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Consolidated Case Nos. 20-1050, 20-1051, 20-1053, 20-1078, 20-1083, 20-1091,
20-1097 & 20-1098

IN THE

**United States Court of Appeals
For the District of Columbia Circuit**

STEIN, INC.,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

and

THE INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL NO. 18

and

TRUCK DRIVERS CHAUFFEURS & HELPERS,
LOCAL UNION NO. 100, affiliated with THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,

and

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA,
LOCAL NO. 534,

*Petitioners/Cross-Respondents/
Intervenor.*

On Petition for Review of Decisions and Orders of the
National Labor Relations Board and Cross-Application for Enforcement

**FINAL JOINT BRIEF FOR PETITIONERS/CROSS-RESPONDENTS
TEAMSTERS LOCAL 100 AND LABORERS LOCAL 534**

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel for Petitioners/Cross-Respondents/Intervenor in the above-captioned matter submits this Certificate of Parties, Rulings, and Related Cases.

A. Parties and Amici

1. Laborers' International Union of North America, Local 534, ("Laborers Local 534") was a Charging Party in the proceeding before Region 9 of the National Labor Relations Board and is a Petitioner/Cross-Respondent/Intervenor in this Appeal.

2. Truck Drivers, Chauffeurs, & Helpers Local Union No. 100, Affiliated with the International Brotherhood of Teamsters ("Teamsters Local 100"), was a Charging Party in the proceeding before Region 9 of the National Labor Relations Board and is a Petitioner/Cross-Respondent in this appeal.

3. The National Labor Relations Board ("Board") is the Respondent/Cross-Petitioner.

4. Stein, Inc. ("Stein") is a Petitioner/Cross-Respondent.

5. The International Union of Operating Engineers, Local No. 18 ("IUOE Local 18") is a Petitioner/Cross-Respondent.

B. Rulings Under Review

Laborers Local 534 and Teamsters Local 100 seek review of the Board's Decision and Order in Stein, Inc., Case Nos. 09-CA-215131, 09-CA-219834, and 09-CB-215147, reported at 369 NLRB No. 10 (January 28, 2020), Jt. App. 9-39, and the Board's Decision and Order in Stein, Inc., Case Nos. 09-CA-214633 and 09-CB-214595, reported at 369 NLRB No. 11 (January 28, 2020), Jt. App. 40-68.

C. Related Cases

To the best of undersigned counsels' knowledge, no related cases are currently pending in this Court or in any other federal court of appeals, or in any other court in the District of Columbia.

Date: February 4, 2021

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioner/Cross-Respondent/Intervenor Laborers Local 534 and Petitioner/Cross-Respondent Teamsters Local 100 make the following disclosures:

Laborers International Union of North America Local 534 is an unincorporated association constituting a labor union under federal labor law; and,

The International Brotherhood of Teamsters Local 100 is an unincorporated association constituting a labor union under federal labor law.

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GLOSSARY

AK Steel	AK Steel Holding Company
ALJ	National Labor Relations Board Administrative Law Judge
Board	National Labor Relations Board
CBA	Collective Bargaining Agreement
IUOE	International Union of Operating Engineers
NLRA	National Labor Relations Act
NLRB	National Labor Relations Board
Stein	Stein, Inc.
TMS	TMS International, Inc.

I. STATEMENT OF JURISDICTION

This proceeding arises from the Board's Decisions and Orders in Stein, Inc., Case Nos. 09-CA-215131, 09-CA-219834, and 09-CB-215147, reported at 369 NLRB No. 10 (January 28, 2020) ("the Board Laborers Decision"), Jt. App. 9-39, and Stein, Inc., Case Nos. 09-CA-214633 and 09-CB-214595, reported at 369 NLRB No. 11 (January 28, 2020) ("the Board Teamsters Decision"), Jt. App. 40-68, (together, "the Board Decisions"). The Board had subject matter jurisdiction over the underlying proceedings pursuant to § 10(a) of the NLRA, 29 U.S.C. § 160(a).

Stein, Inc. filed a petition for review of the Board Teamsters Decision on February 24, 2020 and a petition for review of the Board Laborers Decision on March 23, 2020. IUOE Local 18 filed petitions for review of both the Board Laborers Decision and the Board Teamsters Decision on February 24, 2020. Laborers Local 534 moved to intervene with respect to IUOE Local 18's petition for review of the Board Laborers Decision on February 25, 2020. Teamsters Local 100 filed a petition for review of the Board Teamsters Decision on March 25, 2020. Laborers Local 534 filed a petition for review of the Board Laborers Decision on March 26, 2020. The Board filed cross-applications for enforcement with respect to the Board Decisions on March 30, 2020. This Court has jurisdiction and proper venue over these consolidated proceedings pursuant to §§ 10(e) and (f) of the NLRA, 29 U.S.C. §§ 160 (e), (f).

