

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

**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

**INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18
Petitioner/Cross-Respondent**

and

**LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL NO. 534,
Petitioner/Intervenor**

and

**TRUCK DRIVERS, CHAUFFEURS & HELPERS LOCAL UNION NO. 100,
A/W THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS
Petitioner**

**ON PETITIONS FOR REVIEW AND CROSS-APPLICATIONS FOR
ENFORCEMENT OF TWO ORDERS OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As required by Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board certify the following:

A. Parties, Intervenors, and Amici:

1. Stein, Inc. and International Union of Operating Engineers, Local 18, were the respondents before the NLRB and are the petitioners/cross-respondents before the Court.

2. Laborers' International Union of North America, Local No. 534, and Truck Drivers, Chauffeurs, and Helpers, Local Union No. 100, affiliated with the International Brotherhood of Teamsters, were the charging parties before the Board and are petitioners before the Court.

3. Laborers' International Union of North America, Local No. 534, has intervened on behalf of the NLRB.

4. The NLRB is the respondent and cross-petitioner before the Court; the NLRB's General Counsel was a party before the NLRB.

B. Rulings Under Review: This case is before the Court on the petitions for review filed by Stein; International Union of Operating Engineers, Local 18; Laborers' International Union of North America, Local No. 534; and Truck Drivers, Chauffeurs, and Helpers, Local Union No. 100, and the NLRB's cross-applications for enforcement of two Decisions and Orders issued by the

NLRB against Stein and the Operating Engineers on January 28, 2020, and reported at 369 NLRB No. 10 and 369 NLRB No. 11.

C. Related Cases: This case has not previously been before the Court.

/s/ David Habenstreit

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Dated at Washington, D.C.
This 5th day of February 2021

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FINAL BRIEF GLOSSARY

Documents Referred to in the Board's Brief	Designation
Joint Appendix	JA
Stein's opening brief	SBr.
Operating Engineers' opening brief	OEBr.
Laborers' and Teamsters' joint opening brief	LTBr.

Organizations Referred to in the Board's Brief

International Union of Operating Engineers Local 18	Operating Engineers
Laborers' International Union of North America, Local 534	Laborers
National Labor Relations Board	Board
Stein, Inc.	Stein
TMS, International	TMS
Truck Drivers, Chauffeurs, and Helpers, Local Union No. 100, affiliated with the International Brotherhood of Teamsters	Teamsters

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**ON PETITIONS FOR REVIEW AND CROSS-APPLICATIONS FOR
ENFORCEMENT OF TWO ORDERS OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

These unfair-labor-practice cases are before the Court on the petitions of Stein, Inc.; International Union of Operating Engineers Local 18; Laborers' International Union of North America, Local 534; and Truck Drivers, Chauffeurs, and Helpers, Local Union No. 100, affiliated with the International Brotherhood of Teamsters, to review, and the cross-applications of the National Labor Relations Board to enforce against Stein and the Operating Engineers, two Board Orders issued on January 28, 2020, and reported at 369 NLRB No. 10 and 369 NLRB No. 11. (JA 9-68.)¹ The Laborers intervened in case number 20-1051 on behalf of the Board.

The Board had subject-matter jurisdiction over the proceedings under Section 10(a) of the National Labor Relations Act, as amended, which authorizes the Board to prevent unfair labor practices affecting commerce. 29 U.S.C. §§ 151, 160(a). The Board's Orders are final. The Court has jurisdiction over this proceeding under Section 10(f) of the Act, which allows petitions for review of Board orders to be filed in this Court, and Section 10(e), which allows the Board to cross-apply for enforcement. 29 U.S.C. § 160(e) and (f). The Act places no time

¹ References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

limit on petitions for review or applications for enforcement.

STATEMENT OF THE ISSUES

1. Whether the Board acted within its broad discretion in finding that Stein failed to prove by compelling evidence that the decades-old Teamsters' and Laborers' bargaining units were no longer appropriate such that, among other violations, Stein, as a successor employer, unlawfully failed to bargain with them and the Operating Engineers unlawfully accepted assistance and recognition from Stein?

