SCHEDUELD FOR ORAL ARGUMENT ON MARCH 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 JOINT REPLY BRIEF FOR PETITIONERS/CROSS-RESPONDENTS TEAMSTERS LOCAL 100 AND LABORERS LOCAL 534

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CORPORATE DISCLOSURE STATEMENT

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

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

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

Date: *February 4, 2021*

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GLOSSARY

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

RELEVANT STATUTES AND REGULATIONS

See Addendum for pertinent excerpts.

SUMMARY OF ARGUMENT

The Board erred by refusing to apply Advanced Stretchforming International, Inc., 323 NLRB 529 (1997) to the established facts. The utterance of the magic words "no union" by a successor is not the only trigger of a forfeiture remedy under Advanced Stretchforming. *Conduct* matters. The Board ignored facts revealing Stein's conduct detrimental to the drivers and laborers' Section 7 rights in applying the forfeiture doctrine and fashioning a remedy. Such issues are properly before the Court. When an employer embarks on an unlawful scheme to avoid a successorship bargaining obligation and communicates to potential incoming employees that it refused to recognize their historical collective bargaining representative, a forfeiture remedy is warranted and necessary. Requiring the successor to forfeit its right to set initial terms and conditions of employment is not punitive in such circumstances, but rather is consistent with the equitable principle that any uncertainty created by a successor's own misconduct should be resolved against it.

ARGUMENT

A. Standard of Review

The Court's "review of NLRB decisions is deferential but not toothless." Int'l Longshore & Warehouse Union v. NLRB, 971 F.3d 356, 360 (D.C. Cir. 2020) ("ILWU"). The Court will uphold an order of the Board "unless, reviewing the record as a whole, it concludes that the Board's factual findings are not supported by substantial evidence on the record considered as a whole, 29 U.S.C. § 160(f), or that the Board acted arbitrarily or otherwise erred in applying established law to the facts at issue." United Food & Comm'l Workers Int'l Union, Local 150-A v. NLRB, 880 F.2d 1422, 1429 (D.C. Cir. 1989). The Court must determine whether the Board "examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 782 (2016). To be sure, "an agency's unexplained departure from precedent is arbitrary and capricious." ABM Onsite Servs.-West, Inc. v. NLRB, 849 F.3d 1137, 1142, (D.C. Cir. 2017). So too is an order resting on "clearly distinguishable precedent." Exxel/Atmos, Inc. v. NLRB, 147 F.3d 972, 976 (D.C. Cir. 1998).

B. The Board's Decision Not to Apply the Forfeiture Doctrine to Stein Was Arbitrary and Clearly Erroneous

The Board's decision that Stein did not "refuse to recognize the employees' Section 7 right to collectively bargain," NLRB Brief at 61 (quoting Board Laborers Decision at 3, Jt. App. 11), is arbitrary and clearly erroneous as it relates to the laborers and drivers' Section 7 rights. The Board misconstrued Advanced Stretchforming International, Inc., 323 NLRB 529 (1997), ignoring the underlying principles and factual findings supporting the forfeiture doctrine's applicability. NLRB Brief at 59-62. The Board did not consider (let alone rationalize or reject) the ALJ's factual findings that Stein engaged in conduct detrimental to the drivers and laborers' Section 7 rights.[1] See ALJ Decisions at 8, Jt. App. 21-22 and 50-52. Rather, it suggests that because a Stein representative did not utter the words "no union," the forfeiture doctrine as described in Advanced Stretchforming did not apply.[2] NLRB Brief at 59-60. Illegally forcing the laborers and drivers into an

[1] Importantly, Section 7 rights include the right to engage in, *or refrain from*, activities vis-à-vis particular labor organizations.

[2] The Board's citation to Dean Transp., Inc., 350 NLRB 48, 56 (2007) (employer was party to a pre-existing collective bargaining agreement with rival union with unlimited geographic scope) misses the mark because no party even raised the forfeiture doctrine. NLRB Brief at 61-62. As asserted herein, the forfeiture doctrine is triggered by much more than simply having a pre-existing (arguably, nationwide) collective bargaining agreement. The Board's citation to Planned Bldg. Servs., Inc., 318 NLRB 1049, 1063 (1995) should be rejected because it was decided two years before Advanced Stretchforming and involved a union that presented a

IUOE Local 18 bargaining unit effectively was Stein's utterance, which was "not your union."