II. ISSUES PRESENTED FOR REVIEW

1. Whether the Board erred in its determination that Stein, Inc. did not forfeit its right to set the initial terms and conditions of employment for the bargaining unit employees represented by Teamsters Local 100 and Laborers Local 534, despite having found that Stein violated Sections 8(a)(1) and 8(a)(2) of the NLRA by recognizing IUOE Local 18 as the exclusive collective bargaining representative of both the Teamsters and Laborers unit employees, entering into a collective bargaining agreement with the IOUE, and enforcing that collective bargaining agreement with respect to Teamsters and Laborers unit employees, and despite having found that Stein violated Sections 8(a)(3) and 8(a)(1) of the NLRA by enforcing union-security and dues checkoff provisions in that collective bargaining agreement with respect to Teamsters and Laborers unit employees.

2. Whether the NLRB applied an inappropriate and inadequate remedy based on that erroneous determination.

III. RELEVANT STATUTES AND REGULATIONS

See Addendum for pertinent excerpts.

IV. STATEMENT OF THE CASE

1. Factual Background

A. Stein's predecessors performed work at AK Steel's Middletown, Ohio facility with separate units of drivers, laborers, and operators.

AK Steel Holding Company ("AK Steel") is a manufacturer that operates a steel mill in Middletown, Ohio. ALJ Decisions at 4, Jt. App. 19 and 49. The steel-making process yields as a byproduct molten slag that, once cooled, is processed and ultimately saleable for use in road and highway construction. Id. In addition, from the processed slag, pieces of scrap metal are extracted and resold to AK Steel. Id. For decades, AK Steel utilized a competitive bidding process for contracts to perform the slag/scrap work at its Middletown facility. Id. Two corporations with which AK Steel contracted, International Mill Services, Inc. and Tube City, Inc., d/b/a Olympic Mill Service, merged and continued to perform this work for many years under a series of corporate names, most recently TMS. Id.

TMS and its predecessors utilized employees in three separate bargaining units to perform the slag/scrap reclamation work: drivers, laborers, and operators. ALJ Decisions at 4, Jt. App. 20 and 49. The drivers, who were represented by Teamsters Local 100, operate large off-road dump trucks to transport slag from the furnaces to the sites where the reclamation work is performed, as well as water trucks from which water is sprayed on dirt roads to minimize dust in accordance with

environmental regulations. Id. The laborers, whose duties include performing safety and fire watch, cleaning the plant, cutting larger pieces of metal into smaller pieces (a process known as lancing or torching), and removing slag remnants from cauldrons (referred to as knockout), are represented by Laborers Local 534. Id., Jt. App. 20 and 50. IUOE Local 18 represents the operators, who run all of the heavy equipment, including front-end loaders, forklifts, and the like, except for the dump trucks. Id. at 4-5; Jt. App. 20 and 50.

For decades, TMS and its predecessors recognized and entered into separate collective bargaining agreements with Teamsters Local 100, Laborers Local 534, and IUOE Local 18 for the three respective employee groups. Id. at 5, Jt. App. 20 and 50. Teamsters Local 100's most recent collective bargaining agreement with TMS had effective dates from April 1, 2016, to December 31, 2017. Laborers Local 534's most recent collective bargaining agreement was with TMS's predecessor company, Tube City IMS, LLC ("Tube City IMS"), and was effective from March 1, 2013 to August 31, 2016; TMS and Laborers Local 534 subsequently extended that agreement until December 31, 2017. Id. IUOE Local 18 had a collective bargaining agreement with Tube City IMS that was in effect from October 1, 2015, to September 30, 2018. Id. at 6, Jt. App. 20 and 50. As the ALJ noted, "[t]here is no dispute that TMS continued to recognize Laborers Local 534, Teamsters Local 100, and IUOE Local 18 and applied the terms and conditions of the applicable collective-

bargaining agreement to the applicable unit, until it ceased performing the slag/scrap work at the Middletown location.” Id., Jt. App. 21 and 50.

B. AK Steel opens the slag/scrap work contract for bidding, and Stein solicits IUOE Local 18 to negotiate an agreement covering drivers, laborers, and operators.

In 2017, AK Steel opened the contract for its slag/scrap reclamation work for competitive bidding, and both TMS and Stein submitted bids to perform the work. Id. In August 2017, Stein learned it was the leading bidder for the contract and, intending to perform that work through only one bargaining unit, contacted IUOE Local 18 in August 2017 to initiate negotiations for a collective bargaining agreement. Id., Jt. App. 21 and 50-51. According to Stein’s vice president and chief financial officer Dave Holvey, the Company “selected IUOE Local 18 because, according to a TMS employee roster, Local 18 represented a majority of the total employees performing the slag/scrap work at the Middletown location.” Id. However, Stein was aware that Teamsters Local 100 represented the drivers and Laborers Local 534 represented the laborers but, despite this knowledge, “made no effort to contact either union.” Id.

Stein and IUOE Local 18 commenced negotiations for a new collective bargaining agreement in August 2017. Id. In a draft agreement sent to IUOE Local 18 in October 2017, Stein recognized IUOE Local 18 as the collective bargaining representative for the drivers, laborers, and operators, despite the facts that, at that

time, Stein did not yet employ any workers at the AK Steel site and IUOE Local 18 “had not presented Stein with any authorization cards” from any workers. Id.

