

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

**FINAL OPENING BRIEF FOR PETITIONER/CROSS-RESPONDENT,
STEIN, INC.**

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I. CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES

1. The following are parties to this Action in this Court:

a. Petitioner/Cross-Respondent: Stein, Inc. (“Stein”)

b. Respondent/Cross-Petitioner: The National Labor Relations Board (“NLRB” or “Board”).

c. Petitioner/Cross-Respondent: The International Union of Operating Engineers, Local Union No. 18 (“Operators”).

d. Respondent/Cross-Petitioner: Truck Drivers, Chauffeurs, and Helpers, Local Union No. 100, affiliated with The International Brotherhood of Teamsters (“Teamsters”).

e. Respondent/Cross-Petitioner/Intervenor: Laborer’s International Union of North America, Local No. 534 (“Laborers”).

2. Stein is a for-profit private sector employer primarily involved in slag removal, slag processing, and scrap reclamation for integrated steel mills located throughout the United States. Stein’s parent corporation is the private entity Stein Holdings, Inc., and no publicly held corporation owns 10% or more of either Company’s stock.

B. RULINGS UNDER REVIEW

Stein petitions for partial review of the NLRB's January 28, 2020 final Decisions and Orders in Case Nos. 09-CA-214633, 09-CA-215131, 09-CA-219834, 09-CB-214595, and 09-CB-215147. These Decisions and Orders, reported at 369 NLRB Nos. 10 and 11, were on review of the January 24, 2019 Decisions and Orders issued by NLRB Administrative Law Judge Andrew S. Gollin.

Stein also petitions for review of the NLRB's March 17, 2020 Decision and Order denying Stein's requested reconsideration, rehearing, and reopening of the record in 09-CA-219834.

C. RELATED CASES

On February 24, 2020, the Operators also filed a petition for review of the final Decisions and Orders of the NLRB in Case Nos. 09-CB-214595 and 09-CB-21547. On February 25, 2020, the Laborers' filed a motion to intervene in Case No. 20-1051, which motion was granted by this Court on April 29, 2020. On March 25, 2020, the Teamsters filed its separate petition for review of the NLRB Decisions and Orders in Case Nos. 09-CA-214633 and 09-CB-214595. On March 27, 2020, the Laborers filed a petition for review of the final Decisions and Orders of the NLRB in Case Nos. 09-CA-215131, 09-CA-219834 and 09-CB-215147. On March 30, 2020, the NLRB filed a petition for enforcement "of its Order in full", as to Stein, the Operators, the Teamsters, and the Laborers.

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioner/Cross-Respondent Stein, Inc. makes the following disclosures:

Stein is an incorporated, non-publicly traded entity constituting an “employer” under federal labor law.

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*Authorities upon which Stein chiefly relies.

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*Authorities upon which Stein chiefly relies.

GLOSSARY

AK or AK Steel	AK Steel's plant in Middletown, Ohio
ALJ:	The NLRB's Administrative Law Judge
ALJD:	The decision by the Administrative law decision
Laborers:	The Laborers' International Union of North America, Local No. 534
NLRA:	The National Labor Relations Act
NLRB or the Board:	The National Labor Relations Board
Operators:	The International Union of Operating Engineers, Local No. 18
Stein:	Stein, Inc.
Teamsters:	Truck Drivers, Chauffeurs, and Helpers, Local Union No. 100, affiliated with the International Brotherhood of Teamsters
TMS:	TMS International, Inc.

Unless otherwise noted, page/line transcript citations refer to the Hearing Transcript from the unfair labor practice hearing which took place on September 12, 13, and 17, 2018 and October 22 and 23, 2018. Stein's exhibits are referred to as "SX". The NLRB's exhibits are referred to as "NLRBX". The exhibits of the Operators are referred to as "OX". Jointly-stipulated documents are referred to as "JX".

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review Stein's challenges to the NLRB's January 28, 2020 and March 17, 2020 final Decisions and Orders (Decisions) and the Board's cross-application to enforce its Decisions under Sections 10(f) and 10(e) of the NLRA. In its Decisions the NLRB ruled Stein committed unfair labor practices under Sections 8(a)(1),(2),(3) and (5) of the NLRA.

Stein's petition for review in 369 NLRB No. 11 (Teamsters) was filed on February 24, 2020. Stein's petition for review in 369 NLRB No. 10 (Laborers) was filed on March 23, 2020. The NLRB's cross-application for enforcement was filed on March 30, 2020. The NLRA does not impose time limitations for the filing of petitions for review or enforcement of NLRB decisions.

INTRODUCTION

This appeal challenges, *inter alia*, the NLRB's perfunctory denial of a successor employer's right to organize its unionized workforce into a single integrated bargaining unit, thereby freeing itself from its predecessor's operational inefficiencies. By failing to correctly examine the appropriateness of Stein's new bargaining unit, the Board ignored the United States Supreme Court's holding:

It would be a wholly different case if the Board had determined that because [the successor's] operational structure and practice is different from those of [the predecessor], the [worksite] bargaining unit was no longer an appropriate one.

NLRB v. Burns Int'l. Security Svc., Inc., 406 U.S. 272,280, 92 S.Ct. 1571,1578 (1972). *Burns* was a careful balancing of the NLRA's statutory requirements and the equally important goals of fostering the free flow of capital and business acquisitions, particularly where the employing predecessor and successor are market competitors. *Id.* at 288. The NLRB has recognized the importance of balancing these dual interests. *White-Westinghouse Corp.*, 229 NLRB 667,674 (1977).

In order to fulfill two statutory "appropriate unit" commands¹, the Board has developed a community-of-interest multi-factor analysis. *PCC Structurals*, 365 NLRB No.160, **6-7 (2017). That analysis is a statutory requirement. *Id.*

¹ 29 U.S.C. §§ 159 (b),(c)(5).

The NLRB's footnoted, two-sentence "appropriate unit" analysis falls far short of the "meaningful evaluation" and "vigorous assessment" mandated by Congress. *PCC Structural*s, 365 NLRB No.160, *5 (2017). Neither the NLRB nor the ALJ even mention community-of-interest or its multiple analytical factors. The NLRB, citing this Court, has conceded that such a truncated analysis for a multi-factor test is problematic. *Boeing Co.*, 368 NLRB No.67, n.3 (2019).

Nor did the Board apply its presumption that a single plant-wide bargaining unit is appropriate in the *Burns* successor setting. *Border Steel Rolling Mills, Inc.*, 204 NLRB 814,820 (1973) (citing, *The Singer Company, Climate Control Div.*, 198 NLRB 870 (1972)). Additionally, the Board abhors micro-units at functionally integrated employers such as Stein. *Boeing Co.*, 368 NLRB No.67 (2019).

Compounding its analytical omissions, the Board cited just two factors to support its conclusion that Stein should be saddled with the grossly inefficient operations of its competitor/predecessor - - the mere "work classifications" of TMS' and TMS' history of bargaining with three unions at a single site. *Stein, Inc.*, 369 NLRB Nos. 10,11, n.6 (Jan. 28, 2020). The Board has held that bargaining units are not "appropriate" under 29 U.S.C. §§159(a)-(c) based on nothing more than the job classification itself. *Indianapolis Mack Sales & Service, Inc.*, 288 NLRB 1123,1126 (1988); *A.C. Pavement Striping Co.*, 296 NLRB 206,209 (1989). Decreeing "appropriate units" by job classification fails to fulfill Congress' objectives, and

leads to “chaos” in federal labor law. *Kalamazoo Paper Box Corp.*, 136 NLRB 134,137-140 (1962).

And a *Burns* predecessor’s collective bargaining history cannot be outcome-determinative under the statutorily-required community-of-interest analysis. *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111,119 (D.C.Cir. 1996). The Board itself has so held. *Crown Zellerbach Corp.*, 246 NLRB 202,204 (1979).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the NLRB erred in determining that Stein, as a *Burns*² successor, had a duty to recognize and collectively bargain with the Teamsters and the Laborers?
2. Whether the NLRB erred in determining, in a *Burns* successor setting, that separate bargaining units for Teamsters, Laborers, and Operators constituted “appropriate bargaining units” at Stein?
3. Whether the NLRB erred in determining that Stein committed unfair labor practices by recognizing and bargaining with the Operators as the sole and exclusive representative of its employees?
4. Whether the NLRB erred in determining that the Teamsters and Laborers carried their burdens of proving that their recognition by

² *NLRB v. Burns Int’l. Sec. Svc., Inc.*, 406 U.S. 272, 92 S.Ct. 1571 (1972).

