d 111, 116-17 (D.C. Cir. 1996).

\* \* \*

Because petitioners' waited to raise the issue of equities until they filed their exceptions with the Board, the Board's General Counsel was not on notice of the equities argument at the time of the hearing before the ALJ and consequently did not have "any real opportunity to cross-examine witnesses on this point or to provide counterevidence." Trident Seafoods, 101 F.3d at 117.

\* \* \*

"[A] basic tenet of administrative law [is] that each party to a formal adjudication must have a full and fair opportunity to litigate the issue to be decided by the agency," Trident Seafoods, 101 F.3d at 116, because otherwise, "the record developed with regard to that issue will usually be inadequate to support a substantive finding in [the proponent's] favor", Id.

Collective Concrete, Inc. v. NLRB, 286 F. Appx. 266, \*267 (D.C. Cir. 2019).

**C. The ALJ's New-Found § 8(a)(5) Theory Viz Karoly.**

The ALJ, no-doubt cognizant of the fact that Total Security Management and its progeny was apt to be reversed by this Board,<sup>8</sup> invented on his own an altogether different – and Board-decreed erroneous – theory to protect Karoly under § 8(a)(5) of the Act:

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<sup>8</sup> In OM 17-14 (Feb. 14, 2017), the General Counsel of the NLRB instructed its Regional Directors that they were to seek advice from compliance when presented with a Total Security Management issue, and only after obtaining a recommendation, move such an issue forward by combining the merits hearing with the compliance specification. Id. What's more, the NLRB has

The Judge found that because Respondent Stein forfeited its right to set the initial terms and conditions of employment for the Laborers Local 534 unit employees, Respondent Stein unlawfully applied a probationary period longer than what was in the expired Laborers' Local 534 collective-bargaining agreement with its predecessor. However, as we have already found, Respondent Stein had the right to set the initial terms and conditions of employment of the Laborers' Local 534 unit employees.

Stein, Inc., 369 NLRB No. 10, slip op. at p. 4.

So, the Board ALJ here not only manufactured an altogether new legal theory in an effort to protect Karoly by § 8(a)(5), it was a theory that this Board correctly ruled to be erroneous.

**D. The NLRB's New-Found § 8(a)(5) Theory Viz Karoly.**

In its January 28, 2020 Decision and Order, after reversing the ALJ's altogether new Karoly theory of liability, the Board articulated yet another legal theory that was never pressed or presented at or before the evidentiary hearing, to wit:

As of April 18, 2018, when it discharged Karoly, Respondent Stein had not negotiated a change to that 90-day probationary period with Karoly's bargaining representative, Laborers Local 534. As a consequence, under the terms Respondent Stein set forth in hiring Karoly and his coworkers [announced November 9], Karoly's probationary period had elapsed by the date he was discharged. Because Respondent Stein discharged Karoly pursuant to a probationary period that it had unlawfully unilaterally extended – from "90 day[s]" to "90 days of actual work" – we find that Respondent Stein violated Section 8(a)(5) and (1).

Stein, Inc., 369 NLRB No. 10, slip op. p. 4 (emphasis added).

**III. LAW AND ARGUMENT.**

First of all, the Board's statement that "...Karoly's probationary period had elapsed by the date he was discharged" is the exact opposite of what Counsel for the General Counsel argued and advanced to the ALJ:

Respondent Stein relied solely on the contractual probationary period to justify Karoly's termination.

\* \* \*

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openly questioned the continued legality and viability of Total Security Management. See, Oberthur Technologies of America Corp., 368 NLRB No. 5, n. 2 (2019).

That Respondent relied solely on its discretion under the contractual probationary period is highlighted by its navigation of the disciplinary procedures in its contract – albeit an unlawful contract – with Respondent Local 18.

\* \* \*

But just like the proverbial double-edged sword, Respondent Stein's sole reliance on the contractual probationary period – however easy it may have been – exposes its decision for what it really was: the ultimate use of discretionary discipline.

(G.C. ALJ Br., pp. 31-32) (Attach. "B") (emphasis added).