Following AK Steel’s official award to Stein of the contract to perform the slag/scrap reclamation work effective January 1, 2018, TMS on October 30, 2017, sent written notification “to all TMS employees, Laborers Local 534, Teamsters Local 100, and IUOE Local 18” that it was closing its operations at AK Steel’s Middletown facility as of December 31, 2017. ALJ Decisions at 7, Jt. App. 21 and 51. Stein purchased most of TMS’s equipment used at the site. Id.

C. Stein informs TMS employees that IUOE Local 18 will be their collective bargaining representative and executes a collective bargaining agreement with IUOE Local 18.

On November 9, 2017, Stein’s area manager, Doug Huffnagel, held meetings with TMS employees and read from a document stating that “[a]ll jobs will be under the Operating Engineers Local 18 Union,” setting forth the rates of pay for each job description, and stating that it was Stein’s “goal to hire as many TMS employees as possible.” Id., Jt. App. 21 and 51. Later in November 2017, Teamsters Local 100 business agent Mike Lane spoke to Mr. Huffnagel by telephone and asked whether Stein “intended to negotiate with the Teamsters and honor the contract in place.” ALJ Teamsters Decision at 8, Jt. App. 52. Mr. Huffnagel, who had been copied on the email communications between Stein and IUOE Local 18 regarding their pending contract negotiations, nonetheless responded that he “didn’t know why not”

and told Mr. Lane that someone else would contact him about that. Id. There were no follow up communications to Mr. Lane. Id.

On December 22, 2017, despite the fact that IUOE Local 18 had not presented Stein with any authorization cards, Stein and IUOE Local 18 executed a collective bargaining agreement (“the Stein/Local 18 CBA”). As the ALJ noted,

Stein never notified Teamsters Local 100 or Laborers Local 534 that it had merged the three units, recognized IUOE Local 18 as the representative of that unit, and/or that it entered into a contract with Local 18 altering the wages, hours, and other terms and conditions of employment applicable to the drivers unit and the laborers unit.

Id. at 9, Jt. App. 22 and 52.

D. Stein refuses Teamsters Local 100’s and Laborers Local 534’s demands to bargain and requires employees to join IUOE Local 18.

On January 1, 2018, Stein began performing the slag/scrap reclamation work at AK Steel’s Middletown facility and, by January 2, 2018, Stein had hired “a majority of the TMS employees from each of the three bargaining units.” Id. at 10, Jt. App. 23 and 53. Stein applied the terms of the Stein/Local 18 CBA to the employees performing the slag/scrap work, including the employees represented by Teamsters Local 100 and Laborers Local 534. Id. The terms of the Stein/Local 18 CBA differed in several respects from the collective bargaining agreements covering those workers. Id. With respect to the Teamsters-represented employees, Stein did not continue weekly contributions to both the Central States Southeast and

Southwest Areas Pension Fund and the Ohio Conference of Teamsters & Industry Health & Welfare Fund. ALJ Teamsters Decision at 10, Jt. App. 53; GC Ex. 1, Jt. App. 824. With respect to the Laborers-represented employees, Stein did not continue hourly-based contributions to the Trustees of the Ohio Laborers District Counsel, Ohio Contractors Association Insurance and Pension Fund, and it altered or did not continue provisions related to conditions of work, job classifications, and probationary period. ALJ Laborers Decision at 10, Jt. App. 23; GC Ex. 1, Jt. App. 869. Employees who had been represented by the Teamsters or the Laborers and participated in those unions' affiliated Taft-Hartley pension funds were required to become new participants in an IUOE-affiliated retirement plan. ALJ Decisions at 10, Jt. App. 23 and 53. This change presented a tangible hardship for some of the existing employees. For example, one former TMS driver who had been represented by the Teamsters testified that in early 2018 he was nearing retirement under the Central States plan and was reluctant to move to an IUOE-represented unit and participate in that union's pension plan because he would have to work longer to be able to retire. ALJ Teamsters Decision at 11, Jt. App. 53-54. However, he was told by an IUOE representative that, if he did not join Local 18, he would be taken off the work schedule at Stein. Id.

In addition, with respect to both groups of employees, Stein altered or did not continue the existing

wage rates; shift differential; overtime payments in excess of 8 hours per day; vacation pay; work schedule; call outs or unscheduled overtime outside of the regular or established shifts; seniority provisions; safety equipment and protective clothing; and definition and assignment work.

ALJ Decisions at 10, Jt. App. 23 and 53.

On January 10, 2018, Teamsters Local 100 “sent Stein a letter demanding recognition and requesting bargaining as the exclusive collective-bargaining representative of the drivers unit.” ALJ Teamsters Decision at 10, Jt. App. 53. In February 2018, Stein’s legal counsel informed counsel for Local 100 that Stein would not recognize and bargain with that union. Id. at 11, Jt. App. 53. Stein did not respond to Laborers Local 534’s demand for recognition and request for bargaining, which was conveyed in communications extending through February 2018. ALJ Laborers Decision at 11, Jt. App. 24.