Stein's *Burns* predecessors was derived under Section 9(a) of the NLRA, rather than Section 8(f) of the NLRA?

5. Whether the NLRB erred in determining that Stein's challenges to the §8(f)/§9(a) status of the Teamsters and Laborers were time-barred?
6. Whether the NLRB erred in limiting the "appropriate unit" evidence that it would consider in determining Stein's bargaining obligations?
7. Whether the NLRB erred in creating a new, un-plead, un-charged theory to overturn the discharge of former Laborer member Ken Karoly, when such theory was created after the record had closed; was in contradiction to the theory advocated by the NLRB before the ALJ; and was otherwise not supported by "substantial evidence on the record as a whole"?

STATUTES & REGULATIONS

Pertinent statutes are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

A. Stein.

1. The Highly Integrated Slag/Scrap Work at AK Steel.

The ALJ recognized "[t]he critical facts [in this dispute] are largely undisputed" JA18. AK owns and operates an integrated steel mill in Middletown, Ohio JA604,651. Integrated mills produce blast furnace slag and basic oxygen

furnace (“BOF”) slag as a byproduct of steel-making JA651. Impurities from molten iron in blast furnace slag are transferred to a processing plant where they are off-loaded into a pit; cooled and “fractured” with water; and the metals in that former liquid product (ferrous material) recovered and sold back to AK JA601-603,651. BOF slag is also fed to cooling pits JA99-100,651. That impurity, bonded with limestone, is cooled and hauled to a BOF processing plant where it is then turned into stone aggregate for base to construct highways JA84-86,651,1237.

AK also has “lancing” and steel scraping needs JA191-192,196-197,362. Lancers cut pieces of steel with oxygen-generated lancing rods and that steel is returned to AK to be re-milled JA191-192,197,437. Scrapping involves cutting unusable steel into smaller pieces so that it also can be re-milled JA196-197.

Slag processing, iron recovery, and lancing/burning (“slag reclamation”) is work that AK has outsourced to independent services for over forty years JA769.

2. Stein’s Predecessors at AK.

Slag reclamation is highly competitive JA597. The contracts for these services are fiercely bid JA129,325-327,657. The original provider of these services at AK was the McGraw Construction Company JA654-655. Subsequent competitive bids resulted in the following entities performing slag reclamation at AK: International Mill Service (“IMS”) in September 1997; Olympic Mill Services (“OMS”) in 2000; Tube City in 2002; Tube City/IMS through a corporate merger in 2010; and then

TMS International, LLC JA320-321. All of the above entities are competitors to Stein JA327. Each entity ran slag reclamation using three trade unions--Teamsters, Laborers, and Operators JA Jt.Stip.654-655; Tr.320. Of TMS' sixty-eight slag reclamation operations across North America, AK was the only location where the work was jurisdictionally segregated among three unions on one worksite JA328.

No witnesses could account for how the Teamsters or the Laborers allegedly achieved NLRA §9(a) representational status at AK. One thing is certain: Any purported §9(a) representation was *not* secured through an uncoerced NLRB election JA101,170,200,245,279-280,322-323,596. When McGraw Construction transitioned its operations to IMS, neither the Teamsters nor the Laborers proved majority status to IMS JA82,770-784. When Stein was eventually met with recognition demands from the Teamsters and Laborers, it asked for evidence that the unions did not have §8(f) relationships³ with their predecessor employers JA JX743-744,769⁴. Neither union produced anything (*Id.*).

The Operators, in contrast, did produce §9(a) representational evidence JA966,968-1,109.

³ NLRA §8(f) does not require proof of majority employee representation. *Bentson Contracting v. NLRB*, 941 F.2d 1262, 1263 (D.C. Cir. 1991).

⁴ An NLRB successor to a §8(f) labor contract does not have *Burns* recognition obligations. *Davenport Insulation*, 184 NLRB 908 (1970).

B. TMS' Wages, Hours, and Terms and Conditions of Employment.

1. The TMS Labor Agreements.

As the contractor preceding Stein, TMS negotiated nearly identical labor agreements with its three unions JA JX683-740. All three labor agreements had identical "DEFINITION OF WORK" clauses; provided for a 21-turn work schedule; afforded a 35 cent shift differential; had identical overtime/premium pay clauses; recognized the same Holidays, and the same payment for such; had the same tiered seniority-based scale for vacation benefits and payout; had identical funeral leave; had identical 60-day probationary periods for new hires; had identical jury duty leave and pay provisions; had identical show-up-pay; had identical Friday pay days; paid time-and-one-half for more than eight hours in a work day; required employees to undergo sixteen hours of site-specific safety training; had the same seniority- for selecting vacations; afforded double-time for work performed on Holidays; prohibited vacation entitlement until one year of service is performed; prohibited vacation unless at least 1,300 hours of service was performed; limited to 5 days the use of single day vacation; limited the payout of vacation pay, instead of time-off, on the condition of two weeks advanced notice; had identical seniority-terminating clauses; had identical contractual savings clauses; had identical Management Rights clauses; had identical no-strike pledges; had identical timelines for marshalling grievances, and used the Federal Mediation and Conciliation Service ("FMCS") as

the source for arbitrators; afforded twenty-minute paid lunches; and required lunch breaks to occur after six hours of work JA JX683-740.

Furthermore, the TMS/Laborers labor agreement called for the use of that union's hiring hall JA JX685. So did the TMS/Teamsters labor agreement JA JX702.⁵

These are the undisputed facts that led the NLRB to hold that the TMS unions only shared "... *some* of the same terms and conditions of employment" JA10,41.

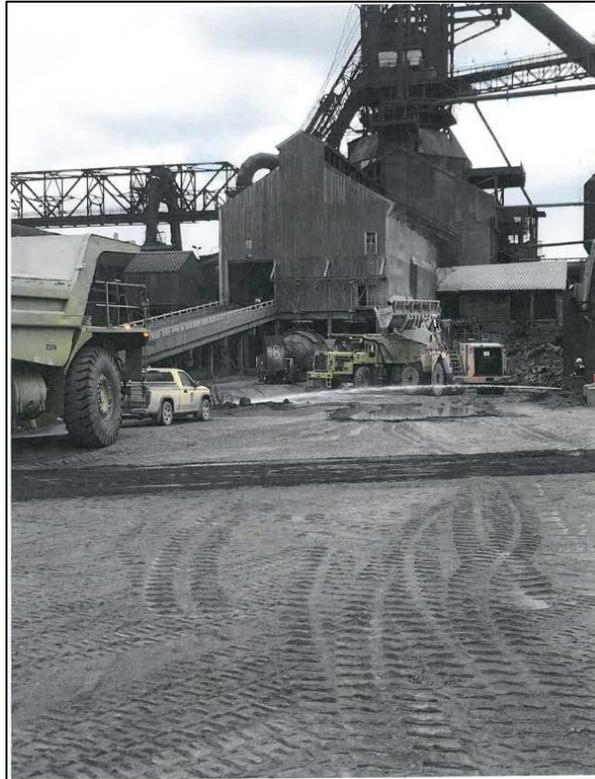
2. TMS' Linear, Highly Integrated Work at AK.

Not only could neither the Teamsters nor the Laborers explain how they became the purported §9(a) representative of TMS bargaining units, they could not explain how they created segregated micro-units for unskilled workers performing linear and highly integrated work.