Counsel for the General Counsel's advocated position that Karoly was still in his 90 working day probationary period had testimonial backing in the record by Karoly himself:

[BY NLRB COUNSEL GOODE OF KEN KAROLY]

Q. And ultimately did [Stein] tell you why you were being terminated?

A. They said because of my probationary period at the time they had --- were in their right to terminate me.

(Tr. 417). Although Karoly disputed some aspects of his discharge meeting and announced discharge decision,<sup>9</sup> he did not further testify on his direct or cross examinations that Stein's discharge statement that he was in his 90 working day probationary period was not factually accurate.

Secondly, and perhaps more importantly, the Board's decisional presumption that Stein somehow had "...unlawfully unilaterally extended the probationary period" – from "90 day[s]" to "90 days of actual work"<sup>10</sup> is factually incorrect. Before this litigation even started, before the theories of liability invoked to protect Karoly were ever advanced or briefed, and in its Burns announcement of initial terms and

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<sup>9</sup> Karoly did dispute that in his discharge meeting that Stein had cited Karoly's repeated failures to answer his AK/Stein safety cellular phone (Tr. 449-452, 458-459). In his first NLRB investigative affidavit, Karoly averred that his repeated failures to answer his safety phone was indeed discussed in his termination meeting (Tr. 450-452). Then, Region 9 hailed Karoly in again to swear out a second affidavit, where he denied discussing his not answering his safety phone in his Stein termination meeting (Tr. 458-459).

<sup>10</sup> Stein, Inc., 369 NLRB No. 10, slip op. p. 4; Jt. Exh. 16, p. 5, § 17.05.

conditions of employment, Stein made it perfectly clear that the new employee probationary period was a "...90-day working probationary period" (Attach. "A", p. 3) (emphasis in original).

Finally, the ALJ's on-again, off-again, and the NLRB's on-again, off-again § 8(a)(5) theories that were summoned forth to cloak Karoly with protection under the Act --- in contradiction to the legal theory actually announced and advocated by Region 9 --- violated Stein's "fair notice" and Due Process rights under the Board's rules, the United States Constitution, and the Administrative Procedures Act, 5 U.S.C. § 554(b)(2). If the NLRB's theory of liability in its notice-issuing complaint is different than that upon which liability is ultimately predicated, and Counsel for General Counsel was aware of the predicate acts forming the basis for the new, unannounced theory of liability before the hearing, the federal circuits and even the Board itself have held that the shifted theory cannot pass Constitutional, statutory, or procedural rule muster. *Henry Bierce Co. v. NLRB*, 23 F.3d 1101, 1106-1108 (6<sup>th</sup> Cir. 1994) (reversing NLRB); *Post Corp. v. Newspaper Guild of N.Y.*, 283 NLRB 430 (1987) (reversing ALJ).

#### **IV. CONCLUSION.**

The NLRB's Case Handling Manual and procedural regulations encourages the use of a motion for reconsideration in circumstances precisely as those presented here. NLRB Case Handling Manual, ¶ 10132.4; 29 C.F.R. § 102.48(d)(2). For the reasons detailed supra, the Board's January 28, 2020 Decision and Order relating to Mr. Karoly's § 8(a)(5) termination should be withdrawn; a new decision and order with respect to Mr. Karoly should issue based on the facts, evidence and circumstances set forth at trial and herein; or, alternatively, the claim relating to Mr. Karoly and his termination should be re-heard or the evidentiary record re-opened.

Respectfully submitted,

s/Keith L. Pryatel

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**CERTIFICATE OF SERVICE**

This is to certify that the foregoing Respondent Stein, Inc.'s Memorandum of Points and Authorities in Support of Motion for Reconsideration, Re-Hearing or Re-Opening of the Record has been served, via electronic mail, this 3<sup>rd</sup> day of February 2020, upon the following:

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**RE: Stein, Inc. and Laborers International Union of North America,  
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As you are aware, our office represents Stein, Inc. with respect to its labor relations matters, including the above-referenced § 8(a)(5) unfair labor practice charge filed on May 8, 2018. As you are also aware, the Laborers International Union, Local No. 534 and Teamsters Local Union No. 100 filed a different set of charges that were fully investigated by Region 9 in 09-CA-214633 by Ms. Theresa Laite, Esq. of the Region 9 office. That investigation involved the production by Stein, Inc. of close to 1,000 pages of documents requested by the Region. References to Bates labeled documents in this position statement shall be to the Bates labeled documents produced in 09-CA-214633.