In early January 2018, after it started performing the AK Steel Middletown work, Stein “began informing drivers and laborers that they needed to join IUOE Local 18,” and its supervisors distributed to them “permit packets” containing an IUOE union authorization card, membership application, and dues deduction authorization form. ALJ Decisions at 11, Jt. App. 24 and 53. Stein management also on multiple occasions from February through April 2018 told the drivers and operators that they would be removed from the schedule if they did not complete and submit IUOE Local 18 permit packets. Id. at 11-12, Jt. App. 24 and 53-54.

2. Procedural History

A. ULP Charges, NLRB Region 9 Complaint and Proceedings.

On February 8, 2018, Teamsters Local 100 filed unfair labor practice charges against Stein in Case 09-CA-214633 and against IUOE Local 18 in Case 09-CB-214595; Teamsters Local 100 amended both charges on March 26, 2018. On February 20, 2018, it filed a ULP charge against Stein in Case 09-CA-215131, and on February 21, 2018, Laborers Local 534 filed a ULP charge against IUOE Local 18 in Case 09-CB-215147; Laborers Local 534 amended both charges on March 26, 2018. Laborers Local 534 filed an additional ULP charge against Stein on May 8, 2018, in Case 09-CA-219834, and subsequently amended that charge on June 27, 2018 (the “Second Laborers Stein ULP Charge”).

On April 19, 2018, the Regional Director for Region 9 of the NLRB issued a consolidated complaint on all of the charges (“the Consolidated Cases”), which subsequently was amended on April 30, 2018 and again on June 29, 2018 (the “Amended Consolidated Complaint”). On September 12, 13, and 17 and October 22 and 23, 2018, the Consolidated Cases were tried before Administrative Law Judge Andrew S. Gollin in Cincinnati, Ohio. ALJ Decisions at 1, Jt. App. 18 and 47.

B. ALJ Decisions: Conclusions of Law and Remedies.

On January 24, 2019, ALJ Gollin issued the Teamsters ALJ Decision and the Laborers ALJ Decision. In both Decisions, Judge Gollin found that Stein was a successor to TMS under NLRB v. Burns Security Services, 406 U.S. 272, 281-295 (1972) and, as such, was obligated to recognize and bargain with Teamsters Local 100 as the exclusive collective-bargaining representative of the drivers unit and with Laborers Local 534 as the exclusive collective bargaining representative of the laborers unit. ALJ Decisions at 21, Jt. 31 and 60. ALJ Gollin further found that, with respect to both Teamsters Local 100 and Laborers Local 534, Stein violated Section 8(a)(5), (3), (2) and (1) of the NLRA by refusing their demands to bargain, by recognizing IUOE Local 18 as the exclusive bargaining representative of the employees in the drivers and laborers units and by entering into, “maintaining, and enforcing a collective-bargaining agreement with Local 18, even though Local 18 did not represent an uncoerced or unassisted majority of the employees” in those units. Id. The ALJ likewise determined that IUOE Local 18 violated Section 8(b)(1)(A) and (2) of the NLRA by “accepting recognition from Stein as the bargaining representative” of the laborers and drivers units, “by entering into, maintaining, and enforcing the terms” of the Stein/Local 18 CBA, and “by receiving dues and fees from the employees” in the laborers and drivers units, “at a time when it did not lawfully represent these employees.” Id.

In addition, in his Ninth Conclusion of Law, ALJ Gollin found that, due to the serious nature of its violations of the NLRA, Stein had forfeited its right as a successor to set the terms and conditions of employment for the drivers and laborers units. ALJ Teamsters Decision at 27, Jt. App. 64; ALJ Laborers Decision at 28, Jt. App. 34. ALJ Gollin noted in his Legal Analysis that Stein had committed “serious unfair labor practices,” including: soliciting “IUOE Local 18 about merging the three units into one and recognizing Local 18 as the unit’s exclusive bargaining representative” when it knew that the drivers and laborers were already represented; negotiating a collective bargaining agreement with IUOE Local 18 for a single unit when it “did not represent a majority of the employees in the drivers or laborers units;” informing TMS employees that, if hired by Stein, “their work would fall under Local 18’s jurisdiction, which effectively informed the drivers and laborers that Stein would unlawfully refuse to abide by its obligation under Burns to recognize and bargain with their chosen representatives; and executing the Stein/Local 18 CBA without any evidence of majority support for IUOE Local 18 among the drivers, laborers, or operators units. ALJ Teamsters Decision at 24, Jt. 61-62; ALJ Laborers Decision at 25, Jt. App. 32-33.