TMS' slag reclamation work had, minute-by-minute, its Laborers, Teamsters, and Operators working in extremely close proximity to each other, while in constant contact with each other JA109-111,115-116,119-120,174-179,227-231,281-284,355-362. Slag reclamation was incapable of being undertaken without each

⁵ Hiring hall clauses are illegal if the labor agreements in question are §9(a) contracts as opposed to §8(f) in origin. *NLRB v. Nat'l. Maritime Union*, 175 F.2d 686,688-689 (2d Cir. 1949), *affirming*, 78 NLRB 971 (1948).

union performing their tasks and duties *Id.* Work at the blast furnace illustrates the inter-union work integration:



JA1110. Teamsters and Laborers testified the yellow-hued front end loaders in SX1 were operated exclusively by Operators at TMS JA110,230-231,251-252,260-261,284,360,433,498. The green haul trucks in SX1 were operated exclusively by Teamsters JA110-111,152,174,177-178,199,230-231,243-244,282-283,345-346,372,433,441,498,503. The worker spraying cooling water into the pit area in SX1 was work performed exclusively by Laborers JA112,176-179,227-231,284,360,433,498. That Laborer's job was to cool the searing slag pits with water so that slag could be loaded into the haul trucks by front-end loaders, and to cool the

tires of both the trucks and loaders so they would not catch fire JA176,179,216,227,229,498. That Laborer also acted as a “spotter” for the loader Operators and Teamster truck drivers to ensure they did not run into other equipment, the searing pits, or AK’s furnaces JA116,198,216,228,237,254,433. That Laborer also spotted Teamsters drivers to ensure their truck beds were not overloaded JA120,216,277.

The slag reclamation/metal recovery was performed by all three trades being in continuous contact with each other via two-way radios JA115,120,177-179,228. Once the large trucks were loaded, they would move and unload the slag at stock piles where the material would later be processed into road-base aggregate, and the process would repeat itself each hour, each day, and each shift JA84-85,88,115,119,177,179,187-188,227, 231,267-268,278, 283.

TMS’ work at its BOF worksite (*See*, SX31, JA1237-1238) was similar in that all three trades worked in conjunction and in close proximity to each other to ensure that the loaders filled the heavy duty haul trucks safely JA605. A Laborer safety employee known as a “knock out” was staffed at the BOF JA180,190-191,216,256,357. The molten iron and slag arrives in large pots, and remnants remain in the pots after the molten iron is poured into the pits JA180,216,256-257. The pot needed to have remnants knocked out, and a Laborer was staffed at the BOF

site to ensure this occurred safely, while loader Operators and Teamsters drivers operated JA180,216,226,255-258.

These were the undisputed facts that led the NLRB to announce that the TMS unions only had "... *some* interaction" JA10,41.

Work integration and interdependence was prevalent in virtually all aspects of AK slag reclamation, albeit with arbitrary craft jurisdictional lines inexplicably drawn by TMS. Teamsters exclusively ran dust suppression water trucks so that all three trades could safely travel at AK JA103,152,177,293,341,371,439-440,502,532,570,1135-1137. A combination fuel/lube truck operated exclusively by Operators travelled throughout TMS' worksite to re-fuel and lubricate equipment and vehicles operated by Teamsters and Operators JA SX1132-1132; Tr.104,252,336,369,501,569. The equipment used to move the slag, or the end product aggregate, such as bobcats JA SX1123-1124, backhoes, and front end loaders JA1110 were exclusively run by Operators JA93-94,108-109,175,185-186,199,252,284,294,309-310,329-330,339-340,364-365,370-371,434,439,499, 642,529,532,566,635. The plants used to transform slag into road base aggregate were operated exclusively by Operators at TMS JA SX1125-1126; Tr.179,202-204,252,307,331-332,365,434-435,499,529,530,566-567. Telehandlers, a large forklift-like machine used to lift and move arriving and departing equipment and deliveries were exclusively operated by Operators JA SX1129-1130;310-

311,334,336,367-368,437,501,531,568. TMS portable hydraulic cranes (i.e. the “Liebherr”) affixed with a magnet for the scrap dismantling performed by Laborers was operated exclusively by Operators JA SX1127-1128; Tr.333,366-367,437,500-501,530,568. Large cranes that either dropped a metal ball to smash coagulated slag, or were affixed with a magnet to recover AK metal JA SX1133-1134 were exclusively run by Operators JA252,308,309,337-338,370,438,501-502,531,569. TMS’ Operator mechanics were solely responsible for maintaining and repairing all of the site equipment and had daily interaction with the Teamsters and Operators JA94,156,252,309,377,482,521-525.

Even the use of shovels by TMS Laborers to clean the belts and tail pulleys of the aggregate-making plants were jurisdictionally siloed exclusively to Laborers JA252,289,358,361,648.

3. TMS’ Common Management.

The top TMS Manager for AK was Bob Huseman, Vice-President of Operations JA318-319. Below Huseman in the managerial hierarchy was Chuck Cooke, the Site Superintendent JA95. TMS Shift Supervisors at AK included Chad Bare, Willie Huseman, and J.R. Cement JA95-96. These TMS Supervisors directed all three trade unions JA97-98,117-118.

4. Other TMS Integration Factors.

The TMS Operators, Teamsters and Laborers all worked the same 21-day turn work shift; shared the same locker room; used the same lunch room; used the same shower facility; shared the same parking lot; and participated in the same morning and monthly safety meetings JA127,128,171-172,264-265,623.

After Stein exercised its post-acquisition *Burns* rights, all three union trades enjoyed *identical* wages, hours, and terms and condition of employment JA JX741-742,745-768.

C. Stein Wins the AK Slag Reclamation/Metal Recovery Contract.

When the Teamsters and Laborers TMS collective bargaining agreements were near expiration, AK put out for bid its slag reclamation contract JA129. At this juncture, the overwhelming majority of workers at AK were Operators JA Jt.Stip.660-668. TMS had just fifteen Teamsters JA658, and just fourteen Laborers JA658-659. TMS had forty-two Operators JA659-660.

With TMS' seniority rosters in-hand that laid bare the Operators' majority status, Dave Holvey, Vice-President and Chief Financial Officer of Stein, arranged a "meet and greet" with Operators representatives JA130-131,932-954. Because Stein knew that it would be performing slag reclamation in a markedly different fashion than the woefully inefficient TMS, Holvey apprised the Operators representatives there would be one bargaining unit at AK JA131-133.

Stein Area Manager Doug Huffnagel began visiting AK to observe TMS' operations in October 2017 JA139-142. Huffnagel witnessed TMS inefficiencies JA598-599,620,630. Material handling processes, work flow, and on-site travel were a mess JA598. Because of the rigid three-craft jurisdictional lines that TMS inexplicably assented to, Teamsters, Laborers, and Operators spent blocks of time milling about watching other trade employees work JA598-599. Union "featherbedding" was rampant as 2 or all 3 trades played small roles in performing one person's job JA598-599.

On November 9, 2017, Huffnagel held a meeting in with all three trades employees JA ALJD21-22; Jt.Stip.51-52; Tr.657-658;143-144;741-745. Huffnagel later made it perfectly clear that the odd, union craft jurisdictional boxes that the Stein interviewees were in at TMS would cease JA266,419-420,600.

D. Stein's Operations at AK.

Only one of TMS' supervisors (Chad Bare) matriculated to Stein employment JA183-184. Although Stein through arms-length transactions acquired some of TMS' equipment, much of it was "junk" JA286-287. Three of TMS' heavy duty cranes were non-operational JA286. Stein brought in heavy-duty cranes, Euclid®

haul trucks and front-end loaders that were not TMS' JA ALJD23,53;286-287. All Stein workers reported to a singular supervisor JA151,207,221,288.

Once Stein assumed operations at AK effective January 1, 2018, it began cross-training all of the previously segregated TMS trade workers. *Such cross training of the three former TMS craft units had never occurred at either IMS, OMS, Tube City/IMS, or TMS JA205,206,349-350.* By January 3, 2018, former TMS Laborer Ova Venters was running bobcats for Stein JA373-374;1139. By January 17, Venters was running backhoes at AK JA376;SX1147. By January 23, Venters was trained on the water truck – a former Teamsters TMS job – and the next day he ran that vehicle JA379-380; SX1150. On several occasions, Venters operated multiple pieces of equipment formerly in the exclusive jurisdiction of either Teamsters or Operators JA379-380,382; SX1157. By the first week of February, for entire weeks, Venters was running backhoes JA383-387; SX1158,1159,1161,1163. By early February, Venters was making off-site parts and material runs – a task previously monopolized by Teamsters JA388-390,393,394-395,SX1164, 1168,1171,1173,1176. Throughout February, Venters continued to run and operate backhoes and bobcats JA381-395. Throughout March, Venters continued to run water trucks JA399-401,402,403; SX1188,1192,1194,1201,1202,1205,1210. By mid-March, Venters was running off-road haul trucks JA404-407;

SX1221,1223,1225,1234. Throughout March 2018, Venters continued to run backhoes and make off-site parts runs JA396-397,398,399,401.

