

ORAL ARGUMENT 3/11/2021

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

PETITIONER/CROSS-RESPONDENT STEIN, INC.'S

FINAL REPLY BRIEF

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*Authorities upon which Stein chiefly relies.

GLOSSARY

ALJ.....	Administrative Law Judge
Bd.Br.	National Labor Relations Board Brief
Board.....	The National Labor Relations Board
Laborers.....	Laborers International Union of North America, Local No. 534
NLRB	The National Labor Relations Board
Operators	The International Union of Operating Engineers, Local No. 18
Teamsters	Truck Drivers, Chauffeurs, and Helpers, Local Union No. 100
TMS.....	TMS International, Inc.

INTRODUCTION AND SUMMARY OF ARGUMENT

The arguments in Respondents’ Teamsters and Laborers consolidated brief (Doc. #1860642) are *jurisdictionally* barred. The National Labor Relations Act, 29 U.S.C. §160(e)¹, and this Court’s steady precedents make that abundantly clear.²

The NLRB altogether ignores its own precedential holdings that *Burns* “appropriate units” cannot be defined by a work classification,³ and concedes that it did not apply the multi-factor unit appropriateness analysis required in the *Burns* successor setting. *See, Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, n.11 (D.C. Cir. 1996).

¹ No objection that has not been urged before the Board ... shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

29 U.S.C. §160(e). “Section 10(e) is a ‘jurisdictional bar’, in the face of which we are ‘powerless in the absence of extraordinary circumstances, to consider arguments not made to the Board’”. *Enter. Leasing Co. of Fla. v. NLRB*, 831 F.3d 534, 550 (D.C. Cir. 2016) (quoting, *W&M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1345 (D.C. Cir. 2008)).

² *AdvancePierre Foods, Inc. v. NLRB*, 966 F.3d 813, 818 (D.C. Cir. 2020); *Napleton 1050, Inc. v. NLRB*, 976 F.3d 30, 49 (D.C. Cir. 2020); *First Student, Inc. v. NLRB*, 935 F.3d 604, 614 (D.C. Cir. 2019); *CC1 Limited Partnership v. NLRB*, 898 F.3d 26, 35 (D.C. Cir. 2018); *W&M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1345 (D.C. Cir. 2008); *Nova Se. Univ. v. NLRB*, 807 F.3d 308, 313 (D.C. Cir. 2015); *HTH Corp. v. NLRB*, 823 F.3d 668, 673 (D.C. Cir. 2016); *Stephens Media v. NLRB*, 677 F.3d 1241, 1255 (D.C. Cir. 2012).

³ *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962) (cited with approval in, *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, n.11 (D.C. Cir. 1996), *reversing in part*, 318 NLRB 738 (1995)).

ARGUMENT

A. The NLRB's §9(b) "Shall" Dilemma.

To be sure, the Board in advancing policy that it desires to foster in the NLRA *Burns* successor setting can more heavily weight bargaining history when making "appropriate unit" determinations (Bd.Br. 34-40). What the Board cannot do, however, is ignore Congress' "shall"⁴ requirements under §9(b) of the Act:

The Board *shall* decide in each case whether, *in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter*, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

29 U.S.C. §159(b) (emphasis added). Congress' "... in each case" clause instructs that §9(b) applies to *Burns* successors: "[T]he words 'in each case' are synonymous with 'whenever necessary' or 'in any case in which there is a dispute'". *American Hosp. Assoc. v. NLRB*, 499 U.S. 606, 610, 111 S.Ct. 1539 (1991).

The phrase "... in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter" has been interpreted by the Board to be imbued with certain statutory mandates. In *Kalamazoo Paper Box*

⁴ [T]he word "shall", when utilized in laws, directives, and the like, means "must" or "is or are obligated to".

Ameren Services Company v. Federal Energy Reg., 330 F.3d 494, n.12 (D.C. Cir. 2003).

Corp., 136 NLRB 134 (1962), the Board held that decreeing “appropriate units” by mere job classifications runs afoul of §9(b) of the Act:

To accord automatically to a subgroup of employees such as truckdrivers, severance from a larger established and stable bargaining unit merely on the basis of the existence of the traditional job classification and a request for a separate unit encompassing such classification, does not, in our opinion, adequately discharge this basic and far-reaching responsibility placed upon the Board by Congress. A title or classification in common usage does not necessarily establish that separate special interests exist and are preponderant.