2. Whether the Board was arbitrary or clearly erred in finding that Stein did not forfeit its right to set the initial terms and conditions of employment and whether it acted within its broad remedial discretion by declining to order reimbursement of contributions to the Teamsters' and Laborers' pension funds?

RELEVANT STATUTORY AND REGULATORY ADDENDUM

The addendum attached to this brief contains all applicable statutory and regulatory provisions.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

A. Predecessor TMS's Operations at AK Steel

AK Steel operates a steel mill in Middletown, Ohio. For decades, it has contracted with various companies to perform scrap reclamation and "slag"

removal and processing at its facility.² (JA 19; JA 653-54 ¶¶5-6.) Those contractors included McGraw Construction, International Mill Services, Tube City, and TMS (itself a merger between International Mill Services and Tube City). (JA 19-20; JA 654 ¶7, 967.) For decades, TMS and its predecessors recognized and bargained with three unions representing the employees performing the slag/scrap work: Operating Engineers Local 18, representing the operators; Laborers Local 534, representing the laborers; and Teamsters Local 100, representing the drivers. Each union had a separate contract with TMS. (JA 20, 23, 50; JA 143, 263, 654 ¶7, 684, 691, 699, 701, 715, 720-21, 769.)

The slag/scrap reclamation process at AK Steel involves removing liquid slag from the furnace and placing it into hot pits for cooling. Once cooled, employees operating front loaders dig it up and load it into dump trucks for transport elsewhere. Employees then use cranes with magnets to extract scrap metal from the slag, and cut the scrap into smaller pieces. The slag is run through a processing plant with shakers and screens that separate it by size. Employees load the processed slag onto dump trucks, transport it to a stockpile, and dump it in piles by size. (JA 20; JA 84-87, 1125.)

² Slag, a by-product of making steel, is processed and used as aggregate in building roads. (JA 19; JA 141.)

For decades, employees in each bargaining unit have performed specific work. The operators run the heavy equipment, such as bobcats, backhoes, front-end loaders, telehandlers, and cranes. (JA 91, 93-94, 105-06, 108-09, 147, 159-61, 260-61.) That Operating Engineers unit also includes mechanics who service the vehicles and equipment. (JA 113-14, 147.) The Teamsters-represented drivers operate the off-road dump trucks to transport hot slag from the furnaces, use water trucks to spray the roads to reduce dust, and pick up parts or supplies from area stores. (JA 88-89, 146-47, 250-52.) The laborers perform safety, fire watch, and cleaning duties, cut large pieces of metal, and remove slag from large pots (called “knockout”). (JA 91-92, 158-59, 196-98, 252-59.)

B. Stein Wins the Slag/Scrap Contract and Decides To Bargain with Only One Union—the Operating Engineers

In 2017, AK Steel put the scrap/slag work up for bid. In August, Stein learned it was the leading bidder. (JA 9, 21; JA 129, 657 ¶14.) Stein decided that, if awarded the work, it would bargain with only one union, not three. (JA 9, 21; JA 129-31.) Because the operators were the most numerous and the Operating Engineers represented those employees, Stein contacted that union in late August. It did not contact the Teamsters or Laborers. (JA 9, 21; JA 129-31.)

On August 22, representatives of Stein and the Operating Engineers met to negotiate a collective-bargaining agreement covering all the employees. (JA 9, 21; JA 133-34, 483-85, 932.) During October, the parties traded proposals. (JA 21;

JA 486-87, 490.) On October 27, Stein's vice president, Doug Holvey, emailed the Operating Engineers, stating that Stein "would like to put the agreement behind us and start planning to convert some of the guys to the Operating Engineers." (JA 21; JA 955.)