Pursuant to the ALJ's evidentiary ruling that imposed both a testimonial presumption and shifting of the burden of proof to the General Counsel JA408-414, Venters - - an adverse witness to Stein - - testified that his cross-jurisdictional work continued unabated at Stein JA415-418.

Tim Wilhoite, a Laborer at AK for eleven years, similarly was cross-trained and began operating equipment that was formerly within the exclusive jurisdiction of one of TMS' other two trades JA428-430. By January 9, 2018, Wilhoite was running the Mustang/Telehandler JA442-443; SX1142. By mid-February, Wilhoite was fully trained and running bobcats JA444-446; SX1169,1170. By the end of February, Wilhoite was operating the front-end loaders formerly within the jurisdiction of Operators JA446-447; SX1172. Wilhoite also began making off-site parts runs JA448-449; SX1175. By March, Wilhoite was operating Stein's aggregate-making plants where he concurrently ran bobcats JA450-451; SX1181. Wilhoite had never run the aggregate plants under TMS JA452-453. Wilhoite's operation of both aggregate-making plants and bobcats for Stein continued unabated JA454,459,461,462-463; SX1182,1183,1189,1193,1195,1203,1206,1211,1218. Wilhoite also began operating backhoes JA463-469; SX1226,1228,1230. Adhering

to the ALJ's evidentiary ruling, Wilhoite –a Stein adverse witness -- testified that his cross-jurisdictional work continued unabated⁶ JA470-471.

Michael Young was a Laborer at TMS JA496-497. By March, Young was operating bobcats JA504; SX1184. On March 6, Young spent ten hours training on haul trucks, and by March 8 was driving them JA505-517; SX1190,1196,1199,1207, 1215,1222,1224,1228,1231,1232,1235,1236. Consistent with the ALJ's evidentiary ruling, Young testified that his cross-jurisdictional work continued unabated at Stein JA517-518.

Chris Michaels was a TMS Laborer JA526-527. By January 8, Michaels was running backhoes JA533-535; SX1140. By January 9 Michaels was running skid steers JA536-537; SX1140,1143,1144. Michaels' operation of bobcats and backhoes – work exclusively within Operators jurisdiction at TMS' – continued unabated throughout January JA538-543; SX1145,1146,1148,1149,1153,1154. By February 11, Michaels was operating the Telehandler JA487; SX1169. Michaels continued to run backhoes, skid steers, and the Telehandler throughout March JA545-551; SX1208,1216. By mid-March, Michaels was operating heavy haul trucks for entire shifts JA548-552; SX1212,1213. Consistent with the ALJ's evidentiary ruling,

⁶ Notwithstanding Wilhoite's testimony that he "primarily" operated equipment rather than performing Laborer work, the ALJ mis-characterized this work as "occasionally" JA24,54.

Michaels testified that his cross-jurisdictional work continued unabated at Stein JA551-552.

Troy Neace was a TMS Laborer performing slag reclamation work since 2004 JA193. By January, Neace was making off-site parts runs for Stein JA571-572; SX1152. That same month, Neace began running backhoes JA573-574; SX1152. In early February, Neace trained to run Stein's aggregate-making plants JA575-576; SX1160. After just eight hours of training, on February 7, Neace ran Stein's aggregate plants JA577-576; SX1160,1162. Thereafter, Neace predominately ran Stein's aggregate plants JA580-595; SX1162,1165,1167,1174,1177;1180,1185, 1186,1187,1191,1197,1200,1209,1214,1217,1219,1227,1233. In March, Neace was fully trained on bobcats JA584,587,594; SX1187. Neace also drove the water truck JA589; SX1198. Consistent with the ALJ's evidentiary ruling, Neace testified his cross-jurisdictional work continued unabated at Stein JA594-595.

Michael Kingery was a TMS Operator JA632-634. By March, Kingery was operating Stein's heavy haul trucks JA636-637. With just one day's training, Kingery routinely drove haul trucks for Stein JA638-645. Consistent with the ALJ's evidentiary ruling, Kingery testified that his cross-jurisdictional work continued unabated JA648.

As demonstrated *supra*, from the inception of Stein's work at AK, TMS' Laborers had been trained in, and were performing what had been Operators and

Teamsters work; TMS' Operators had been trained in, and were performing what had been Laborers and Teamsters work; and TMS' Teamsters had been trained to perform what had been Operators work JA628,631.⁷ As former TMS Teamsters truck driver and adverse witness Robert Tracy testified, in his twenty-eight years of on-site presence at AK, none of this had happened before JA107-109. Huseman corroborated this fact JA350. Neither the Teamsters nor Laborers had ever before run the aggregate plants JA332. Neither the Teamsters nor the Laborers had ever before operated skid steers JA329-330. Neither the Teamsters nor the Laborers had ever before run the Telehandler JA334-336. Neither the Teamsters nor the Laborers had ever before run backhoes JA339-340. Neither the Operators nor the Laborers had ever before run water trucks JA341-342.

These are the undisputed facts that negate the NLRB's conclusion that Stein's employees had "... *limited* cross-training and cross-jurisdictional assignment of work" JA10,41.

E. Ken Karoly.

Ken Karoly (Karoly) was a former TMS Laborer Knockout Safety Attendant JA215-216. Karoly began employment with Stein on January 6, 2018 JA233-235; SX1113-1117.

⁷ See also, JA Rej.Ex.1241-1243: Teamster Bowling training on backhoes.

Knockout Safety Attendants cool down the pits and spot loaders and trucks as they maneuver JA216,606-607. In addition to the two-way radio contact that Karoly maintained with the loaders and trucks, beginning January 28, 2018 Stein issued its Knockout Safety Attendants a cellular telephone JA607-609; SX1120. AK at times could not reach the Knockout Safety Attendant on the two-way radio because of background noises, and felt that a cell phone would enhance communications JA609. In March Karoly dropped the cell phone and ran over it, destroying it JA220-222,609.

On March 19, Paul Reeds, AK's Section Manager sent Huffnagel a text: "I'm hearing from [TMS'] crew that they are without Stein up to 40 minutes during shift changes sometimes" JA611,616; SX1239-1240. Reeds was referencing multiple times when AK could not reach Stein's Knockout Safety Attendant because Karoly had switched the two-way radio to the wrong channel JA616-617. Karoly testified that communication between Stein and AK was of utmost importance JA232-233. Karoly also admitted that he "accidentally" placed the radio on the wrong channel at times JA238. The only Stein Knockout Safety Attendant with whom AK had communication difficulties was Karoly JA ALJD25; Tr.614-615. Ben Wolf, AK's blast furnace Foreman, was "very irate" and yelling at Huffnagel about AK's inability to communicate with Karoly JA ALJD25; Tr.615-616.

On March 31, Bill Fletcher ran a loader into the slag pit, crushing its fender JA SX1121-1122; Tr.236-237,617-618. Karoly was the safety-spotter when this occurred JA236-237. Karoly admitted that safety was a “very important” part of his job responsibilities and was touted by Stein’s client, AK JA231-234.

After destroying the cellular telephone; failing to prevent damage to a loader; and irritating AK by having his two-way radio perpetually on the wrong channel, Huffnagel terminated Karoly on April 18 JA618-619; NLRBX964-965. When handed the termination notice, Karoly did not dispute any of the discharge-inducing incidents JA617.

Significantly, the NLRB General Counsel did not dispute at the hearing that Karoly’s termination occurred while he was still in his 90-day probationary period under the Stein/Operators labor contract JA JX743-768. To the contrary, the General Counsel advocated that this was the case. Moreover, it was jointly stipulated that Karoly did not engage in any protected, concerted §8(a)(1) activity that prompted his termination, and that Stein did not unlawfully discriminate against Karoly under §8(a)(3) of the NLRA JA Jt.Stip.666.