With this view in mind, we have carefully considered the present practice and are convinced that it is not a salutary approach toward achieving *the purposes of the Act*, because it tends to disregard the community of interests truckdrivers have with other employees, and ignores the possibility that the job content and employment situation may not be accurately reflected in the classification or title held - - indeed may have little relevancy to the circumstances with which the parties must deal.

Therefore, we believe it is both necessary and desirable for us to return to the earlier practice of determining the predominant community of interest based upon consideration of the various factors stated above.⁵

⁵ *Kalamazoo Paper Box* listed the “appropriate unit” factors as: “[A] difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job function and amount of working time spent away from the plant sites under State and Federal regulations; the infrequency or lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and the history of bargaining.” 136 NLRB at 137.

[P]ermitting severance of truckdrivers as a separate unit based upon a traditional title, as our [dissenting] colleagues urge, would result in creating a fictional mold within which the parties would be required to force their bargaining relationship. *Such a determination could only create a state of chaos rather than foster stable collective bargaining, and could hardly be said to “assure to employees the fullest freedom in exercising the rights guaranteed by this Act” as contemplated by Section 9(b).*

Kalamazoo Paper Box Corp., 136 NLRB 134, 137-140 (1962) (emphasis added).

The Board “... will not give controlling weight to bargaining history to the extent it departs from statutory provisions”. *William J. Keller*, 198 NLRB 1145, 1145 (1972).

Interestingly, the Board’s counsel on appeal confesses that the Board had to examine if the units “hamper employees in fully exercising rights guaranteed by the Act” (Bd.Br. 26), but the Board did not even mention this required analysis, let alone perform it. *Stein, Inc.*, 369 NLRB Nos. 10,11, n.6 (2020).

Although cited to the ALJ, to the Board on exceptions, and to this Court, the ALJ and the Board on exceptions and again on appeal does not mention, or distinguish *Kalamazoo Paper Box Corp.* “When ‘a party makes a significant showing that analogous cases have been decided differently, the agency must do more than simply ignore that argument’”. *Davidson Hotel Co. v. NLRB*, 977 F.3d 1289, 1292 (D.C. Cir. 2020) (reversing NLRB “unit appropriateness” determination). The Board steadfastly continues to deny a worker’s job classification as an “appropriate unit” meaningful factor except in the construction

employer setting. Compare, *Hydro Constructors Inc.*, 168 NLRB 105 (1967) with, *E.H. Koester Bakery*, 136 NLRB 1006 (1962).

The Board's counsel's statement that the NLRB made its *Burns* "unit appropriateness" determination here "... based on job classifications, skills, tasks, identities and bargaining history" (Bd.Br. 27, 40) is sophistry. The Board clearly announced what it considered: "The *historical* bargaining units' breakdown by *work classifications* still 'conform[ed] reasonably well to other standards of appropriateness'". *Stein, Inc.*, 369 NLRB Nos. 10, 11, n.6 (2020) (emphasis added). The Board's lawyers on appeal cannot substitute or re-rationalize the Board's stated reliance. "The Board and the union provided some explanation in their briefs in this court ... and at oral argument ... [b]ut the explanation must come from the Board itself". *Davidson Hotel Co. v. NLRB*, 977 F.3d 1289, n.2 (2020) (citing, *Erie Brush & Mfg. Corp. v. NLRB*, 700 F.3d 17, 23 (D.C. Cir. 2012)). See also, *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575 (1947).

In *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111 (D.C. Cir. 1996), this Court identified the multi-factor test that governs under *Burns* to analyze a NLRA successor's "appropriate unit" challenge:

Under the community-of-interest test, the Board evaluates unit appropriateness on the "degree to which a group of employees share a "community-of-interest" distinct from the interests of other employees of the company". *Banknote Corp. v. NLRB*, 84 F.3d 637, 647 (2d Cir. 1996). Factors considered include whether, in relation to other employees, they have different methods of compensation, hours of

work, benefits, supervision, training and skills; if their contact with other employees is infrequent; if their work functions are not integrated with those of other employees; and if they have historically been part of a distinct bargaining unit. (citing, *Kalamazoo Paper Box*, 136 NLRB 134, 137 (1962)).