In late October, AK Steel awarded the slag/scrap work to Stein, effective January 1, 2018. (JA 9, 21; JA 657 ¶14.) Of the 71 employees performing the work when Stein won the contract, 42 were operators represented by the Operating Engineers, 15 were drivers represented by the Teamsters, and 14 were laborers represented by the Laborers. (JA 23; JA 658-60 ¶¶17-19.)

On November 9, Doug Huffnagel, Stein's area manager, held meetings with the TMS employees. (JA 9, 21; JA 657-58 ¶16.) At the meetings, he read from a document informing employees that Stein intended to "hire as many TMS employees as possible," the start date would be January 1, and "all jobs will be under the Operating Engineers Local 18 Union." (JA 9, 21; JA 144-45, 657-58 ¶16, 741.) The document, which Huffnagel read "as it is," also detailed some terms and conditions of employment, including job classifications and wage rates, the holidays to be observed, and the seniority procedure. (JA 144-45, 657-58 ¶16, 741.) Finally, the document specified that all employees would be "subject to a 90 day probationary period, a physical, and a background check." (JA 9, 22; JA 741.) Huffnagel provided employees with a copy of the document and informed them

they would have to complete an application, undergo an interview, and pass a physical, background check, and drug test to be hired. He also told them that there was no guarantee they would be hired. (JA 9, 22; JA 121-26, 144, 181-82, 657-58 ¶16.)

By November 21, Stein and the Operating Engineers were “in agreement” on a collective-bargaining contract, and Holvey encouraged the Operating Engineers to “get this signed soon.” (JA 22; JA 958.) That agreement was signed and executed on December 22. (JA 9, 22; JA 960, 963.) It recognized the Operating Engineers as the bargaining representative of all the Stein employees doing slag/scrap work, including the drivers and laborers, even though the Operating Engineers had not presented any proof that it had the support of a majority of the employees. (JA 22, 52; JA 135-36, 747.) The agreement also required employees, as a condition of continued employment, to become members of the Operating Engineers within 30 days of work and pay dues. (JA 9, 22, 40, 52; JA 748.) The collective-bargaining agreement set out job classifications, including general laborer, lancer, site laborer/safety, truck driver, general operator, crane operator, hot pit operator, and A, B, and master mechanic. (JA 750.) Hourly wages ranged from \$15.00 for a general laborer to \$26.25 for a master mechanic. (JA 21-22; JA 750.)

In November, driver and Teamsters union steward James Bowling introduced himself to Huffnagel and asked if Stein “was going to go with all crafts.” Huffnagel replied that he “couldn’t say at this time.” (JA 52; JA 162-63.) When Teamsters business agent Mike Lane later called Huffnagel and asked if Stein intended to bargain and honor the Teamsters’ contract, Huffnagel responded that he “didn’t know why not” but he “didn’t really handle that and someone else would get back” to Lane. (JA 52; JA 242.) Lane next asked if Stein intended to hire the drivers working under the Teamsters’ contract at TMS, to which Huffnagel said he “believed so, yes.” No one from Stein contacted Lane after this conversation. (JA 52; JA 242.)

Stein recognized the Operating Engineers as the sole collective-bargaining representative but never notified the Teamsters or Laborers that it had merged the units. Nor did it notify those unions that it entered an agreement with the Operating Engineers and changed the terms and conditions of the driver and laborer employees they represented. (JA 22, 52; JA 131, 136-38, 494-95.)

On December 31, 2017, TMS ceased performing the slag/scrap work at AK Steel; Stein took over operations the next day and began applying the Operating Engineers’ collective-bargaining agreement to all employees. (JA 22-23, 52-53; JA 657-64 ¶¶15, 17, 18, 19, 23.) The former TMS employees hired to work for Stein continued to perform the same duties and tasks for Stein, using essentially

the same equipment. (JA 23, 53; JA 152, 157-58, 189, 191-92, 217-18, 251-52, 259, 268, 375, 553-56.) By January 1, when Stein commenced operations, it had hired 38 employees, 34 of whom had previously worked for TMS. (JA 22-23; JA 663-64 ¶23.)