The utterance of the words "no union" by a successor is not the sole trigger of a forfeiture remedy under Advanced Stretchforming. In fact, no case has ever so limited its reach. The focus, rather, is on the successor's overall conduct and the effect of that conduct on Section 7 rights. Advanced Stretchforming, 323 NLRB at 530. While Advanced Stretchforming and one case cited by the Board discuss the utterance of the words "no union," JLL Rest., 347 NLRB 192, 205 (2006), not a single Board case has ever limited the Advanced Stretchforming forfeiture doctrine in such a manner.[3]

To be sure, the Board—while discussing the equitable principles underpinning the forfeiture doctrine—explained:

> This equitable doctrine, which arose in the context of defining an appropriate remedy for an employer that sought to avoid the successor's bargaining obligation by refusing to hire applicants from the predecessor's unionized work force, **is equally relevant to the allegation of unlawful unilateral changes**. The fundamental premise for the forfeiture doctrine is that it

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majority of authorization cards in advance of the recognition, the majority of which were later found tainted.

[3] At least one other ALJ found the forfeiture doctrine applied under Advanced Stretchforming to conduct like the conduct here, but it was later dismissed by the Board for jurisdictional reasons. Oxford Electronics, Inc., 369 NLRB No. 6, slip op. at 19 (2020) (applying forfeiture for refusal to recognize and enter into good-faith negotiations with the unit employees' long-term collective-bargaining representative and, instead, recognizing a rival union).

> would be contrary to statutory policy to "confer Burns rights on an employer that has not conducted itself like a lawful Burns successor because it has unlawfully blocked the process by which the obligations and rights of such a successor are incurred." State Distributing Co., 282 NLRB 1048, 1049 (1987). In other words, the Burns right to set initial terms and conditions of employment must be understood in the context of a successor employer **that will recognize the affected unit employees' collective bargaining representative and enter into good-faith negotiations with that union about those terms and conditions.**

Advanced Stretchforming, 323 NLRB at 530 (emphasis added). The Board's express language in Advanced Stretchforming—i.e., "*that* union"—refers to the "affected unit employees'" chosen bargaining representative, id., not some other union handpicked by a successor as Stein did here.

The Board's contention that the forfeiture doctrine should not apply to Stein because Stein's conduct supposedly was "based on a belief – though ultimately incorrect – that it was bargaining with the union that 'represented a majority of employees in what it considered to be an appropriate unit,'" NLRB Brief at 62 (quoting Board Laborers Decision at 3, Jt. App. 11), is contradicted by the record and confuses Stein's determination to bargain with a single unit for an innocent if mistaken "belief" that the unit **it** had chosen – a single unit represented by IUOE Local 18 – was "appropriate." In fact, even before Stein was awarded the AK Steel contract, it already knew it would refuse to recognize and enter into good-faith negotiations with the unit laborers and drivers' long-term collective-bargaining

representatives, Local 534 and Local 100, respectively. Instead, Stein handpicked, unlawfully recognized, and negotiated an agreement with another union, IUOE Local 18—all in secret before it was presented with a single signed authorization card. And Stein required the unit laborers and drivers to sign, as a condition of employment, dues authorization forms allowing Stein to deduct membership dues from their pay and remitted those dues to IUOE Local 18. These facts, which were ignored by the Board, demonstrate Stein did not conduct itself like a lawful Burns successor, which must trigger the forfeiture doctrine.

When an employer embarks on an unlawful scheme to avoid a successorship bargaining obligation and communicates to potential incoming employees that it refused to recognize their historical collective bargaining representative, a forfeiture remedy is necessary. Requiring the successor to "forfeit" its right to set initial terms and conditions of employment is not punitive in those circumstances, but rather is consistent with the equitable principle that any uncertainty created by a successor's own misconduct should be resolved against it. Eldorado, Inc., 335 NLRB 952, 953 (2001). The Board's refusal to apply the appropriate law to the actual facts of the case renders its decision arbitrary and clearly erroneous.

C. This Court Has Jurisdiction to Consider Teamsters Local 100's and Laborers Local 534's Challenge to the Board's Remedy

The Board's contention that the Court lacks jurisdiction to consider the "argument" that the Board "erred by failing to exercise its remedial discretion to order Stein to reimburse their respective pension funds due to the severity of Stein's conduct before it took over operations," NLRB Brief at 65, is founded upon a misreading of the Act, the applicable case law, and the record of the proceedings, including Petitioners' Joint Brief.