Having found that Stein had forfeited its right to unilaterally set initial terms and conditions of employment for the Teamsters and Laborers unit employees, ALJ Gollin concluded that Stein “violated Section 8(a)(5) and (1) of the Act since January

1[, 2018] when it began applying the terms and conditions” of the Stein/Local 18 CBA and by “unilaterally changing the existing terms and conditions of employment” for the drivers and laborers, as set forth in TMS’s contracts with Teamsters Local 100 and Laborers Local 534. ALJ Teamsters Decision at 27, Jt. App. 64; ALJ Laborers Decision at 28, Jt. App. 34. ALJ Gollin thus ordered Stein, upon request of either Teamsters Local 100 and/or Laborers Local 534, “to rescind any departure from the terms and conditions of employment that existed before January 1, 2018, and retroactively restore preexisting terms and conditions of employment,” including contributions to the respective retirement and health and welfare funds, wage rates and overtime payments, among other listed items. Id., Jt. App. 35 and 64. In addition, ALJ Gollin ordered Stein to “compensate affected employees for adverse tax consequences, if any, of receiving a lump sum back pay award,” and to pay “any additional amounts” to the respective pension and health and welfare funds as a result of its violations. Id.

As part of his ordered remedy, the ALJ directed Stein to withdraw recognition from IUOE Local 18 as the collective bargaining representative of the employees in the laborers and drivers units and to cease and desist applying the Stein/Local 18 CBA, “including, but not limited to, the union-security and dues-checkoff provisions” to the employees in those units. ALJ Teamsters Decision at 28, Jt. App. 65; ALJ Laborers Decision at 29, Jt. App. 36. ALJ Gollin further ordered Stein to

recognize and bargain with Teamsters Local 100 and Laborers Local 534 for their respective units. Id.

C. The Board reviews and modifies the ALJ Decisions.

Stein and IUOE Local 18 filed exceptions to the ALJ Decisions, together with supporting briefs, on March 14, 2019, and the General Counsel filed limited cross-exceptions to the ALJ Decisions on March 28, 2019. Following responsive briefing among Stein, IUOE Local 18, and the General Counsel, the Board reviewed the ALJ Decisions and issued Decisions and Orders with respect to the ALJ Decisions, both dated January 28, 2020.

In its Decisions, the Board agreed with ALJ Gollin that Stein is a successor to TMS under Burns Security Services, supra, and thus had a duty to recognize and bargain with both Teamsters Local 100 and Laborers Local 534. Board Teamsters Decision at 2, Jt. App. 41; Board Laborers Decision at 1, Jt. App. 10. Accordingly, the Board agreed with ALJ Gollin that Stein violated Section 8(a)(2) and (1) by recognizing IUOE Local 18 as the exclusive collective bargaining representative of the Teamsters Local 100 and Laborers Local 534 unit employees, by entering into the Stein/Local 18 CBA, and by maintaining and enforcing that agreement with respect to the Teamsters Local 100 and Laborers Local 534 unit members. Id. The Board further affirmed that Stein violated Section 8(a)(3) and (1) “by maintaining and enforcing the union-security and dues-checkoff provisions” of the Stein/Local

18 CBA with respect to the Teamsters Local 100 and Laborers Local 534 unit members. Id. In addition, the Board found that IUOE Local 18 violated Section 8(b)(1)(A) and (2) by accepting recognition from Stein as the bargaining representative for the drivers and laborers, by entering into and enforcing the Stein/Local 18 CBA, and by receiving dues and fees from the drivers and laborers. Id.

However, the Board disagreed with ALJ Gollin's Ninth Conclusion of Law that Stein had forfeited its right to set the initial terms and conditions of employment of the Teamsters and Laborers unit employees; it amended the ALJ Decisions to delete the Ninth Conclusion of Law and remove that portion of the order directing Stein "to retroactively restore the preexisting terms and conditions of employment" contained in the Teamsters and Laborers contracts with TMS. Board Teamsters Decision at 4, Jt. App. 43; Board Laborers Decision at 5, Jt. App. 12-13. The Board further ordered that, upon request by Teamsters Local 100 and Laborers Local 534, Stein "will be required to rescind any departures from the terms and conditions of employment that existed immediately prior to its unlawful recognition of Respondent IUOE Local 18, which would include reinstating the lawful initial terms and conditions that Respondent Stein announced to bargaining unit employees on November 9[, 2017]." Id. Stein, therefore, was not required to resume the terms and conditions that had existed under the existing Teamsters and Laborers contracts or

to make the affected employees whole for lost pay or benefits, including contributions to the longstanding pension plans in which they had participated. These conclusions by the Board are the basis of the appeals by Teamsters Local 100 and Laborers Local 534.¹

V. SUMMARY OF ARGUMENT

The Board erred in deleting the ALJ Decisions' Ninth Conclusion of Law and instead determining that Stein had not forfeited its right as a Burns successor to set the initial terms and conditions of employment for the Teamsters- and Laborers-represented employees. The Board ignored both the substance and import of the ALJ Decisions' factual findings regarding Stein's egregious violations of Sections 8(a)(1) and (2) and misapplied its own precedent in Advanced Stretchforming International, Inc., 323 NLRB 529 (1997), in which the Board had recognized that a Burns successor's right to set initial terms and conditions of employment is subject to forfeiture as a result of its own unlawful conduct.