On January 10, the Teamsters contacted Stein by letter, demanding recognition and requesting to bargain as the representative of the drivers unit. (JA 53; JA 665 ¶24, 742.) After speaking with legal counsel, Stein contacted the Operating Engineers and requested that it provide authorization cards, which employees sign stating their desire for union representation, to prove its majority status. (JA 53; JA 136-37.) The Operating Engineers provided Stein with authorization cards from a majority of the operators, but none were signed by drivers or laborers. (JA 53; JA 135-36, 491-94.) Stein's attorney told the Teamsters that it had a majority of signed cards from the Operating Engineers, and Stein would not recognize and bargain with the Teamsters. (JA 53; JA 743.)

The Laborers' attorney contacted Stein's attorney by email on February 20, also demanding recognition and requesting to bargain as the representative of the laborers' unit, and noting he had left a voice mail demanding recognition "a few weeks ago." (JA 23; JA 665 ¶27, 769.) The Laborers never received a response to its demands. (JA 24.)

C. Stein Assists the Operating Engineers with Membership; both Stein and the Operating Engineers Threaten Employees

Soon after it commenced operations, Stein began informing employees they were required to join the Operating Engineers. On January 3, Stein supervisor Jason Westover gave packets to employees, which included an Operating Engineers' authorization card, application for membership, and dues-deduction authorization form. Westover told employees they needed to fill out the forms and return them to the Operating Engineers. (JA 24, 53; JA 164-66.)

In mid-January, Westover gave Gary Wise, a driver, one of the Operating Engineers' packets and told him to fill it out and join the Operating Engineers or "he would be taken off the schedule." (JA 53; JA 269-71.) Westover told Wise that if he went to the Operating Engineers' union hall, someone would help him complete the packet. (JA 53; JA 271.) Wise visited the hall and spoke with Operating Engineers' representatives, including Jason Gabbard. Wise explained some of his concerns about joining the Operating Engineers, including that he was near retirement under the Teamsters' pension plan and would have to work longer before he could retire with the Operating Engineers. Gabbard told Wise that if he "wanted to keep [his] job, [he] had to" join the Operating Engineers. (JA 53-54; JA 272-74.) In February, when Wise returned to the union hall to turn in his completed packet, he again expressed his concerns about his pension and retirement to Gabbard and Richard Dalton, the Operating Engineers' business

manager. In addition to telling Wise the Teamsters pension fund was “going under,” they said if he did not join the Operating Engineers, they would “have to kick you off the job.” (JA 54; JA 275-77.)

In February, Gabbard visited the Stein jobsite to pass out membership packets to employees. Because he was unable to see every employee on his list, Gabbard left the envelopes with Huffnagel, who agreed to distribute them to the correct employees. Huffnagel also permitted Gabbard to return to the jobsite on another occasion to distribute packets. (JA 24, 54; JA 148-50.)

In mid-February, Westover told the employees assembled for the morning meeting that a representative of the Operating Engineers would be coming out to talk to them, and if they did not complete the membership packets and return them to the Operating Engineers, they would be taken “off the schedule.” (JA 54; JA 167.) A few days later, Westover passed out Operating Engineers’ membership packets to employees. (JA 54; JA 168.) Stein’s site superintendent Jeff Porter also threatened laborers and drivers that “if you guys don’t get signed up with Local 18 Operating Engineers, we’re going to have to take you off the schedule until you do.” (JA 54; JA 239-40.)