Id. at n.11. But here, the Board only mentioned two analytical factors – bargaining history and work classifications. *Stein, Inc.*, 369 NLRB Nos. 10, 11, n.6 (2020). “The need for a [NLRB] explanation is particularly acute when an agency is applying a multi-factor test through case-by-case adjudication”. *Davidson Hotel Co. v. NLRB*, 977 F.3d 1289, 1292 (D.C. Cir. 2020) (quoting, *LeMoyne-Owen College v. NLRB*, 357 F.3d 55,60-61 (D.C. Cir. 2004)).

The Board’s claim that *PCC Structural*s and *Boeing* were new unit - - not *Burns* successor - - precedents, and thus are “not relevant” (Bd.Br. 38) is fallacious because the NLRB stated that its analysis in both of those “appropriate unit” precedents was required in order to implement the “shall” §9(b) mandates of the Act.

B. The NLRB’s Precedent Dilemma.

“A decision of the Board that departs from established precedent without a reasoned explanation is arbitrary”. *Davidson Hotel Co. v. NLRB*, 977 F.3d 1289, 1292 (D.C. Cir. 2020) (quoting, *NLRB v. Sw. Reg’l. Council of Carpenters*, 826 F.3d 460, 464 (D.C. Cir. 2016)). The Board now admits that its *Border Steel*, 204 NLRB 814 (1973) decision invoked and applied a legal presumption that plantwide bargaining units are appropriate in the *Burns* successor setting, but criticizes *Stein*

for failing to “... cite a case that requires [the Board] to apply a [plantwide] presumption rather than its court-approved presumption in favor of historical bargaining units” (Bd.Br. 38). This argument misses its mark. “[W]e must identify the standard at issue, examine its application in prior adjudications, and then determine whether the instant case is a faithful application of existing law or instead a *sub silentio* revision”. *Circus Lemoyne Casino v. NLRB*, 961 F.3d 469,476 (D.C. Cir. 2020), *reversing*, 366 NLRB No. 110 (2018). The Board did not even acknowledge *Border Steel’s* plantwide *Burns* presumption or state that the presumption is trumped by bargaining history. “The Board’s decision is arbitrary if it ‘entirely fail[s] to consider an important aspect of the problem’”. *Fred Meyer Stores v. NLRB*, 865 F.3d 630,638 (D.C. Cir. 2017), *reversing*, 362 NLRB 698 (2015). In any event, *Boeing Co.*, 368 NLRB No. 67 (2019) is the case the Board is in search of: “[T]he Board has long given substantial weight to prior bargaining history” [but] “functional integration is a factor in determining whether a petitioned-for unit is appropriate and, where present, cuts against the appropriateness of a less-than-plantwide unit”. *Border Steel’s* application of a plantwide unit presumption was not some anomaly. “A plant-wide unit is presumptively appropriate under the Act”. *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 136 (1962); *The Singer Co.*, 198 NLRB 870,875 (1972) (“[A] plantwide unit is presumptively appropriate”).

The Board's effort to shed *Bentson Contracting v. NLRB*, 941 F.2d 1262 (D.C. Cir. 1991), *reversing*, 298 NLRB 199 (1990) by simplistically claiming that case "did not involve successorship", and implicated a initial §8(f) contract (Bd.Br. 34) ignores the salient holding of that decision, and the Board's *Bentson*-attacking precedents. *Bentson Contracting* implicated "... 'combination' employees - - that is, individuals who not only drove trucks but also performed laborer work". *Id.* at 1265. *Bentson Contracting's* troika of Laborers, Operators, and Laborers: "... functioned together to accomplish the task at hand, working the same hours, receiving the same breaks, sharing tools, wearing the same type of safety equipment and attending the same meetings at the jobsite". *Id.* at 1266. Those are the same facts here! See, *infra* at pp.10-15. Citing the Board its own precedents⁶, *Bentson Contracting* held that cross-jurisdiction work units cannot be determined by their job classification a la'

Kalamazoo Paper Box:

The Board not only disregarded the substantial overlap of employees resulting from its unit determinations, but erred in a more fundamental way when it included the same job classification "combination employees" – in two different units. Unit classifications including the same job *categories* in two bargaining units are necessarily at odds with the principle of exclusive representation. To be sure, the Board need not choose the "most appropriate" unit, but simply "an" appropriate unit. See *American Hospital Ass'n v. NLRB*, 499 U.S. 606, 111 S.Ct. 1539, 1542, 113 L.Ed. 2d 675 (1991). But we hold that placing the same job category in two units, with the distinct possibility that employees will end up having to join two unions to hold one job, cannot

⁶ *Pulitzer Pub. Co.*, 203 NLRB 639 (1973); *Sunray Ltd.*, 258 NLRB 517 (1981).

be considered appropriate. Since the Board's determination of the truckdrivers unit and the laborers unit were arbitrary, capricious and otherwise contrary to law, we decline to enforce the Board's orders in *Bentson II* ("Teamsters") and *Bentson III* ("Laborers").