¹ The IUOE was ordered to cease threatening former members of the Teamsters and Laborers unit with termination if they did not join that union, to decline representation of the drivers and laborers units and to reimburse all present and former members of those units for any initiation fees, dues or other monies withheld from their paychecks and paid to the IUOE under the improper collective bargaining agreement. Teamsters Local 100 and Laborers Local 534 have no dispute with these ordered remedies. Board Decisions at 6, Jt. App. 14-15 and 45.

The Board further erred by modifying the remedies in the ALJ Decisions by deleting the orders that Stein retroactively restore the terms and conditions of employment that existed before January 1, 2018, with respect to the Teamsters-represented drivers and the Laborers-represented workers until Stein negotiates in good faith with each union to an agreement or to impasse and to make whole the affected employees. The Board's removal of these remedies effectively rewards Stein for its misconduct and imposes a years-long forfeiture upon the affected employees, who have been denied their chosen collective bargaining representatives as well as the pension benefits and other terms and conditions of employment those representatives may have achieved in negotiations for a collective bargaining agreement with Stein.

VI. STANDING

Teamsters Local 100 and Laborers Local 534 have standing to seek review of the Board Decisions as aggrieved parties to a final order of the Board pursuant to 29 U.S.C. § 160(f).

VII. ARGUMENT

1. Standard of Review

A reviewing court will uphold an order of the NLRB “unless, reviewing the record as a whole, it concludes that the Board's factual findings are not supported by

substantial evidence on the record considered as a whole, 29 U.S.C. § 160(f), or that the Board acted arbitrarily or otherwise erred in applying established law to the facts at issue.” United Food & Comm’l Workers Int’l Union, Local 150-A v. NLRB, 880 F.2d 1422, 1429 (D.C. Cir. 1989).

A. The Board’s determination that Stein did not forfeit its right as a Burns successor to set the initial terms and conditions of employment for the Teamsters Local 100 and Laborers Local 534 unit employees is contrary to established law and must be reversed.

The Board’s conclusion that Stein did not forfeit its right as a Burns successor to set the initial terms and conditions of employment for the drivers and laborers derives from an unduly narrow reading of Advanced Stretchforming, upon which ALJ Gollin relied and in which the Board held:

The fundamental premise for the forfeiture doctrine is that it would be contrary to statutory policy to “confer *Burns* rights 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 conferred.” *State Distributing Co.*, 282 NLRB 1048, 1049 (1987). In other words, the *Burns* right to set initial terms and conditions of employment must be understood in the context of 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 at 530-31. In the Decisions at issue here, the Board constricted the equitable doctrine of forfeiture by effectively limiting it to the facts in Advanced Stretchforming, which it distinguished from the facts in the

present case. The Board thus failed to follow the letter and spirit of its own precedent and, in so doing, missed the forest for the trees.

In concluding that Stein had forfeited its Burns successor rights, ALJ Gollin cited Stein's unlawful recognition of and execution of a collective bargaining agreement with IUOE Local 18 and its unlawful decree that IUOE Local 18 would represent new hires. Board Decisions at 3, Jt. App. 11 and 42. Disagreeing, the Board instead found that Burns was controlling and that the facts in Advanced Stretchforming are distinguishable because, at the time of successorship, the company in that case "informed employees that there would be *no* union for those whom it hired." Id. (internal citation omitted). Continuing, the Board found:

In contrast to the successor in *Advanced Stretchforming*, Respondent Stein did not tell employees that there would be no union, nor did it refuse to recognize the employees' Section 7 right to collectively bargain. Instead, Respondent Stein questioned the trifurcation of the employees into three separate bargaining units and sought to bargain solely with the union that it believed represented a majority of the employees in what it considered to be an appropriate bargaining unit consisting of all of the slag/scrap processing employees.

Id. On this basis, the Board concluded that Stein "did not engage in the kind of wholesale repudiation of employees' Section 7 rights that occurred in Advanced Stretchforming." Id.

In so concluding, the Board improperly narrowed the broader reach of the Advanced Stretchforming holding to circumstances in which a Burns successor overtly refuses to recognize and collectively bargain with any union whatsoever. By

the Board's reasoning, Stein's willingness to contract with just one of the three collective bargaining representatives of the existing employees, regardless of the existing unit structure or the employees' wishes, immunized it from the application of the forfeiture doctrine. The Board's conclusion not only is unsupported by the forfeiture doctrine itself, as articulated in Advanced Stretchforming, but also is based upon a skewed reading of the facts that would cast Stein's behavior in an unjustifiably benign light. To the contrary, the facts are that Stein not only denied the drivers and laborers their Section 7 rights to their chosen bargaining representatives but did so in a manner so egregious as to constitute a statutory violation comparable in its severity to that in Advanced Stretchforming.