D. Stein Begins Cross-Training Employees and Assigning Cross-Jurisdictional Work

After assuming operations, Stein began cross-training a few employees to perform tasks outside their traditional work assignments. Huffnagel implemented the new training because he believed that TMS's strict adherence to the three unions' work jurisdictions created inefficiencies. (JA 24, 54; JA 598-99, 629-30.) From January through March, Stein cross-trained five laborers and one operator to perform work previously done only by operators or drivers. (JA 24-25, 54-55.) For example, by February, laborer Venters operated a bobcat and backhoe, drove the water truck, and drove the pickup to get parts, and by March, he drove the dump truck. (JA 24; JA 374-80, 404.) By February, laborer Wilhoite occasionally operated the telehandler, bobcat/skid steer, and front-end loaders. He also drove the pickup truck to get parts. (JA 24; JA 448-49, 451-53, 460, 466-67, 471-74.) By February, laborer Michaels operated the backhoe, skid steer, and telehandler. (JA 25; JA 535-37, 544-45, 556.) By February, laborer Neace operated the backhoe, drove the pickup to get parts, and primarily ran the processing plant. (JA 25; JA 573-74, 576, 582-95.) By March, laborer Young operated bobcats and off-road dump trucks. (JA 25; JA 504-06, 520-21.) By March, operator Kingery drove off-road dump trucks and performed some manual labor such as shoveling. (JA 25; JA 648-49.) All the trainees performed these and a few other cross-

jurisdictional duties in addition to their traditional work. (JA 24-25; JA 387-93, 421-26, 473-74, 520-21, 554-56.)

E. Stein Unilaterally Changes the Probationary Period and Discharges Laborer Karoly

Laborer Ken Karoly worked for TMS and Stein as a knockout safety attendant. In March, after Stein took over, Karoly accidentally ran over the safety attendants' shared cell phone. He reported the incident but was not disciplined. (JA 25; JA 219-22.) On March 19, after Karoly switched his two-way radio to the wrong channel, two AK Steel managers complained to Huffnagel that crew members could not communicate with Karoly during the day. As a result, Stein altered the schedule to ensure a safety attendant would be stationed at the furnace at all times, which increased costs. (JA 25; JA 611, 613-16.) Two weeks later, operator Bill Fletcher, while backing up, damaged the loader he was running. Karoly, as the safety attendant on duty, was responsible for spotting and communicating risks. (JA 25; JA 223-24, 236-37, 617-18.) Huffnagel met with both Fletcher and Karoly about the incident and disciplined only Fletcher. (JA 25; JA 224.)

On April 18, Huffnagel discharged Karoly. The "employee record notice" Huffnagel gave him explained the discharge on the basis of those earlier incidents. (JA 25; JA 964.) Huffnagel also told Karoly that he was discharged because he had not yet completed the probationary period set out in the collective-bargaining

agreement with the Operating Engineers. (JA 25; JA 225.) That agreement established the probationary period as 90 days “of actual work,” a change from the 90 day probationary period initially set by Huffnagel on November 9. (JA 22, 25; JA 225, 741, 761, 964.) Stein did not inform the Laborers of the change or offer to bargain with them over it. (JA 25.)

II. The Board’s Conclusions and Orders

Acting on unfair-labor-practice charges filed by the Teamsters and Laborers, the Board’s General Counsel issued complaints alleging that Stein and the Operating Engineers violated the Act by their conduct. Following a hearing, an administrative law judge upheld the violations as alleged. (JA 34-35, 63-64.) The Board (Chairman Ring, Members Kaplan and Emanuel), in agreement with the administrative law judge, found that Stein violated Section 8(a)(2) and (1) of the Act, 29 U.S.C. § 158(a)(2) and (1), by recognizing the Operating Engineers as the exclusive bargaining representative of the employees in the units represented by the Teamsters and the Laborers, entering into a collective-bargaining agreement with the Operating Engineers that covered those employees, and maintaining and enforcing that agreement as to the Teamsters’ and Laborers’ unit members. (JA 10, 34, 41, 63-64.) Stein, by allowing the Operating Engineers access to the job site to distribute membership and dues-deduction forms to Teamsters’ and Laborers’ employees, provided assistance and support that further violated Section