Id. at 1267. The Board's appellate counsel's raising of facts nowhere cited by the Board or its ALJ - - "TMS cross-trained operators to drive trucks, and several times a year assigned [Operating Engineer] mechanics to drive trucks when Teamsters were not available" (Bd.Br. 31) - - proves too much as it only exacerbates the Board's *Bentson Contracting, Pulitzer Pub. Co., and Sunray Ltd.* dilemma.

C. The NLRB's Allentown Mack Dilemma.

In *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 118 S.Ct. 818 (1998), the Supreme Court reversed the Board notwithstanding its 29 U.S.C. §160(b) "substantial evidence on the record as a whole" deferential review standard. *Allentown Mack*, after observing that the Board promulgates its rules through adjudication rather than rule making⁷, held that the Board must honestly and forthrightly adjudicate record facts:

That is not the sort of Board action at issue here, however, but rather the Board's allegedly systematic undervaluation of certain evidence, or allegedly systematic exaggeration of what the evidence must prove.

⁷ The National Labor Relations Board, uniquely among major federal administrative agencies, has chosen to promulgate virtually all the legal rules in its field through adjudication rather than rulemaking.

Allentown Mack Sales & Service, Inc. v. NLRB, 522 U.S. 359, 374, 118 S.Ct. 818 (1998).

When the Board purports to engage in simple factfinding, unconstrained by substantive presumptions or evidentiary rules of exclusion, it is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands.

Id. at 378.

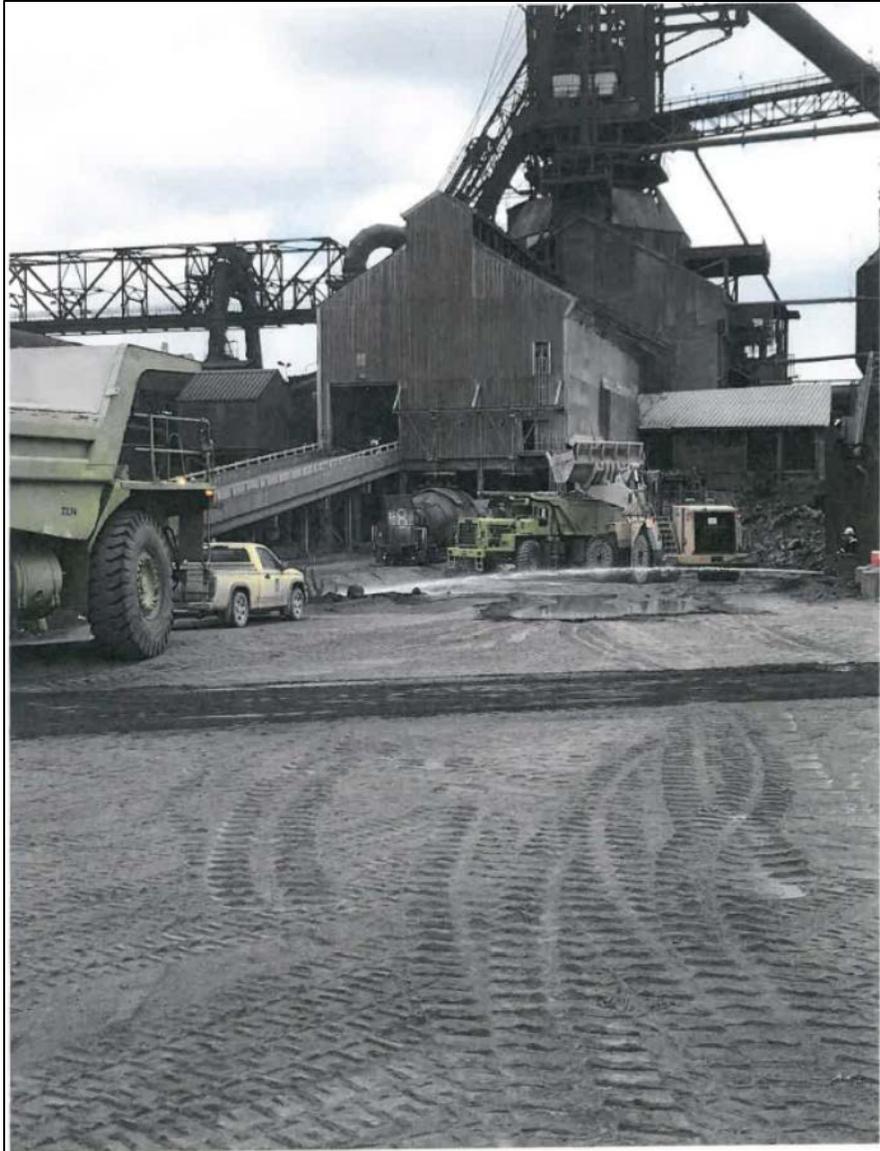
The Board's factual conclusion that the former TMS Teamsters, Laborers, and Operating Engineers "... had *some* interaction and shared *some* of the same terms and conditions of employment" is the very sort of disingenuous fact finding that *Allentown Mack Sales* criticized (Stein Opening Br. pp.8-14).