The Board tacitly acknowledged that Stein indeed knew that the drivers and laborers each were separately represented from the operators; far from merely "questioning" the "trifurcation" of the units, it rejected the existing unit and representation structure altogether and unilaterally proceeded to pursue an arrangement with one unit that suited its interests. The Board ignored the fact that, even *before* being awarded the AK Steel Middletown contract, Stein—itsself—solicited IUOE Local 18 to represent the drivers, laborers, and operators without regard to the wishes of the employees or the rights of the other two unions. The Board also ignores the facts that, four months before it actually began to perform the slag/scrap work for AK Steel, Stein initiated negotiations for a collective bargaining

agreement with IUOE Local 18, conducted those negotiations in secret, and executed the Stein/Local 18 CBA well before it employed any workers at the AK site and before the IUOE presented it with any authorization cards. ALJ Decisions at 8, Jt. App. 21-22 and 50-52. There is, thus, simply no basis for the Board's supposition that Stein "believed" that IUOE Local 18 represented a majority of the employees then employed by TMS. While Stein did not cross the Board's newly created bright line by telling the then-TMS employees there would be "no union," it planned and executed in clandestine fashion extraordinary steps to defeat the drivers' and laborers' rights to their chosen collective bargaining representatives, in order to manufacture a unit and a contract more to Stein's liking.

Minimizing the serious nature of Stein's misconduct, the Board held that a Burns successor retains the right to set the initial terms and conditions of employment *even* if it "violates Section 8(a)(2) and (1) by unlawfully assisting and recognizing a rival union to the one that had been recognized by the predecessor." Board Decisions at 3, Jt. App. 11 and 42. The Board chiefly relies upon Burns and Reliable Trailer & Body, 295 NLRB 1013, 1019-20 (1989), overlooking or obscuring the substantial distinctions between the employers' conduct in those cases and Stein's in this case. Simply put, Stein's misconduct was far worse than that of either of the employers in those cases, by several orders of magnitude; thus, ALJ

Gollin correctly held that Stein had forfeited its rights as a Burns successor to set initial terms and conditions of employment for the drivers and laborers.

In Burns, the successor employer, Burns International Security Services, Inc. did not wish to operate under the existing contract between its predecessor, Wackenhut, and the United Plant Guard Workers of America (“UPG”). Therefore, two days before it assumed Wackenhut’s responsibilities at Lockheed Aircraft Service Co., it recognized another union, the American Federation of Guards (“AFG”), with which Burns had existing agreements at other locations, to represent the employees at the Lockheed location. Burns, 406 U.S. at 275-76. Shortly thereafter, Burns refused UPG’s demand to bargain. Id. at 276. The Supreme Court held that Burns “was not entitled to upset what it should have accepted as an established union majority by soliciting representation cards for another union” and upheld the Board’s order that Burns bargain with UPG. However, it set aside that portion of the Board’s order requiring Burns to honor Wackenhut’s contract with UPG. Id. at 279-80. Instead, the Court held that a successor employer such as Burns is free to set the terms and conditions for the employees; whether it must consult with the existing union first depends on whether it “is perfectly clear” that it intends to hire all of the existing employees in the unit. Id. at 284, 294-95.

Stein’s conduct in the present matter is materially different from Burns’s conduct – and far more egregious. While Burns indeed acted upon a preference for

one union to the detriment of another, there is nothing in the facts of that case to suggest it engaged in a months-long, premeditated and secret scheme to divest the former Wackenhut employees of their chosen representative. Moreover, by its actions, Stein displaced not just one but two collective bargaining representatives for its own convenience. Accordingly, Stein's conduct differed substantially from Burns's in both its extreme bad faith and its larger scale of impact.

The conduct of the employer in Reliable Trailer likewise is readily distinguishable from Stein's with respect to the Petitioners' units. Reliable Trailer was party to a collective bargaining agreement with the International Association of Machinists and Aerospace Workers ("the Machinists") which, by its terms, would extend to cover any company employees within a certain radius. 295 NLRB at 4. When Reliable Trailer purchased a business within that radius, Vanco, whose employees were represented by United Auto Workers Local 1612 ("the UAW"), Reliable Trailer refused to recognize the UAW and asserted that the Machinists would represent the employees at the facility formerly operated by Vanco.

Though it undeniably violated Section 8(a)(2) and (1), Reliable Trailer at least was party to a pre-existing collective bargaining agreement that purported, albeit wrongly, to extend its reach to other potential employees, regardless of their current representation status. Stein did not have even this fig leaf to cover its conduct. The Board's reliance upon Reliable Trailer is misplaced, since the context of the Burns

successor's conduct there is materially different from the context of Stein's misconduct here.

B. On the basis of its erroneous finding that Stein had not forfeited its rights to set the initial terms and conditions of employment for the drivers and laborers, the Board ordered an inadequate and inappropriate remedy.