**The Predicate Basis for This Charge is Legally Inactionable.**

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As set forth in the written charge provided to Stein, Inc. ("Stein" or "Respondent"), the stated basis for the charge is a singular § 8(a)(5) allegation that Stein "...made unilateral changes in terms and conditions of employment" relating to Mr. Ken Karoly, "resulting in his discipline and termination" effective April 18, 2018. The stated basis of the charge – that Stein made impermissible unilateral changes to the former Laborers/TMS contract that, by its terms, expired without renewal when Mr. Karoly exited his employment with TMS – is erroneous as a matter of law.

Proper analysis of the charge begins and ends with United States Supreme Court's decision in *NLRB v. Burns Security Services*, 406 U.S. 272, 281-295 (1972). It is also important to note that throughout the entire investigation of 09-CA-214633,

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at no point in time did Field Investigator Theresa Laite allege or state that Stein was somehow a “perfectly clear” successor to the former TMS contractor at the AK Middletown, Ohio work site. To the contrary, Ms. Laite conceded and admitted during that separate unfair labor practice investigation that Stein, Inc., at best, was a simple “successor” under the *Burns* doctrine. While Stein disputes, and is prepared to fully litigate that erroneous assertion, the distinction between a *Burns* “successor” and a NLRA “perfectly clear” successor is significant:

In *NLRB v. Burns Security Services*, 406 U.S. 272, 281-295 (1972), the Supreme Court held that a successor employer is not bound by the substantive terms of a collective-bargaining agreement negotiated by the predecessor and is generally free to unilaterally set initial terms and conditions of employment. *Creative Vision Resources, LLC*, 364 NLRB No. 91, slip op. at 2 (2016). The Court explained that the duty to bargain will not normally arise before the successor sets initial terms because it is not usually evident whether the union will retain majority status in the new work force until after the successor has hired a full complement of employees. *Id.* The Court recognized, however, that “there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees’ bargaining representative before it fixes terms.” *Id.*

In *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), *enfd. per curiam*, 529 F.2d 516 (4<sup>th</sup> Cir. 1975), the Board addressed the “perfectly clear” exception, and found it was “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 prior to inviting former employees to accept employment.” *Creative Vision Resources, LLC*, 364 NLRB No. 91, slip op. at 3. Acknowledging that “the precise meaning and application of the Court’s caveat is not easy to discern,” the Board reasoned that “[w]hen an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer ‘plans to retain all of the employees in the unit,’ as that phrase was intended by the Supreme Court,”

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because of the possibility that many of the employees will reject employment under the new terms, and therefore the union's majority status will not continue in the new work force. *Id.*

In cases subsequent to *Spruce Up*, the Board clarified that the perfectly clear exception is not limited to situations where the successor fails to announce initial employment terms before it formally invites the predecessor's employees to accept employment. Rather, a new employer has an obligation to bargain over initial terms when it displays an intent to employ the predecessor's employees without making it clear that their employment will be on different terms from those in place with the predecessor. *Creative Vision Resources, LLC*, *supra*, citing, *Canteen Co.*, 317 NLRB 1052, 1053-1054 (1995), *enfd.*, 103 F.3d 1355 (7<sup>th</sup> Cir. 1997). Thus, in applying the "perfectly clear" exception of *Burns*, the Board scrutinizes not only the successor's plans regarding the retention of the predecessor's employees, but also the timing and clarity of the successor's expressed intentions concerning existing terms and conditions of employment. *Creative Vision Resources, LLC*, at 7. Stated another way, to avoid "perfectly clear" successor status, a new employer must clearly announce its intent to establish a new set of conditions prior to, or simultaneous with, its expression of intent to retain the predecessor's employees. *Nexeo Solutions, LLC*, 364 NLRB No. 44, *slip. op.* at 6.