As the slag/scrap contractor preceding Stein, TMS negotiated virtually identical labor agreements with its three unions JA 683-740. All three labor agreements had identical "DEFINITION OF WORK" clauses JA 686, 703, 723. All three contracts provided for a 21-turn work schedule JA 687, 703, 723. All three contracts afforded a 35 cent shift differential JA 687, 703. All three contracts had identical overtime/premium pay clauses JA 687, 704, 729. All three contracts recognized the same Holidays, and the same payment for such JA 687, 704, 729-730. All three contracts had the same tiered seniority-based scale for vacation benefits, and payout thereof JA 690, 706, 730-731. All three contracts had identical funeral leave provisions JA 692, 709-710, 734-735. All three contracts had identical 60-day probationary periods for new hires JA 694, 709, 721. All three contracts had identical jury duty leave and pay provisions JA 693, 711, 735. All three contracts

had identical show-up-pay clauses JA 688, 705, 727. All three contracts had identical Friday pay days JA 688, 705, 724. All three contracts paid time-and-one-half hourly premium for more than eight hours in a work day JA 687, 704, 729. All three contracts required employees to undergo sixteen hours of site-specific safety training JA 689, 705, 720. All three contracts had the same seniority-based deadline for selecting vacations JA 690, 706, 731. All three contracts afforded double-time pay for work performed on Holidays JA 690, 706, 731. All three contracts prohibit vacation entitlement until one year of service is performed. JA 690, 706, 731. All three contracts prohibited vacation benefits unless at least 1,300 hours of service was performed in the preceding year JA 690, 706, 731. All three contracts limited to 5 days the use of single day vacation JA 690, 706, 732. All three contracts limited the payout of vacation pay, instead of time-off, on the condition of two weeks advance notice JA 690, 706, 731. All three contracts had identical seniority-terminating clauses JA 695, 709, 722. All three contracts had identical contractual savings clauses JA 693, 711, 734. All three contracts had identical Management Rights clauses JA 684, 701, 719. All three contracts had identical no-strike pledges JA 686, 702-703, 720. All three contracts had identical timelines for marshalling grievances, and use the Federal Mediation and Conciliation Service (“FMCS”) as the source for arbitrators JA 693-694, 710-711, 733-734. All three contracts afforded twenty-minute paid lunches JA 686, 703, 728-729. All three contracts required lunch breaks

to occur after no more than six hours of work *Id.*. This is not “some” of the same terms and conditions, it is virtually all. That the Teamsters, Operators and Laborers “receive different wages and [fringe] benefits” “based upon union affiliation and contractual mandates rather than an employer’s assessment of an employee’s skill or aptitude for the job” renders those differences insufficient to create an “appropriate unit”. *A.C. Pavement Striping*, 296 NLRB 206, 210 (1989); *Indianapolis Mack Sales & Service*, 288 NLRB 1123, 1126 (1988) (“A comparison of the parts of service [labor] contracts [of the predecessor] reveals, however, that with the exception of different job classifications and higher hourly wages for mechanics, their other terms are almost identical”). (But see, Bd.Br. 27) (championing the trades’ different wages and benefits).