8(a)(2) and (1) of the Act. (JA 10 n.8, 34-35, 41 n.8, 64.) Stein violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by applying the dues deduction and union security provisions of its collective-bargaining agreement with the Operating Engineers to the Teamsters' and Laborers' units. (JA 10, 34, 41, 64.) Stein violated Section 8(a)(1) of the Act by telling employees in the Teamsters' and Laborers' bargaining units that all jobs would be under the Operating Engineers and by threatening to remove them from the work schedule if they did not join the Operating Engineers and submit a dues deduction form. (JA 10 n.8, 34, 41 n.8, 63.) Stein violated Section 8(a)(5) and (1) by refusing the Teamsters' and Laborers' requests for recognition and failing to bargain with them, and by discharging employee Ken Karoly pursuant to a probationary period it unlawfully extended. (JA 11, 13, 34-35, 43, 64.) The Board found, in disagreement with the administrative law judge, that Stein did not violate the Act by setting the initial terms and conditions of employment. (JA 11-12, 42-43.)

The Board also found that the Operating Engineers violated Section 8(b)(1)(A) and (2) of the Act, 29 U.S.C. §158(b)(1)(A) and (2), by accepting recognition from Stein as the exclusive collective-bargaining representative of the employees in the Teamsters' and Laborers' bargaining units; by entering into, maintaining, and enforcing the terms of the collective-bargaining agreement with Stein; and by receiving dues and fees from employees in the Teamsters' and

Laborers' bargaining units. (JA 10, 35, 41, 64.) The Operating Engineers further violated Section 8(b)(1)(A) of the Act by threatening to take employees in the Teamsters' and Laborers' units off the work schedule if they did not join and pay fees and dues to the Operating Engineers and by receiving assistance and support from Stein through access to the jobsite to distribute membership applications and dues-checkoff authorizations to Teamsters' and Laborers' unit employees. (JA 10-11 n.8, 35, 41-42 n.8, 64.)

The Board's Orders require Stein and the Operating Engineers to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act. (JA 13, 36, 43-44, 65.)

Affirmatively, the Orders direct Stein to withdraw and withhold all recognition from the Operating Engineers as the bargaining representative of the Teamsters' and Laborers' unit employees unless and until the Board certifies it as the exclusive representative of those employees; refrain from applying the collective-bargaining agreement with Operating Engineers to the Teamsters' and Laborers' unit employees, unless and until that union has been certified as their representative; recognize and on request bargain with the Teamsters and Laborers as the exclusive collective-bargaining representative of their respective units and if an agreement is reached, embody the understanding in a signed agreement; notify

the Teamsters and Laborers in writing of any changes made to the employees' terms and conditions of employment, and upon request, rescind any departures from the terms and conditions of employment that existed prior to its unlawful recognition of the Operating Engineers. (JA 13-14, 36-37, 44, 65-66.) In addition, Stein must offer Karoly full reinstatement and make him whole; remove from its files any reference to Karoly's unlawful discharge and notify him that this has been done; and post the Board's remedial notice. (JA 14, 36-37.)

Affirmatively, the Board ordered the Operating Engineers to decline recognition of the Teamsters' and Laborers' unit employees unless and until it has been certified as their exclusive representative and post a remedial notice. Finally, the Board ordered Stein and the Operating Engineers to jointly and severally reimburse all employees in the Teamsters' and Laborers' units for all initiation fees, dues, and other monies paid by them to the Operating Engineers or withheld from their wages pursuant to the collective-bargaining agreement between Stein and the Operating Engineers. (JA 15, 46, 66.)

SUMMARY OF THE ARGUMENT

Before Stein took over the slag/scrap operations at AK Steel, the employees working there were represented by three unions: the Operating Engineers, Teamsters, and Laborers. Stein decided to proceed with a single facility-wide unit and to bargain with only the Operating Engineers. Before it even started operations at AK Steel, Stein negotiated a collective-bargaining agreement with the Operating Engineers that covered all three units of employees and included a union-security provision, requiring employees to join the union and pay dues. At no point did Stein bargain with the Teamsters or Laborers. Together, Stein and the Operating Engineers determined for themselves that the three-decades-old units should be merged into one represented by the Operating Engineers. Because the historical units remained appropriate, Stein and the Operating Engineers could not lawfully do so, and by their conduct, they disregarded the employees' rights under the Act to choose their own bargaining representatives.