F. The ALJ’s Decisions.

1. The ALJ’s Evidentiary Ruling.

In addition to over 3,000 documents produced by Stein to the General Counsel in response to a sweeping pre-hearing subpoena, Stein produced 14,000 documents

mid-hearing JA624-625. The 14,000 documents included Operator Reports memorializing work Stein's employees were doing on an hourly basis at AK from January 1, 2018, through August 2018. *Id.* To prevent the hearing from extending for a period of months, as witness-after-witness testified about their daily Stein work tasks, the ALJ issued an evidentiary ruling JA408-415. Once evidence of cross-jurisdictional work was presented by Stein, it became the General Counsel's burden to prove those cross-jurisdictional assignments ended or changed in frequency.

Possessing over 14,000 of Stein's Operator Reports, the General Counsel did not introduce a single employee report at the hearing. Instead of finding that the General Counsel had failed to meet his shifted burden of proof, the ALJ concluded (erroneously) that Stein had only introduced evidence of "occasional cross-jurisdictional work" JA ALJD28-29.

2. The ALJ's Merits Decision.

The ALJ foisted a "heavy burden" on Stein to demonstrate that its predecessor's micro-units had been rendered "inappropriate" JA ALJD28. The ALJ analyzed only the work assignment changes inaugurated by Stein, without examining whether TMS' units were "appropriate" in the first instance JA24-25,28-29. Concluding that Stein had allegedly committed unfair labor practices before its *Burns* bargaining obligation attached, the ALJ held that Stein could not lay claim to *Burns*' "inappropriate unit" successor exception JA28-29,31-33 (relying on and

citing *Advanced Stretchforming*, 323 NLRB 529 (1997) and *Dodge of Naperville*, 357 NLRB 2252 (2012)). Ignoring his own burden-shifting evidentiary ruling, the ALJ concluded that Stein's cross-training and cross-union work assignments "...were not so regular and widespread as to alter the appropriateness of the three historical units" JA28. The ALJ ruled that the discharge of Karoly was violative because Stein forfeited its *Burns*' rights JA33-34.

G. The NLRB's Decisions.

The NLRB ruled that its ALJ materially erred in determining that Stein "...forfeited its *Burns* right." 369 NLRB No.10 at *3. Accordingly, the Board held that its ALJ erred by not addressing the "appropriate unit" successor issue that was the bulwark of Stein's business acquisition decision-making. *Id.* at n.5. To fill the "appropriate unit" analytical vacuum, the Board offered this footnoted "analysis":

The extent to which the three historical bargaining units in this case had some interaction and shared some of the same terms and conditions of employment did not make maintaining separate units repugnant to the Act's policies, notwithstanding Respondent Stein's limited cross-training and cross-jurisdictional assignment of work. The historical bargaining units' breakdown by work classifications still "conform[ed] reasonably well to other standards of appropriateness".

Id. at n.6 (quoting, *Deferiet Paper Co. v. NLRB*, 235 F.3d 581,583 (D.C.Cir. 2000)).

The Board also disagreed with its ALJ's rationale over the discharge of Karoly, and manufactured a different reason to scuttle Karoly's termination: "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)”. 369 NLRB No.10, *5.

The Board rejected Stein’s §8(f)/§9(a) union trade recognition defense, finding it to be “time-barred under Sec. 10(b)”. *Id.* at n.6.

Because it was never afforded notice or an opportunity to address the Board’s new Karoly theory, Stein moved for reconsideration JA1252-1265: Stein Mot. to Reconsider/Reopen. Again, Stein was met with a terse, footnoted NLRB ruling JA69-71.

SUMMARY OF ARGUMENT

This dispute involves the United States Supreme Court-recognized gateway for a successor employer faced with the union-recognitional obligations of its predecessor, where the predecessor and successor are fierce market competitors. *NLRB v. Burns Int’l. Security Srvcs., Inc.*, 406 U.S. 272,280, 92 S.Ct. 1571,1578 (1972). The NLRB failed to apply its community-of-interest multi-factor analysis to determine whether Stein must be saddled with the union-recognitional business decisions of its predecessors. Most recently, the NLRB has held that applying its community-of-interest analysis is indispensable to fulfilling its statutory obligations under 29 U.S.C. §§159(a)-(c). *PCC Structural*s, 365 NLRB No.160, **6-7 (2017); *Boeing Co.*, 368 NLRB No.67, n.3 (2019). Had the Board applied the statutorily-

required community-of-interest analysis, it would have run headlong into a host of precedents by this Court requiring it side with Stein. *Bentson Contracting Co. v. NLRB*, 941 F.2d 1262 (D.C.Cir. 1991); *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111 (D.C.Cir. 1996); *Deferiet Paper Co. v. NLRB*, 235 F.3d 581 (D.C.Cir. 2000).

Additionally, the truncated analysis that the NLRB did undertake, consisting of just two sentences in a single footnote, was contrary to the NLRB's settled precedents that every *bona fide* "appropriate unit" analysis requires "meaningful evaluation" and a "vigorous assessment" of the statutorily-mandated community-of-interest factors. *PCC Structurals*, 365 NLRB No.160, **6-7 (2017).

Had the NLRB performed the statutorily required community-of-interest analysis, it would have been compelled to apply a presumption that a plant-wide bargaining unit is appropriate. *Armco, Inc.*, 279 NLRB 1184,1213 (1986); *Border Steel Rolling Mills, Inc.*, 204 NLRB 814,820 (1973). And, the Board would have been forced to recognize its past rulings rejecting micro-units at functionally integrated businesses. *Boeing Co.*, 368 NLRB No.67 (2019) (quoting, *Publix Super Markets*, 343 NLRB 1023,1027 (2004)).

The deficient analysis that the NLRB did apply was predicated on just two factors - - the worker's classifications and the predecessor's union recognitional history - - that simply cannot carry the Board's *Burns* water. The Board itself has stated that creating "appropriate units" by the mere classification of the worker

contravenes the Act, and leads to “chaos” in labor law. *Kalamazoo Paper Box Corp.*, 136 NLRB 134,137-140 (1962). And, this Court, the NLRB, and the NLRA all flatly prohibit reliance upon the mere history of collective bargaining in determining a *Burns* successor’s obligations. *Bentson Contracting Co.*, 941 F.2d 1262,1267 (D.C.Cir. 1991); *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111,119 (D.C.Cir. 1996); *Crown Zellerbach Corp.*, 246 NLRB 202,204 (1979); 29 U.S.C. §159(c)(5).

Contrary to the underlying charge, the notice pleadings, and the General Counsel’s advocacy, the NLRB decided that Karoly was *not* within his probationary period when terminated. Instead, the NLRB invented the factually unsupportable theory that Stein unilaterally altered its probationary period from 90-*calendar days* to 90-*working days*. Springing this new legal theory on Stein well after the charge has been investigated and the ALJ’s evidentiary record has been closed plainly violates both the Due Process Clause of the United States Constitution, as well as the Administrative Procedure Act, 5 U.S.C. § 554(b)(3). *NLRB v. Blake Const.*, 663 F.2d 272,279 (D.C.Cir. 1981); *Collective Concrete, Inc. v. NLRB*, 786 F.Appx. 266, *268 (D.C.Cir. 2019); *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111 (D.C.Cir. 1996).

STANDING

Stein is an entity “... aggrieved by a final order of the Board” determining that Stein committed unfair labor practices under the NLRA. 29 U.S.C. § 160(f).

STANDARDS OF REVIEW

Whether the NLRB adhered to its own “appropriate unit” precedents is subject to plenary review. *Cleveland Construction, Inc. v. NLRB*, 44 F.3d 1010,1016 (D.C.Cir. 1995). If the Board did not, that is “arbitrary and capricious” decision-making under 5 U.S.C. § 706(2)(A). *ABM Onsite Srvc.–West v. NLRB*, 849 F.3d 1137,1142 (D.C.Cir. 2017). Whether NLRB decisions are consistent with its enabling Act is subject to *de novo* review. *CSX Transp., Inc. v. Surface Transp. Bd.*, 774 F.3d 25,33 (D.C.Cir. 2014). Whether, with respect to Ken Karoly’s §8(a)(5) discharge, the NLRB violated Stein’s Due Process Article V Constitutional rights, and whether the Board violated the Administrative Procedure Act, 5 U.S.C. § 554(b)(3), are both subject to *de novo* review. *NLRB v. Blake Const.*, 663 F.2d 272,279 (D.C.Cir. 1981).

The NLRB’s factual findings are to be affirmed only where they are “supported by substantial evidence on the record considered as a whole”. 29 U.S.C. §160(e).