Nor was the “... some interaction” an honest characterization. Stein had, daily and consistently, the former Laborers, Teamsters, and Operating Engineers working in extremely close proximity to each other, while in constant contact with each other JA 109-111, 115-116, 119-120, 174-179, 227-231, 282-284, 355-362.



JA 1110. As both Teamsters and Laborers adverse witnesses to Stein testified, the yellow-hued front end loader in Stein Exh. 1 was exclusively operated by the Operators at TMS JA 110, 230-231, 251-252, 260-261, 284, 360, 433, 498. The off-road, green-hued haul trucks in Stein Exh. 1 were operated exclusively by Teamsters at TMS JA 110-111, 152, 174, 177-178, 199, 230-231, 243-244, 282-283, 345-346,

372, 433, 441, 498, 503. The worker spraying cool water into the pit area as depicted in Stein Exh. 1 was work performed exclusively by a TMS Laborer JA 112, 176-179, 227-231, 284, 360, 433, 498. That former Laborer's job was not only to cool down the hot slag pits with water so that they could be loaded into the haul trucks by the front-end loaders, but also to cool off the tires of both the haul trucks and loaders so that they would not catch fire as they drove on and through the slag pits JA 176-179, 216, 227, 229, 498. That TMS Laborer would also act as a "spotter" for the Operator loader operator and Teamster haul truck driver as they maneuvered their equipment, to ensure they did not run into other equipment, the searing pits, or the AK blast furnaces JA 116, 198, 216, 228, 237, 254, 433. Finally, that TMS Laborer safety lookout also safety spotted the Teamsters haul truck drivers to ensure their beds were not overloaded JA 120, 227, 402.⁸

The slag reclamation/metal recovery functions were performed by all three trades being in constant contact with each other via two-way radios JA 115, 120, 177-179, 228. Once the large haul trucks were loaded, they would move and unload the slag at nearby stock piles where the material would later be processed into road-

⁸ The Board has consistently held that employees who perform safety-related tasks that are integral to the tasks and duties of other employees must be included in a single unit. *Westinghouse Elec. Corp.*, 137 NLRB 332,336 (1962); *Westinghouse Elec. Corp.*, 300 NLRB 834,834 (1990). Yet, this factor and these precedents are mentioned nowhere in the Board's decision, or in its brief to this Court.

base aggregate, and the entire process would repeat itself over, and over, and over again each hour, each day, and each shift JA 84-85, 88, 115, 119, 177, 179, 187-188, 227, 231, 267-268, 278, 283.

Stein's work at its BOF worksite (*See*, Stein Exh. 31, JA 1237) is similar in nature to that of the blast furnace (BF) site, in that all three former trades are working in conjunction, and in close proximity to each other to ensure that the loaders filled the heavy duty haul trucks safely JA 605. A former Laborer safety person known as a "knock out" is staffed at the BOF worksite JA 180, 190-191, 216, 256, 357. The molten iron and slag arrives at the BOF plant in large pots, and remnants remain in the pots after the molten iron is poured into the pits JA 180, 215, 256-257. The pot used for transportation literally has to have remnants knocked out from the pot, and a former Laborer at the BOF site ensures that occurs safely, while Operator loader operators and former Teamsters truck drivers operate nearby JA 180, 214-216, 226, 255-258. In other words, "... the employees work together in close proximity in an interrelated process". *A.C. Pavement Stripping*, 296 NLRB 206, 210 (1989).

The "Board's decision is arbitrary if it ... 'offer[s] an explanation for its decision that runs counter to the evidence before the Agency'". *Fred Meyer Stores v. NLRB*, 865 F.3d 630,638 (D.C. Cir. (2017) (quoting, *Motor Vehicle Mfg. Assoc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29,43 103 S.Ct. 2856 (1983)). This is not "some" interaction, it is consistent, minute-by-minute interaction. Employee "...

contact with other employees” assuredly is *not* “infrequent”. *Trident Seafoods v. NLRB*, 101 F.3d at n.11. And while *Trident Seafoods* considered the *Burns* factors “contact with other employees” and “work functions ... integrated with those of other employees” (*Id.* at n.11), the Board’s brief noticeably does not mention or analyze these factors. But see, *Bentson Contracting*, 941 F.2d 1262, 1267 (D.C. Cir. 1991) (“[I]t is not practicable ... to divide the integrated job ... into separate parts and to assign the different parts to different bargaining units”) (quoting, *Pulitzer Pub. Co.*, 203 NLRB 639, 641 (1973)).