The Board Teamster Decision and the Board Laborers Decision were both "final orders" of the Board and thus, pursuant to Section 10(f) of the Act, Petitioners were entitled to seek review of those Decisions in this Court. 29 U.S.C. § 160(f) ("Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in … the United States Court of Appeals for the District of Columbia[.]")

For its part, the Board relies upon Section 10(e) of the Act, which grants federal courts jurisdiction to hear the Board's petition for enforcement of an order and which provides, as the Board notes, that "No objection that has not been urged before the Board, its member, agent, or agency, 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). However, that these "objections" concern the Board's findings of fact and conclusions of law, rather than the remedies ordered by the Board, is made clear when viewed in the full context of Section 10(e),

which in significant part concerns how a reviewing court should treat the Board's findings of fact and under what circumstances it may permit the parties "to adduce additional evidence." Id. Section 10(e) itself is silent as to a court's approach to reviewing the Board's ordered remedy.

That Section 10(e) is not directed toward challenges to the Board's ordered remedies is made even more clear upon review of the cases which the Board cites in support of its position, both of which involve the courts' rejection of employers' challenges of the Board's findings of fact and conclusions of law on the grounds that they had not raised these objections at earlier stages in the proceedings. First, in Nova Southeastern University v. NLRB, 807 F.3d 308, 316 (2015), the employer ("Nova") challenged the Board's application of New York-New York v. NLRB, 676 F.3d 193 (D.C. Cir. 2012) ("NYNY") in determining that Nova's "onsite contractor employees were entitled to distribute union literature in [its] parking lot." This Court noted that "[a]lthough this finding was made for the first time by the Board, not the ALJ, Nova never sought reconsideration by the Board and it offers no extraordinary circumstances to excuse its failure." Id. (citations omitted). This Court further found that Nova's exceptions to the ALJ's analysis were "vague" and thus "insufficient under section 10(e)." Id. (citation omitted). Similarly, in Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 665 (1982), the Supreme Court found that the Court of Appeals for the Ninth Circuit lacked jurisdiction under Section 10(e) to

decide whether unions "violate § 8(b)(4)(a) [of the Act] when they picket to obtain a subcontracting clause sheltered by the construction industry proviso," because the issue "was not raised during the proceedings before the Board, either by the General Counsel or by [the employer]." In sum, Nova Southeastern University and Woelke & Romero Framing are readily distinguishable on their facts and lend no support to the Board's argument.

Further, Petitioners' argument that "the severity of Stein's conduct before it took over operations" merited the implementation of the forfeiture doctrine, so as requiring reimbursement of their respective pension funds, NLRB Brief at 65, is not newly minted, as the Board seems to suggest, but rather derives directly from the ALJ Decisions themselves. ALJ Teamsters Decision at 27, Jt. App. 61-62; ALJ Laborers Decision at 28, Jt. App. 32-33. The Board thus is not prejudiced, and Section 10(e) is not violated, by Petitioners' objection to the Board's modification of the ALJ Decisions' remedies so as to remove the retroactive reimbursement of wages and benefits lost, as well as payments in reimbursement to their respective pension funds.

CONCLUSION

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

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CERTIFICATE OF COMPLIANCE

1. This document complies with Federal Rule of Appellate Procedure 32(a)(7) and the Order this Court dated July 29, 2020 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), this document contains 2,142 words.

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

Date: *February 4, 2021*

/s/Ryan K. Hymore

CERTIFICATE OF SERVICE

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

Date: *February 4, 2021*

/s/Ryan K. Hymore

STATUTORY ADDENDUM

NLRA § 7

NLRA § 8(a)(1), (2), (3), (5)

NLRA § 8(b)(1)(A), (2)

NLRA § 160(e), (f)

THE NATIONAL LABOR RELATIONS ACT

Section 7 of the NLRA (29 U.S.C. § 157):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a)(1), (2), (3) and (5) of the NLRA (29 U.S.C. § 158(a)(1)-(3), (5)):

(a) Unfair labor practices by employer

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

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

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

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless

following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

…

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

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

(b) Unfair labor practices by labor organization

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

(1) to restrain or coerce

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

…

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

Section 10(e), (f) of the NLRA (29 U.S.C. § 160(e), (f)):

(e) PETITION TO COURT FOR ENFORCEMENT OF ORDER; PROCEEDINGS; REVIEW OF JUDGMENT

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) REVIEW OF FINAL ORDER OF BOARD ON PETITION TO COURT

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.