*Walden Security, Inc.*, 366 NLRB No. 44, \*9 (March 23, 2018).

Before Stein on-boarded any employee who formally worked for TMS at the AK Middletown, Ohio work site, it clearly and unequivocally announced that it was exercising its *Burns* right to set initial terms and conditions of employment that were altogether different from whatever terms and conditions of employment TMS chose to negotiate with its various unions (Doc. No. 0088). More importantly, Stein announced that *none* of the former TMS employees were guaranteed or assured of employment with Stein, and instead would have to go through application filing, background checks, interviewing, and ultimate selection by a consensus of Stein managers. Significantly, one of the initial terms and conditions of employment that Stein, exercising its *Burns* right, informed prospective employees that they would be subject to was a 90 day *working* probationary period (Doc. No. 0088). That *Burns*-invoked right was, in fact, eventually negotiated into the operative Stein/IUOE Local

Michael E. Riggall, Field Investigator  
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No. 18 collective bargaining agreement that governs Stein's workforce at the AK Middletown, Ohio work site (Doc. No. 0573).

So what Laborers Local No. 534 labels as a "unilateral change" in terms and conditions of employment was nothing more than Stein's *Burns* legal right to establish the initial terms and conditions of employment as it saw fit. And, because Stein is without question *not* a "perfectly clear" *Burns* successor, it had no NLRA duty, or contractual duty for that matter, to keep in place the former terms and conditions of employment that had been negotiated by TMS for the former Laborers workforce, including Ken Karoly. *Walden Security, Inc., supra*.

#### **The Reasons for Ken Karoly's Termination.**

As you indicated over the telephone on June 14, 2018, Mr. Karoly, and accordingly Laborers Local No. 534, does not contend, allege, or suggest that Mr. Karoly's termination from employment was discriminatory in violation of § 8(a)(3) of the Act. Nor, for that matter, has Mr. Karoly, or Laborers Local No. 534 alleged or suggested that Mr. Karoly's termination from employment was as a result of his having engaged in any form of protected, concerted activity in violation of § 8(a)(1) of the Act.

Whether Mr. Karoly's discharge was "right" or "wrong", or "just" or "unjust" is irrelevant to the analysis under the NLRA. That statute only protects disciplinary action that is § 8(a)(3) discriminatory, or as a result of one having engaged in protected, concerted activity. Nevertheless, Stein will explain the objectively legitimate reasons for Mr. Karoly's forcible separation from Stein's employment.

During the brief period of time that Mr. Karoly was employed by Stein (1/1/18-4/18/18), and while still in his *Burns* probationary period, Mr. Karoly dropped, ran over, and destroyed a Company-issued cellular phone. Additionally, Mr. Karoly made himself unavailable for necessary communication by either shutting off his two-way radio, or conveniently placing it on the wrong channel so that neither Stein nor its client AK Steel could communicate with Mr. Karoly. The precipitating event that led to Mr. Karoly's termination was yet another incident wherein Mr. Karoly refused and failed to answer his two-way radio when attempted to be summoned by AK Steel representative Ben Wolf. That event occurred on the cusp of Mr. Karoly's announced 4/18/18 discharge, which was for the very reasons

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expressed in the attached Exhibit "A".<sup>1</sup> Mr. Karoly's non-charged allegation that he cost Stein overtime, as a result of AK Steel insisting on its employees staying at or near the blast furnace until the end of their work shifts, and only then traveling back to the Health & Welfare office was not cited, or mentioned as, a precipitating reason for Mr. Karoly's termination. In point of fact, AK Steel's insistence on its contractor Stein to have the area near the blast furnace manned until shift end was made in mid-March, and Mr. Karoly's termination did not happen until over a month later on the cusp of Mr. Karoly once again making himself unavailable when AK Steel representative Ben Wolf attempted to make contact with him.<sup>2</sup>

As I mentioned, in preparation for our call yesterday, I reached out to the attorney for IUOE Local 18, and asked that he apprise me of the status of the pending grievance that had been filed by that collective bargaining representative on behalf of Mr. Karoly, contesting his termination. Up until that point in time, the Company had fielded Local 18's grievance on behalf of Mr. Karoly and allowed the local breathing room to make a decision about the wisdom of pressing the matter to an arbitration hearing. Yesterday, I was informed that Local 18 is, in fact, intent on challenging Mr. Karoly's discharge through the available grievance/arbitration procedure, where IUOE Local 18 intends to represent Mr. Karoly's interests with all vigor.