Substantial evidence is a deferential standard. But deference is not abdication.

Otay Mesa Property, L.P. v. U.S. Dept. of the Interior, 646 F.3d 914,916 (D.C.Cir. 2011). This Court “must take into account whatever in the record fairly detracts” from factual conclusions. *Cleveland Construction v. NLRB*, 44 F.3d 1010,1014 (D.C.Cir. 1995).

ARGUMENT

I. THE BOARD'S ORDER SHOULD BE VACATED, IN PART, BECAUSE THE NLRB FAILED TO APPLY THE STATUTORILY-MANDATED COMMUNITY-OF-INTEREST ANALYSIS TO STEIN'S CONSOLIDATED BARGAINING UNIT.

A. The Board Erred by Failing to Conduct a Vigorous Community-of-Interest Analysis.

“Congress contemplated that whenever unit appropriateness is questioned, the Board would conduct a meaningful evaluation”. *PCC Structurals*, 365 NLRB No.160, *4 (2017) (emphasis added). The Board, therefore, must undertake a “vigorous assessment” of bargaining unit appropriateness and: “Congress intended the Board’s review of unit appropriateness would not be perfunctory”. *Id.* The NLRB fulfills this obligation only when its “appropriate unit” analysis is tethered to the community-of-interest multi-factor test. *PCC Structurals*, 365 NLRB No.160, **6-7 (2017). *Accord, Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, n.11 (D.C.Cir. 1996); *Deferiet Paper Co. v. NLRB*, 235 F.3d 581,583 (D.C.Cir. 2000).

The NLRA-mandated community-of-interest test is multi-factor in nature⁸, and the Board has conceded:

⁸ 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

Multi-factor tests “lead to predictability and intelligibility only to the extent the Board explains in applying the tests to varied fact situations, which factors are significant, which less so, and why”. (quoting, *LeMoyne-Owen College v. NLRB*, 357 F.3d 55,61 (D.C.Cir. 2004)).

Boeing Co., 368 NLRB No.67, n.3 (2019).

Members of this Court have railed at the Board when it has attempted to fulfill its “appropriate unit” analysis in a mere two-sentence, footnoted conclusory statement. *NLRB v. Tito Contractors, Inc.*, 847 F.3d 724,734 (D.C.Cir. 2017) (LeCraft Henderson, J. (concurring)), *reversing*, 362 NLRB No.119 (June 18, 2015).

The entirety of the NLRB’s “appropriate unit” analysis was tucked away in a footnote, consisting of the just two sentences. *Id.* at n.6. Rather than conducting a meaningful community-of-interest analysis, the Board made fleeting mention of the “historical bargaining units’ breakdown by work classifications” as being outcome-determinative. *Id.* at n.6.

The Board has stated that bargaining units cannot be deemed “appropriate” under 29 U.S.C. §§ 159(a)-(c) based on nothing more than the job classification itself. *Indianapolis Mack Sales & Service, Inc.*, 288 NLRB 1123,1126 (1988); *A.C.*

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. *Id.* at n.11 (*citing, Kalamazoo Paper Box*, 136 NLRB 134, 137 (1962)).

Trident Seafoods, Inc. v. NLRB, 101 F.3d 111, n.11 (D.C.Cir. 1996).

Pavement Striping Co., 296 NLRB 206,209 (1989). Indeed, the NLRB has ruled that decreeing “appropriate units” by job classification fails to fulfill Congress’ NLRA objectives, and leads to “chaos”:

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).

The Board’s position that job classifications are insufficient to establish an “appropriate unit” has been consistent. *Border Steel Rolling Mills, Inc.*, 204 NLRB 814,821-822 (1973). “[A]n agency’s unexplained departure from precedent is arbitrary and capricious”. *ABM Onsite Srv.-West, Inc. v. NLRB*, 849 F.3d 1137,1142 (D.C.Cir. 2017). This Court has also held that job classifications cannot serve as the statutorily-required community-of-interest. *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, n.16 (D.C.Cir. 1996).

To the extent the Board mentions, but does not analyze, the bargaining “histor[y]” at TMS, the Board has been consistent that that factor cannot be outcome-determinative. *Rock-Tenn Co.*, 274 NLRB 772-773 (1985) (rejecting 15-year bargaining history); *Crown Zellerbach Corp.*, 246 NLRB 202-203 (1979); *A.C. Pavement Striping Co.*, 296 NLRB 206,210 (1989). This Court has followed the Board. *Deferiet Paper Co. v. NLRB*, 235 F.3d 581,583-584 (D.C.Cir. 2000); *Trident*

Seafoods, Inc. v. NLRB, 101 F.3d 111,119 (D.C.Cir. 1996); *Bentson Contracting Co. v. NLRB*, 941 F.2d 1262,1267 (D.C.Cir. 1991).

This Court has noted the depleted value of bargaining history under *Burns* where the successor employer implements operational changes. *Bentson Contracting Co. v. NLRB*, 941 F.2d 1262,1268 (D.C.Cir. 1991). Accord, *NLRB v. Indianapolis Mack Sales & Service, Inc.*, 802 F.2d 280,285 (7th Cir. 1986) (“It begs the question to rely on the bargaining history of the predecessor alone, because one must then assume that the duties of the service and parks department employees remain substantially the same under Indianapolis Mack as they were under [the predecessor] Mack Truck”).

Congress legislated that bargaining history would not be controlling: “In determining whether a unit is appropriate for the purposes specified in subsection (b), the extent to which the employees have organized shall not be controlling”. 29 U.S.C. § 159(c)(5).

The Board made no attempt to examine Stein’s single, consolidated bargaining unit in light of the NLRA-required community-of-interest factors, and offered no reason for its failure to do so. “Explaining why the [unit] excluded employees have distinct interests in the context of collective bargaining is necessary to avoid arbitrary lines of demarcation”. *Boeing Co.*, 368 NLRB No.67 (2019)

(quoting, *Constellation Brands, U.S. Ops., Inc. v. NLRB*, 842 F.3d 784 (2d Cir. 2016)).

The NLRB's decision should be reversed. *Cleveland Construction, Inc. v. NLRB*, 44 F.3d 1010, 1016 (D.C.Cir. 1995) ("The [NLRB] is not free to ignore its precedent without explanation"), *reversing*, 311 NLRB 1397 (1993).

B. The Board Failed To Follow This Court's *Deferiet Paper* Imprimatur On The "Appropriate Unit" Analysis In A *Burns* Setting.

The Board stated that Stein's "... limited cross-training and cross-jurisdictional assignment of work" did not sufficiently alter TMS' bargaining unit work classifications JA NLRB Dec.10,41. This Court, however, has stated that such a purely comparative analysis misses the mark:

A unit might, for instance, be only marginally appropriate prior to the transaction, in which event relatively small changes following the transfer of ownership could push it into the category of an inappropriate unit.

Deferiet Paper Company v. NLRB, 235 F.3d 581,580,584 (D.C.Cir. 2000).

Stein disputes its cross-training and cross-jurisdictional work was "limited", but even if that were true *Deferiet Paper* instructs that the NLRB first needed to determine whether the troika of units at TMS were "appropriate". "Like many [*Burns*] successor stories, our saga must begin with the predecessor employer". *NLRB v. Security-Columbian Bank Note Co.*, 541 F.2d 135,136 (3d Cir. 1976). Had the Board followed *Deferiet Paper*, it would have found that virtually every term

and condition of employment of the TMS Operators, Laborers, and Teamsters were identical (*See, supra* at 9-10). That the Teamsters, Laborers, and Operators enjoyed different hourly wage rates at TMS was insufficient to treat them as stand-alone bargaining units where, as here, all of the other terms and conditions of employment were identical. *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, n.16 (D.C.Cir. 1996), *reversing*, 318 NLRB 738 (1995). The NLRB used to follow *Trident Seafoods*. *A.C. Pavement Striping Company*, 296 NLRB 206,209 (1989); *William J. Keller, Inc.*, 198 NLRB 1144 (1972).

There was an even greater need here for the Board to conduct a thorough community-of-interest analysis of Stein's consolidated bargaining unit since there was no evidence that the historical trinity of units at AK emanated from an NLRB election. If uncoerced elections had initially brought these three bargaining units to life, it could be argued that the Board had, at least at some point in time, examined and approved their "appropriateness" by applying the community-of-interest test. There is no record evidence that any such NLRB elections ever took place, although the records of such were within the General Counsel's ability to access and present.