The Board’s claim “[t]hat Stein intended - - sometime in the undefined future - - to train additional employees and assign different tasks, is irrelevant” (Bd.Br. 35) runs smack into *Bentson Contracting*, where this Court held that the employer’s mere announcement that “[w]e may, for example, ask you to do various types of work on your crew”⁹ was not only relevant, it was outcome-determinative:

[T]he situation is different when the employer has exercised its prerogative to institute *new* terms and conditions of employment. Then historical practices are less pertinent to the determination of the appropriate bargaining unit.

Bentson sought to train its employees to perform a multitude of tasks; the Board’s unit determinations on the other hand, are based on discrete

⁹ *Bentson Contracting*, 941 F.2d at 1268. An even stronger announcement of cross-jurisdictional work assignment was made to TMS’ applicants by Stein JA 600, 621, 622.

functions. The operators unit would confine employees to a single task, contrary to the wishes of the company, or force the employees in the unit to join two or more unions, with all the attendant practical and legal difficulties already discussed. It is clear that the Board relied heavily on the company's practices under the expired section 8(f) agreements and did not sufficiently take into account the new terms and conditions of employment the company legally sought to institute after it repudiated those agreements.

Id. at 1268, 1270. The Board held that Stein had the same prerogative as Bentson Contracting. *Stein, Inc.*, 369 NLRB Nos. 10, 11, n.6 (2020).

D. The NLRB's Bargaining Obligation Timing Dilemma - Ken Karoly.

The ALJ stated "a bargaining demand is necessary to trigger the successor's duty to bargain". *Stein, Inc.*, 369 NLRB No. 10, p.19 (2020). That was a correct statement of settled NLRA law:

I note, in this regard, that in *Hampton Lumber Mills-Washington*, 334 NLRB 195 (2001) the Board held: A successor employer's obligation to recognize the union attaches after the occurrence of two events: (1) a demand for recognition or bargaining by the union; and (2) the employment by the employer of a "substantial and representative complement" of employees, a majority of whom were employed by the predecessor.

Jamestown Fabricated Steel & Supply, 362 NLRB 1314,1320 (2015).

The ALJ found that for former Laborers, they did not demand recognition or bargaining until "February 20" and former Teamsters did not demand recognition until "January 10" JA 23, 53. The Board did not take exception to the AJL's findings as to when Stein's alleged NLRA bargaining obligations attached. "In determining whether an employer has violated Section 8(a)(5) of the Act by making a unilateral

change, the key date is the date the bargaining obligation attaches”. *M&M Parkside Towers*, 2007 WL 313429 (2007). Before either January 10 or February 20, and before Karoly worked one minute for Stein, the terms and conditions for Stein’s employees stated: “The probationary period shall be ninety (90) days of *actual work*” JA 665, 751.¹⁰

The Board cites no precedent for asserting “Stein ... had [to] negotiate a change to that probationary period with the Laborers, Karoly’s bargaining representative” (Bd.Br., 52). Settled law is to the contrary. In *SF Market St. Healthcare v. NLRB*, 570 F.3d 354 (D.C. Cir. 2009), this Court held in the *Burns* successor setting that an acquiring employer need not “... in advance [of hiring] announce all (or indeed any) new terms it intended to establish upon taking over”, and that post-hire terms and conditions incorporated in a pre-hire communication was not an unlawful unilateral change violative of the Act. *Id.* at 362, *reversing*, 351 NLRB 975 (2007). Karoly’s September 28, 2017 employment application stated: “If hired in the Union setting, I understand that my wages, hours and terms and conditions of employment are subject to the labor agreement negotiated by and

¹⁰ The NLRB’s announced presumption that Stein’s *Burns* initial terms and conditions established a 90-day *calendar day* probationary period (JA 69-71) is inaccurate. The Board’s Circuit brief accurately quotes the November 9 Stein employee communication: “All prospective employees will be subject to a 90 day probationary period” (Bd.Br. 51). Nowhere did it state the 90 days was a “calendar” measured period of time.

between the Company and the Union” JA 1117. That incorporated labor contract stated Karoly’s probationary period was “ninety (90) days of actual work” before Stein had a bargaining obligation with the Laborers’ union, and before Karoly worked a minute for Stein. Karoly’s probationary period was not “unlawfully extended” (Bd.Br. 15). It was lawfully established. And the Board’s statement “[u]nder Board law, once Stein set the initial [*Burns*] terms of employment, it could not change those terms” (Bd.Br. 21) is another inaccurate statement of *Burns* successorship law. *Jamestown Fabricated Steel*, 362 NLRB at 1320.