Because Stein's conduct was perfectly authorized under *Burns*; and because none of these cited charge conduct is alleged to be § 8(a)(3) discriminatory, or as a result of protected, concerted activity, Stein respectfully requests that this charge

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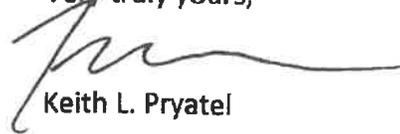
<sup>1</sup> The attached Exhibit "A" was not only handed to Mr. Karoly when his discharge was announced, it was read to him by Doug Huffnagel as well. Mr. Karoly took his copy of the attached Exhibit "A" and threw it at Huffnagel when his termination was announced.

<sup>2</sup> In the attached Exhibit "A" the termination memorializes that Mr. Karoly was one to "constantly complain about working for this company". Those complaints as fielded by Stein management were not concerted in nature. Rather, they were decidedly un-concerted and personal to Mr. Karoly, who was complaining about not being able to work 6 or 7 days per week (as he apparently had with TMS), while Stein held more to a safety-conscious workweek of only 5 days per week. In other words, Mr. Karoly was griping for Stein to implement an unsafe, "overwork" scheduling while Stein was insistent on a safer course of action. That is the opposite of protected, concerted activity. And, in any event is not *concerted* to any degree.

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be dismissed with a finding of no probable cause. If, after your review of these materials, you find you are in need of any additional information, please do not hesitate to contact the undersigned.

Very truly yours,

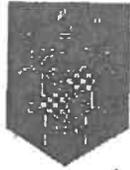
A handwritten signature in black ink, appearing to read "Keith L. Pryatel", with a long horizontal flourish extending to the right.

Keith L. Pryatel

KLP/lmc

Enclosure

**A**



**THE**  
**STEIN**  
COMPANIES

## Employee Record Notice

Employees Name:	<u>Ken Karoly</u>	Disciplinary Action Rec	<u>X</u>
Date:	<u>4/18/2018</u>	Safety Commendation Rec	<u>          </u>
Time:	<u>5am</u>	Attendance Rec.	<u>          </u>
		Conduct Rec.	<u>X</u>
		Quality of Work	<u>X</u>

**Employer Explanation of Notice:**

The employee was hired on 1/1/18 with Stein Inc. and since his hire date has not grown or shown any enthusiasm about his position and it has been displayed in his work performance. The employee is constantly complaining about working for this company, shown he is not a team player, has since damaged company property and has on two occasions not followed written rules and procedures. In addition to the above, while performing his job as safety attendant has been involved in two equipment damage issues in his work area. In both instances the employee failed to provide adequate safety direction to avoid these incidents. Therefore under section 17.05 of the CBA, the company has chosen to terminate the employee as of 4/18/18.

On 4/17 to 4/18 shift Mr. Karoly did not answer AK BF Foreman. The BF Foreman had to contact Stein S

Employee:

Comments of Notice

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Foreman's Signature:  Date: 4-18-18

Employees Signature REFUSED TO SIGN Date: 4-18-18 *(TALKED WITH ME ON MY DESK)*

Superintendents Signature  Date: 4-18-18 5:40 AM

## Middletown Operations

- Start Date/Hire Date - January 1, 2018
- All jobs will be under the Operating Engineers Local 18 Union
- It is Stein, Inc.'s goal to hire as many TMS employees as possible who remain in good standing with TMS through January 1, 2018.
- Classification and Rates

Group	Job Description	1/1/2018	
1	General Laborer	\$	15.00
	Mechanic Helper	\$	17.50
	Lancer	\$	21.93
	Lube Man	\$	20.45
	Site Laborer/Safety	\$	20.93
2	Truck Driver	\$	21.12
3	General Operator	\$	24.63
	Crane Operator	\$	24.63
	B Mechanic	\$	24.63
4	A Mechanic	\$	25.00
	Hot Pit Operator	\$	26.13
	Master Mechanic	\$	26.25