C. The Board Failed to Apply Its *Burns* Single-Plant-Wide "Appropriate Unit" Presumption.

Under *Burns*, the Board has held: "A plantwide unit of all employees (excluding office clerical employees, technical employees, salesmen, guards, and

supervisors) is presumptively appropriate for bargaining”. *Border Steel Rolling Mills, Inc.*, 204 NLRB 814,820 (1973).

Nowhere did the Board consider, let alone apply, this *Burns* “appropriate unit” presumption. By inexplicably departing from precedent, enforcement should be denied. *ABM Onsite Srvc.–West v. NLRB*, 849 F.3d at 1142.

D. The Board Failed to Apply Its Presumption Against “Micro-Units” In Functionally Integrated Employment Settings.

In *Boeing Co.*, 368 NLRB No.67 (Sept. 9, 2019), the NLRB rescued The Boeing Company from a successful Machinists’ Union organizing drive of Flight Line workers at a functionally integrated aircraft assembly plant. Even though the 178 employees who voted for unionization worked in a final assembly building separate from the unit-excluded employees; “earn[ed] higher wages than many, though not all, excluded employees”; held FAA licenses not held by excluded workers; and “worked under entirely separate supervisory structures” than their excluded co-workers, the NLRB crushed the Flight Line workers’ organizational efforts: “As the Board has observed before, it is ‘particularly inappropriate to carve out a disproportionately small portion of a large functionally integrated facility as a separate unit’”. *Id.*, slip op. at 5. According to the Board: “The 2,700 production-and-maintenance employees stationed throughout the production line all work towards producing a single product, 787 aircraft”. *Id.*, slip op. at 5.

To bolster *Boeing*, the NLRB cited *Publix Super Markets*, 343 NLRB 1023 (2004) where the Board again rejected a “micro-unit” of 60 Fluid Processing workers (i.e. milk processors and bottlers) separated from 900 warehouse employees. *Id.* at 1027. Because Fluid Processing employees were in “different business units”, thereby creating “a distinction between the two groups in supervision and control of labor relations”, the NLRB’s regional director found the Fluid Processing micro-unit to be an “appropriate unit”. *Id.* at 1026-1027. Not so said the NLRB, since both the Warehouse Distribution and Fluid Processing employees “... are engaged in processing and distributing grocery items to the Employer’s retail stores”. According to the Board: “We find it particularly inappropriate to carve out a disproportionately small portion of a large, functionally integrated facility as a separate unit”. *Id.* at 1027.

To be sure, *Boeing* and *Publix Super Markets* both involved nascent units, and the Board noted that here JA NLRB Dec.10,41. But *Boeing* stated that its analysis on micro-units was mandated by the NLRA’s text. *Boeing Co.*, 368 NLRB No.67, slip op. p.3 (Sept. 9, 2019) (quoting, *Wheeling Island Gaming*, 355 NLRB 637, n.2 (2010)). Since, the Board’s prohibition against micro-units at functionally integrated businesses is statutorily-required and statutorily-based, that this dispute arises in the *Burns* successor setting is an impermissible distinction.

Boeing makes sense. The NLRA requires the Board “... assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter” when deciding “appropriate units.” 29 U.S.C. § 159(b). Micro-units defeat the majority unit’s collective strength, and pose a “tail wagging the dog” environment in integrated businesses. *Mallinckrodt Chemical Works*, 162 NLRB 387,392 (1966). For instance, Stein’s 15 Teamsters could decide the fate of its 56 Laborers and Operators by exercising their NLRA strike right. Neither the Laborers nor the Operators could perform slag/metal recovery at AK if Teamster truckdrivers were in separate units and concertedly struck. *Boeing* and *Publix Super Markets* held, that type of “tail wagging the dog” does not “... assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter”. 29 U.S.C. § 159(b).

E. The Board Did Not Consider All Of The *Burns* “Appropriate Unit” Tests.

This Court has identified four distinct scenarios whereby a *Burns* successor can eschew its predecessor’s collective bargaining units. *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111,118 (D.C.Cir. 1996). The NLRB mentioned, *sans* analysis, only the “... repugnant to the Act’s policies” and “‘conform[ed] reasonably well to other standards of appropriateness’” tests JA NLRB Dec.10,41. The Board gave no consideration to whether “‘compelling circumstances’ are present that ‘overcome the significance of bargaining history’”, or that requiring Stein to recognize three

separate unions would “... hamper employees in fully exercising rights guaranteed by the Act”. *Trident Seafoods, Inc. v. NLRB*, 101 F.3d at 118.

By all of the *Burns* “appropriate unit” tests, the Board erred.

F. The Board Impermissibly Weighted TMS’ Bargaining History To The Exclusion Of The Community-Of-Interest Tests.

To the extent the Board mentions, but does not analyze, the bargaining “histor[y]” at TMS, NLRB precedent holds that that factor cannot be outcome-determinative. *Rock-Tenn Co.*, 274 NLRB 772-773 (1985); *Crown Zellerbach Corp.*, 264 NLRB 202-203 (1979); *A.C. Pavement Striping Co.*, 296 NLRB 206,210 (1989). This Court has followed suit. *Deferiet Paper Co. v. NLRB*, 235 F.3d 581,583-584 (D.C.Cir. 2000); *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111,119 (D.C.Cir. 1996); *Bentson Contracting Co. v. NLRB*, 941 F.2d 1262,1267 (D.C.Cir. 1991). Bargaining history under *Burns* has little analytical value where the successor employer implements material changes in operations. *Bentson Contracting Co. v. NLRB*, 941 F.2d 1262,1268 (D.C.Cir. 1991). Accord, *NLRB v. Indianapolis Mack Sales & Service, Inc.*, 802 F.2d 280,285 (7th Cir. 1986).

This is not the first time that the Laborers, Teamsters, and Operators have attempted to create trifurcated bargaining units under the NLRA, and where the NLRB reversibly placed its thumb on the “bargaining history” scale approving of such. *Bentson Contracting Co. v. NLRB*, 941 F.2d 1262 (D.C.Cir. 1991), reversing, 297 NLRB Nos. 14,27,84 (1990). In *Bentson*, after years of tri-furcated trade

recognition, the Company summarily repudiated its §8(f) labor agreements at expiration, and began "... emphasizing on-the-job employee cross-training". *Id.* at 1263. On the heels of withdrawing recognition from its three unions, the company distributed an employee handbook announcing: "We may, for example, ask you to do various types of work on your crew". *Id.* at 1268. When the three unions later filed §9(a) petitions, to be recognized in three distinct bargaining units, the NLRB approved the maneuver. This Court reversed:

The Regional Director found that all of the employees comprising each of Bentson's crews, including operators, truck drivers, and laborers, functioned together to accomplish the task at hand, working the same hours, receiving the same work breaks, sharing tools, wearing the same type of safety equipment, and attending the same meetings at the jobsite.

Ordinarily, employment practices over a long period of time would be the best measure of the actual work divisions, and would be a proper means of determining whether employees share a particular "community-of-interest".

But the 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 functions. The operator's 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.

Id. at 1266,1268,1270.

Bentson stated: “The Company was legally entitled to do [cross-training] without having to bargain with any unions regarding this change”. *Bentson Contracting Co. v. NLRB*, 941 F.2d at 1269. That exists here: “[A]s a *Burns* successor, Respondent Stein was not required to maintain, nor was it bound by, the collective bargaining agreement between predecessor TMS Laborers’ Local 534 [or Teamsters 100], including the provision relating to definition and assignment of work, conditions of work, and job classifications” JA NLRB Dec.10,41.

Bentson requires reversal.