After its error in concluding that Stein had not forfeited its Burns successor rights, the Board further erred by deleting the portions of the remedies in the ALJ Decisions that directed Stein to retroactively restore the terms and conditions that existed prior to January 1, 2018, and to make the drivers and laborers whole, particularly for lost benefits including most significantly to make retroactive contributions to the applicable Teamster or Laborers' pension funds for the covered employees. Although Judge Gollin noted that, in a "traditional Burns successor case, the remedy is to order the employer to recognize the union and bargain, upon request, over the unit employees' terms and conditions of employment," he concluded:

Stein ... is not a stranger to this unit or uninvolved with the establishment of the terms and conditions of employment. On the contrary, Stein fabricated this bargaining unit by merging three separate, appropriate units, and then hand-picked the unit's bargaining representative, all *before* it hired *any* employees. Furthermore, while a traditional *Burns* successor is allowed *to set* initial terms and conditions of employment, it is not permitted *to negotiate* those terms and conditions with a union that does not represent an uncoerced majority of the employees in the unit at issue.

ALJ Decisions at 25 (emphasis in original), Jt. App. 33 and 62. The traditional Burns remedy is inadequate to redress the “serious nature” of Stein’s unfair labor practices prior to January 1, 2018. The ALJ’s ordered remedy is consistent not only with the remedy ordered by the Board for similarly egregious violations in Advanced Stretchforming but also with the equitable principle that “any uncertainty created by [a successor’s] own misconduct should be resolved against it.” El Dorado, Inc. 335 NLRB 952, 953 (2001).

The Board further erred by modifying the remedy to require Stein to reinstate only the “lawful initial terms and conditions that [it] announced to bargaining unit employees” on November 9, 2017, not the terms and conditions that existed under the then-existing collective bargaining agreements. Board Teamsters Decision at 4, Jt. App. 43; Board Laborers Decision at 5, Jt. App. 13. This modification was predicated upon the Board’s disagreement with the ALJ’s conclusion that Stein’s unlawful conduct began with the improper recognition of IUOE Local 18 in October 2017, when Stein exchanged a draft collective bargaining agreement containing language recognizing the IUOE as the sole collective bargaining representative for the drivers, laborers and operators. Board Decisions at 2, Jt. App. 10 and 41. The basis for the Board’s ruling was that “Stein did not begin employing” any of the Teamsters or Laborers unit employees until January 1, 2018, when it assumed responsibility for the AK Steel site work. Id. However, the NLRB ignored Stein’s

entire course of conduct with IUOE Local 18 dating from August 22, 2017, when it extended *de facto* recognition to the IUOE by soliciting it to be the sole bargaining representative at the AK Steel Middletown facility, engaged in clandestine negotiations, and executed a collective bargaining agreement with IUOE Local 18 before it even began to perform the work there. Throughout, Stein treated IUOE Local 18 in all respects as the sole recognized collective bargaining representative for the drivers, laborers, and operators. By focusing on the January 1, 2018 effective date of the Stein/Local 18 CBA as opposed to Stein's entire course of conduct with respect to the other two unions and the rights of the non-IUOE workers, the Board utterly failed to take into account the severity of the Employer's violations of the NLRA or the impact on the employees forced into a union they had not chosen.² The Board's rulings on Stein's purported rights and the appropriate remedies are inconsistent with its own case law and with the facts of the case and, as such, must be overturned.

² The Petitioners are mindful of Capital City Contractors, Inc. v. NLRB, 147 F.3d 999 (1998), in which this Court modified a similar "make whole" remedy in the case of a Burns successor forfeiture to limit the applicable time period to what would have been a reasonable period of bargaining and remanded the case to the Board to determine what that reasonable period would have been. This Court expressed concern that the original remedy constituted a "penalty," speculative in nature, that would contravene Section 10(c) of the NLRA. The Petitioners respectfully submit that, in the instant case, Stein's demonstrable hostility to the presence of Teamsters Local 100 and Laborers Local 534, combined with the existing and specific terms of those unions' contracts, make clear that the remedy prescribed in the ALJ Decisions, far from speculative, is correctly tailored to the unique circumstances in these cases.

VIII. CONCLUSION

For the reasons set forth herein, the petitions for review should be granted and the Board's cross-applications for enforcement of the Board Decisions should be denied only to the extent that they conflict with the petitions.

Date: February 4, 2021

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CERTIFICATE OF COMPLIANCE

1. This document complies with Federal Rule of Appellate Procedure 32(a)(7) and the Order this Court dated July 29, 2020 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), this document contains 6,429 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Office 2019, font Times New Roman, and font size 14.

Date: February 4, 2021

/s/Ryan K. Hymore

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: February 4, 2021

/s/Ryan K. Hymore

STATUTORY ADDENDUM

NLRA § (8)(a)(1), (2), (3), (5)

NLRA § 8(b)(1)(A), (2)

Section 8(a)(1), (2), (3) and (5) of the NLRA (29 U.S.C. § 158(a) (1-3, 5)):**(a) Unfair labor practices by employer**

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 [section 156 of this title], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

...

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

Section (8)(b)(1)(A), (2) of the NLRA (29 U.S.C. § 158(b)(1-2)):

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents--

(1) to restrain or coerce

(A) employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

...

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; ...