- The following holidays will be observed:

New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Day after Thanksgiving, & Christmas Day

- All questions regarding pension and health & welfare benefits should be directed to the Operating Engineers Union
- Seniority for matters including job bids, layoffs and overtime preference only will be determined on the date you were hired by TMS regardless of trade. To retain your seniority position you must commit to employment with Stein by November 20<sup>th</sup>
- All prospective employees will be subject to a 90 day probationary period, a physical, and a back ground check.
- All TMS employees at Middletown will be measured for uniforms on Wednesday, November 15<sup>th</sup>.

**B**

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

STEIN, INC.

and

Case 09-CA-214633

TRUCK DRIVERS, CHAUFFEURS AND  
HELPERS LOCAL UNION NO. 100,  
AFFILIATED WITH THE INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS

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

and

Case 09-CB-214595

TRUCK DRIVERS, CHAUFFEURS AND  
HELPERS LOCAL UNION NO. 100,  
AFFILIATED WITH THE INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS

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

**GENERAL COUNSEL'S POST-HEARING BRIEF**  
**TO THE ADMINISTRATIVE LAW JUDGE**

employees lasted 60 days. (Jt. Ex. 6, pp. 12-13) Respondent Stein’s probationary period, however, lasted 90 working days. Karoly was discharged on April 18 pursuant solely to Respondent Stein’s probationary period in its contract with Respondent Local 18. Karoly’s discharge occurred well outside the 60-day probationary period in the Laborers contract, and thus was directly affected by Respondent Stein’s unlawful unilateral change to the probationary period. As such, Karoly should be ordered reinstated, with backpay. <sup>13/</sup>

D. Respondent Stein violated Section 8(a)(5) when it discharged employee Ken Karoly without first notifying and bargaining with Laborers Local 534.

The Board has concluded “that an employer must provide its employees' bargaining representative notice and the opportunity to bargain before exercising its discretion to impose certain discipline on individual employees, absent an agreement with the union providing for a process, such as a grievance-arbitration system, to address such disputes.” *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106, slip op. at 2 (2016). “The imposition of discipline on individual employees alters their terms and conditions of employment and implicates the duty to bargain if it is not controlled by preexisting, nondiscretionary employer policies or practices. *Total Security Management*, 364 NLRB No. 106, slip op. at 3. “When an employee is terminated . . . the termination is unquestionably a change in the employee’s terms of employment.” *Id.*

Thus, *Total Security Management* obligates an employer - after it has preliminarily decided to impose serious discipline, including discharge - to “provide the union with notice and an opportunity to bargain over the discretionary aspects of its decision *before* proceeding to impose the discipline.” *Id.* at 10. (emphasis in original) “The aim is to enable the union to effectively represent the employee by, for example, providing exculpatory or mitigating

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<sup>13/</sup> As discussed below, Karoly should also be returned to work, with backpay, for Respondent Stein’s violation of the principles articulated in *Total Security Management*.

information to the employer, pointing out disparate treatment, or suggesting alternative courses of action.” *Id.* Any other result would “permit employers to exercise unilateral discretion over discipline after employees select a representative . . . would demonstrate to employees that the Act and the Board’s processes implementing it are ineffectual, and would render the union (typically, newly certified or recognized) that represents the employees impotent.” *Id.* at 12. (emphasis added) Indeed, “Courts have recognized that employees are particularly vulnerable to unfair labor practices when the bargaining relationships is new and the parties are negotiating for an initial contract.” *Id.* at 12, fn. 23. (emphasis added)

In this context, if an employer can show that an employee was disciplined “for cause” within the meaning of Section 10(c) of the Act, backpay and reinstatement may not be awarded. *Id.* at 18. To make the requisite showing, an employer must show that: “(1) the employee engaged in misconduct, and (2) the misconduct was the reason for the suspension or discharge.” *Id.* If such a showing is made, the General Counsel and the Charging Parties may “contest the respondent’s showing, and may also seek to show, for example, that there are mitigating circumstances or that the respondent has not imposed similar discipline on other employees for similar conduct.” *Id.* And if General Counsel and Charging Parties are successful in doing so, the employer then must show that it would nevertheless have imposed the same discipline, keeping in mind that the employer “retains the burden of persuasion in this analytical framework.” *Id.*