When a successor takes over a business, it is obligated to bargain with the incumbent unions representing its employees so long as there is a substantial continuity with the predecessor operation, a majority of the employees also worked for the predecessor, and the historical units remain appropriate for bargaining. Stein does not dispute that its operations were essentially the same as TMS's or that a majority of its employees came from the predecessor; its main challenge is to

the units' appropriateness. Although Stein argues that the Board should have conducted its traditional community-of-interest analysis and applied a facility-wide presumption to the units here, the Board does not treat historical units in a successorship situation as though they were being organized for the first time. Instead, the incumbent unions enjoy a presumption of continuing majority status, and the party challenging the appropriateness of the units bears the heavy burden of demonstrating by compelling evidence that the historical units no longer conform to standards of appropriateness. Stein failed to meet this burden.

Although Stein argues that its cross-training and cross-jurisdictional assignment of work justified its decision to combine the historical units into a single facility-wide unit, its evidence showed that only 6 of its 60 employees had been cross-trained and were performing some cross-jurisdictional work three months into its contract at AK Steel. Even those employees still primarily performed their traditional tasks. Meanwhile, Stein continued to classify employees by task (laborers, drivers, and operators), differentiated between those classifications in the wage rates, and primarily assigned those employees their traditional work. The Board therefore did not abuse its discretion by determining that Stein failed to meet its burden of showing by compelling evidence that the historical units were no longer appropriate.

Stein and the Operating Engineers argue in the alternative that Stein has no obligation to bargain with the Teamsters or Laborers because those unions were not majority representatives and had pre-hire collective-bargaining agreements under Section 8(f) of the Act that could be lawfully disregarded after contract expiration. There are two problems with this argument that neither Stein nor the Operating Engineers can overcome: any attack on majority status is time-barred by Section 10(b) of the Act, and Section 8(f) applies only to construction industry employers. Given that the Teamsters and Laborers have represented their respective units for decades, and Stein and the Operating Engineers stipulated that the work was not and had never been construction work, their argument fails.

If the Court affirms the Board's findings that the units remained appropriate and Stein had an obligation to bargain with the Teamsters and Laborers, then Stein and the Operating Engineers violated the Act by entering and applying a collective-bargaining agreement to the drivers and laborers, applying the union-security and dues-deduction provisions to those employees, and threatening those employees with loss of work if they did not join the Operating Engineers. Stein also violated the Act by assisting the Operating Engineers, and that union violated the Act by accepting the assistance.

Before Stein took over operations, it announced certain initial terms and conditions of employment, including that the probationary period would be 90

days. But the collective-bargaining agreement it executed with the Operating Engineers changed that probationary period to 90 days of actual work. Stein discharged laborer Ken Karoly under the new, longer probationary period. Under Board law, once Stein set the initial terms of employment, it could not change those terms without providing notice and an opportunity to bargain to his majority representative, the Laborers. Stein admittedly did not provide notice to or bargain with the Laborers over the change.

The Board did not err by making two decisions challenged by the Teamsters and Laborers. First, the Board's decision that Stein did not forfeit its right to set the initial terms and conditions of employment was not arbitrary or clearly erroneous. Although Stein did commit unfair labor practices, it did not discriminate in hiring or tell employees it would not negotiate with any union—the two types of behavior to which the Board has previously applied its forfeiture doctrine. Second, the Board declined to order Stein to reimburse the Teamsters' and Laborers' pension funds. The Unions' remedial challenge is not properly before the Court because it was not first raised to the Board. In any event, as a successor with the right to set the initial terms and conditions of employment, Stein notified employees that their pensions would change, which it had the right to do.