The Board’s claim that Stein “did not raise [this] issue to the Board (Bd.Br. n.16) is incorrect. Not only did Stein raise it (JA 1251) the ALJ found this to be the controlling law and factually undisputed JA 28, 33. It is the Board who waived this issue by not cross-excepting to the ALJ’s factual and legal findings on this point. 29 C.F.R. §102.46. The Act’s 29 U.S.C. §160(e) waiver proviso applies equally to the Board. *Nat’l. Maritime Union of America v. NLRB*, 867 F.2d 767, 775 (2d Cir. 1989).

The Board, perhaps rhetorically, asks what evidence Stein would have marshalled if the Board had, at the outset, not conceded that Karoly was in his legally-recognized probationary period¹¹ when fired (Bd.Br. 55). How about asking Superintendent Huffnagel if the November 9 communique’ and its “90 days”

¹¹ The Board conceded in its post-hearing brief that Karoly was indeed in his probationary period when terminated JA 1244-1248.

reference was to calendar days or days-of-work? Or how about showing Huffnagel his pre-complaint NLRB affidavit where he informed the Board's investigators that Stein's probationary period was always 90 days of actual work?

E. The Teamsters' And Laborers' Cross-Petition Arguments Are Jurisdictionally Barred.

The administrative hearing lasted five days and produced 1,346 pages of transcribed witness testimony. Through it all, counsel for the Teamsters asked zero questions and counsel for the Laborers asked just 22 questions¹², none of which related to any fact to bolster the arguments now posed in their cross-petition brief (Doc. #1860642). Neither the Teamsters nor Laborers filed a post-hearing brief to the ALJ, or a brief on exceptions to the NLRB. More significantly, when met with the Board's decision that Stein had not forfeited its *Burns* status, and the Board's remedial bargaining order, neither the Teamsters nor Laborers availed themselves of the Board's procedures and rules that would have permitted them to raise their new-found Circuit-petition arguments initially with the NLRB. *See* 29 C.F.R. § 102.48(d)(2) (authorizing motions for reconsideration, re-hearing, or re-opening of the record); *NLRB Case Handling Manual*, ¶ 10132.4. “[P]ursuant to Section 10(e), a party's failure to present a question to the Board - - including failing to file a motion for reconsideration under the Board's regulations, *see* 29 C.F.R.

¹² JA 351-352, 423-426.

§102.48(d)(1)(2011) - - ‘prevents consideration of the question by the courts’”.
Stephens Media v. NLRB, 677 F.3d 1241, 1255 (D.C. Cir. 2012) (quoting, *Woelke & Romero Framing v. NLRB*, 456 U.S. 645, 666, 102 S.Ct. 2071 (1982)).

Where, as here, the Board decides an issue on a different basis than that of the ALJ, the party wishing to challenge that ruling must invoke their rights to reconsideration or re-hearing. *Int’l. Ladies’ Garment Workers v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3, 95 S.Ct. 972 (1975); *Collective Concrete, Inc. v. NLRB*, 786 F. Appx. 266, **266-267 (D.C. Cir. Jan. 11, 2019). A party who fails to exhaust administrative rights and remedies is *jurisdictionally* barred from raising claims with this Court. *Enter. Leasing Co. of Fla. v. NLRB*, 831 F.3d 534, 550 (D.C. Cir. 2016).

Respectfully submitted,

Dated: February 4, 2021

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7) and Circuit Rule 32(a), I hereby certify that this Petitioner/Cross-Respondent Stein, Inc.'s Final Reply Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7). The Brief contains 5,075 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B).

I further certify that this Brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the Brief has been prepared in Times New Roman 14-point font using Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February 2021, I filed the foregoing Petitioner/Cross-Respondent Stein, Inc.'s Reply Brief through this Court's CM/EFT system, which will send an electronic notice of filing to the following:

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