Respondent Stein admits that it did not notify and bargain with Karoly’s lawful collective-bargaining representative, Laborers Local 534. Moreover, one need look no further than Karoly’s termination notice to determine that Karoly was subjected to Respondent Stein’s discretionary decision to discharge him. The circumstances surrounding Karoly’s termination do not remotely give rise to the Board’s “exigent circumstances” test which would justify termination prior to notice and bargaining. In terminating Karoly, Respondent Stein did not

accuse Karoly of violating specific work rules. On the contrary, Respondent Stein relied solely on the contractual probationary period to justify Karoly's termination. Respondent Stein's reliance on Karoly's purported complaining and two incidents that occurred the month prior for which Karoly was never terminated further show the complete dearth of any justifiable conduct to warrant termination.

That Respondent relied solely on its discretion under the contractual probationary period is highlighted by its navigation of the disciplinary procedures in its contract - albeit an unlawful contract - with Respondent Local 18. Article 17.05 states that "[p]robatinary employees may be laid off or discharged as exclusive [sic] determined by the Company...." (J. Ex. 16, p. 15) However, Article 7 of the contract restricts Respondent Stein's ability to summarily discharge an employee charged with conduct warranting suspension or discharge, stating that:

7.01 . . . an employee shall not be peremptorily discharged. When the Company concludes that the employee's conduct may justify suspension or discharge, the employee shall be suspended initially for not more than five (5) working days, and notified in writing of such suspension, and the reasons; therefore, shall be indicated. A copy of such notice shall be submitted to the Business Agent of the Union or the designated representative at the time notification is given to the employee.

17.02 During the suspension period, the employee shall, if so desired, be granted a hearing before the Plant Superintendent. . . .

(J. Ex. 16, p. 4)

Had Karoly actually committed an infraction warranting a suspension or discharge, according to Respondent Stein's unlawful contract with Respondent Local 18, Respondent Stein would have been subjected to significant red tape in order to finalize Karoly's termination. Instead, with no evidence that Karoly had remotely conducted himself in a manner warranting discharge, Respondent Stein chose the easy road, and simply cited the probationary period as a means to its desired end. But just like the proverbial double-edged sword, Respondent Stein's sole reliance on the contractual probationary period - however easy it may have been - exposes

its decision for what it really was: the ultimate use of discretionary discipline. In fact, Respondent had so little reason to discipline Karoly, let alone terminate him, it relied up on unsubstantiated griping and two incidents for which Karoly was never disciplined. Even more, Respondent Stein added additional reasons for Karoly's discharge after it had presented him with his termination notice.

While Respondents' may argue that the instant matter is inapposite to the Board's ruling in *Total Security Management* because the instant matter does not involve a newly certified unit, that argument is unavailing. Units that have historically been represented by a labor organization are no less at risk of suffering unilateral changes to their long-enjoyed terms and conditions of employment than a newly-certified unit. Surely, the instant matter serves as a noteworthy reminder of that point. And the Board clearly contemplated circumstances like the instant matter, specifically highlighting situations where a unit may be newly recognized in explaining the vulnerability of employees to unfair labor practices when the negotiating parties have a new bargaining relationship and are bargaining for an initial contract. Had Respondent Stein recognized Laborers Local 534 as the exclusive-collective bargaining agent of its laborers, the parties would have embarked upon a new bargaining relationship as they bargained for an initial contract.

For the reasons discussed above, Respondent Stein violated Section 8(a)(5) of the Act by failing and refusing to notify and bargain with Laborers Local 534 prior to using its discretion to terminate Karoly. Because Respondent Stein has fallen woefully short of proving that Karoly engaged in misconduct for which he was discharged, Respondent Stein should be ordered to reinstate Karoly with appropriate backpay until such time that it notifies and bargains with Laborers Local 534 over his discharge.