II. THE BOARD ERRED IN NOT PROPERLY ANALYZING STEIN’S § 8(f)/§9(a) DEFENSE.

Section 8(f) of the NLRA “... allows employers in the building and construction industry to bargain with a union without an initial election or showing of majority support”. *Bentson Contracting Co. v. NLRB*, 941 F.2d at 1263. Because majority support has never been demonstrated, §8(f) bargaining relationships do not have *Burns* successor rights. *Davenport Insulation*, 184 NLRB 908 (1970). “Proof of majority status is peculiarly within the special competence of the union”. *Stoner Rubber Co.*, 132 NLRB 1440,1445 (1959); *NLRB v. Downtown Bakery Corp.*, 330 F.2d 921,927 (6th Cir. 1964). Where unions are challenged on claimed §9(a) status,

the Board applies an adverse inference when a union fails to produce evidence of how it became the workers' collective bargaining agent. *Ryder Student Transp. Svcs.*, 333 NLRB 9,13 (2001); *Champion Rivet Co.*, 314 NLRB 1097,1105 (1994).

The Board did not consider Stein's §8(f)/§9(a) defense because it labeled it time-barred. (citing, *Machinist Local 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411 (1960)). *Bryan Mfg.*, however, considered the issue of whether the *same employer* that entered into an illegal §8(f) bargaining agreement could challenge that relationship after the NLRA's limitations period had run. *Bryan Mfg.* was a case where an NLRA employer wanted to make use of "... its own illegal action/recognition of a minority union and §8(a)(2) illegal assistance - - as a defense to its refusal to bargain". *Bender Ship Repair Co.*, 188 NLRB 615,628 (1971). That is not the setting here. "[A]n [NLRB] order resting on 'clearly distinguishable precedent'" is arbitrary and capricious. *Int'l. Longshore & Warehouse Union v. NLRB*, 2020 WL 4914087, *3 (D.C.Cir. Aug.21, 2020), *reversing*, 366 NLRB No.76 (May 2, 2018).

"The Board has found that the 6-month 10(b) period begins only when a party has 'clear and unequivocal notice of a violation of the Act'". *United Kiser Svcs.*, 355 NLRB 318,319-320 (2010) (citing, *Broadway Volkswagen*, 342 NLRB 1244,1246 (2004)). There was no §10(b) bar to this §8(f)/§9(a) issue. *Bryan Mfg.* is inapposite. *See, James Julian*, 310 NLRB 1247 (1993) (allowing a petitioning

union to challenge as a §8(f) arrangement the collective bargaining agreement with an employer and another union in existence for 30 years).

III. THE BOARD IMPERMISSIBLY FABRICATED A NEW LEGAL THEORY TO OVERTURN THE TERMINATION OF KEN KAROLY, A THEORY THAT IS NOT SUPPORTED BY “SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE”.

The NLRB advanced a new rationale for sustaining its § 8(a)(5) Karoly-claim. The unfair labor practice charge made no claim that Stein altered the probationary period under which Karoly was discharged JA NLRBX830-833,834-835,875-879. In its pre-hearing investigative statement Stein announced that its November 9 communication established a 90 *working day* probationary period JA1262: Stein Mot. to Recon. Attach “A” p.3.

The Second Amended Complaint conceded that Karoly was within a 90 *working day* probationary period when fired. Region 9 plead that Stein’s *Burns* rights attached as late as “January 1, 2018” when Stein “...unilaterally implemented initial terms and conditions of the Unit” JA885: Sec. Amend. Comp.¶11. A complaint-incorporated document (i.e., Stein’s labor agreement with the Operators) made it perfectly clear:

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

JA Jt.Stip.665; JX764 (emphasis added). Additionally, the General Counsel plead his challenge to Karoly's discharge as one under *Total Security Management*⁹, 364 NLRB No.106 (2016), which required that Karoly be in his probationary period when terminated JA JX750,761; ALJD33-34;886-887. The General Counsel conceded post-hearing that Karoly was still in his 90 *working day* probationary period when terminated JA1244-1248: NLRB Post-Hearing Brief to ALJ, pp.29-32.

This Court has held that 29 U.S.C. § 160 will not allow a reviewing circuit to base its analysis and ruling on a new-found theory never advanced before the administrative law judge. *Collective Concrete, Inc. v. NLRB*, 786 F. Appx. 266, *267 (D.C.Cir. 2019).

The Board's rationale that "...Karoly's probationary period had lapsed by the date he was discharged" is the exact opposite of what the General Counsel argued to the ALJ JA1244-1248: NLRB ALJ Br., pp.31-32. The theory that Karoly was still within his 90 working day probationary period had testimonial backing by Karoly himself JA225.

The Board's *post hoc* rationale is also logically inconsistent. The Board stated Stein exercised its *Burns* right on "November 9 when it distributed a handout" JA12: 369 NLRB No.10, *5. Yet to handicap Stein on its cross-jurisdictional evidence the

⁹ The NLRB recently overturned *Total Security Management*. *800 River Road Operating Co.*, 369 NLRB No.109 (June 23, 2020).

Board held that Stein had a duty to bargain only after the Teamsters and Laborers “demanded recognition” JA10: NLRB Dec. n.6. The Teamsters did that January 10, 2018, and the Laborers on February 20, 2018 JA Jt.Stip.665. Before either date, Stein publicized:

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

JA665: Jt.Stip.¶26; JX16,p.5. “When an agency’s decisions ... is neither logical nor reasonable” it is reversibly arbitrary and capricious. *NBC Universal Media v. NLRB*, 815 F.3d 821,823 (D.C.Cir. 2016).

Stein’s “fair notice” and Due Process rights were violated under the Constitution and Administrative Procedure Act, 5 U.S.C. § 554(b)(2). *Henry Bierce Co. v. NLRB*, 23 F.3d 1101, 1106-1108 (6th Cir. 1994) (reversing NLRB); *Post Corp. v. Newspaper Guild of N.Y.*, 283 NLRB 430 (1987) (reversing ALJ); *Collective Concrete, Inc. v. NLRB*, 786 F.Appx. 266, *267 (D.C.Cir. 2009) (reversing NLRB).

IV. THE BOARD ERRED IN ITS CROSS-TRAINING/CROSS-JURISDICTIONAL WORK EVIDENTIARY RULING.

NLRB evidentiary rulings are scrutinized for whether they are “... an abuse of discretion and unduly prejudiced the complaining party”. *Quicken Loans, Inc. v. NLRB*, 830 F.3d 542,551 (D.C.Cir. 2016).

The ALJ ruled that Stein’s daily operator reports and live testimony about how it operated differently than TMS would only be accepted through March 2018

JA408-415: 894-901. Once cross-jurisdictional work was evidenced, the General Counsel was then burdened with proving cross-jurisdictional work at some point ceased. *Id.* The ALJ ignored that mid-hearing evidentiary ruling, and post-hearing criticized Stein for failing to introduce sufficient evidence of cross-jurisdictional work JA ALJD28-29,57-58. The Court should not countenance the snare set by the ALJ.

The NLRB's ruling was inconsistent with historical *Burns* NLRB decisions. *Ford Motor Co.*, 367 NLRB No.8 (2018); *Sun Coast Foods*, 273 NLRB 1643,1646 (1985); *Boston Gas Co.*, 235 NLRB 1354 (1978). “[W]e must identify ...whether the instant case is faithful application of existing law or instead a *sub silentio* revision”. *Circus Circus Casino v. NLRB*, 961 F.3d 469, 476 (D.C.Cir. 2020). *See, Ozark Auto Dist. v. NLRB*, 779 F.3d 576,583-84 (D.C.Cir. 2015)(reversing NLRB evidentiary ruling).

CONCLUSION

Based upon the arguments and authorities set forth herein, the Board's Decisions and Orders should be, in part, denied enforcement.

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 Initial Opening Brief for Petitioner/Cross-Respondent, Stein, Inc. complies with the type-volume limitation of Fed. R. App. P. 32(a)(7), as limited by this Court's August 28, 2020 Order. The Brief contains 8,999 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 Final Opening Brief for Petitioner/Cross-Respondent Stein, Inc. through this Court's CM/EFT system, which will send an electronic notice of filing to the following:

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STATUTORY ADDENDUM

29 U.S.C. § 158(a)(1)-(5)..... A-001

29 U.S.C. § 158(f)..... A-002

29 U.S.C. § 159(a)-(c)..... A-002

29 U.S.C. §158 Unfair labor practices

(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 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 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 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 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 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 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 nonmembership 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;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

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

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3): *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

29 U.S.C. §159. Representatives and elections

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the

purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) Determination of bargaining unit by Board

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: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) Hearings on questions affecting commerce; rules and regulations

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board -

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a), or (ii) assert that the individual or labor organization,

which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.