ARGUMENT

I. The Board Acted within Its Wide Discretion To Find that Stein Failed To Present Compelling Evidence that the Historical Units Were No Longer Appropriate for Bargaining; as a Result, Both Stein and the Operating Engineers Violated the Act by Their Conduct To Deny Drivers and Laborers Their Rights to the Collective-Bargaining Representative of Their Choice

A. Applicable Principles and Standard of Review

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees” 29 U.S.C. § 158(a)(5).³ Under that provision, it is well settled that, upon acquiring a business, a new employer is a “successor” required to recognize and negotiate with the representative of its predecessor’s employees if (1) there is substantial continuity between the two operations, (2) a majority of its employees are former employees of the predecessor, and (3) the historical units remain appropriate for bargaining. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 (1987); *NLRB v. Burns Int’l Sec. Servs., Inc.*, 406 U.S. 272, 279-81 (1972); *Cnty. Hosps. of Central Cal. v. NLRB*, 335 F.3d 1079, 1082-83 (D.C. Cir. 2003). If those conditions are met, a successor employer is “ordinarily free to set initial terms on

³ A violation of Section 8(a)(5) produces a derivative violation of Section 8(a)(1), 29 U.S.C. § 158(a)(1), which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the[ir] [statutory] rights.” *See Verizon New York, Inc. v. NLRB*, 360 F.3d 206, 207 (D.C. Cir. 2004).

which it will hire the employees of a predecessor,” before bargaining with the incumbent union. *Burns*, 406 U.S. at 294. The successor’s bargaining obligation is then “trigger[ed]” if it immediately starts operations with no hiatus or gradual build-up of employees, and if a majority of its employees had been employed by the predecessor employer. *Fall River*, 482 U.S. at 46-47. *See also Burns*, 406 U.S. at 295 (successor’s obligation to bargain matured when it hired its work force).

Successors must bargain with incumbent unions because they enjoy a rebuttable presumption of majority support. *Fall River*, 482 U.S. at 38. *Accord Harter Tomato Prods. Co. v. NLRB*, 133 F.3d 934, 937 (D.C. Cir. 1998). The presumption “promote[s] stability in collective-bargaining relationships, without impairing the free choice of employees” and furthers the Act’s policy of promoting industrial peace “during this unsettling transition period.” *Fall River*, 482 U.S. at 38-39 (internal quotation marks and citation omitted). Thus, under the doctrine of successorship, a change in the ownership of the employing enterprise does not by itself destroy the presumption of continuing majority status. *Id.* at 37-38; *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 118 (D.C. Cir. 1996). Instead, a successor is obligated to bargain with the incumbent union or unions because “a mere change in ownership, without an essential change in working conditions, would not be likely to change *employee* attitudes toward representation.” *NLRB v. Fall River Dyeing & Finishing Corp.*, 775 F.2d 425, 428-29 (1st Cir. 1985) (emphasis in

original) (quotation omitted), *affirmed*, 482 U.S. 27 (1987).

The Board's findings regarding successorship are "conclusive" under Section 10(e) of the Act, 29 U.S.C. § 160(e), if they are supported by substantial evidence on the record as a whole. *Fall River*, 482 U.S. at 44. A reviewing court may not displace the Board's choice between two fairly conflicting views, even if the court "would justifiably have made a different choice had the matter been before it de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

Where, as here, a challenge is lodged to the continued viability of an historical unit, the Court reviews the Board's findings of fact under the substantial evidence standard. *See Trident*, 101 F.3d at 117-18 (Board's unit determination upheld where subordinate findings supported by substantial evidence and rationale did not offend Act's policies). The Court upholds the Board's application of law to the facts "unless arbitrary or otherwise erroneous." *Harter Tomato*, 133 F.3d at 937.

Stein conceded before the Board that there was substantial continuity in its operations and that a majority of the drivers and laborers it hired were previously employed by TMS and represented by the Teamsters and Laborers. The only successorship element in dispute, therefore, is the continued appropriateness of the historical units. (JA 10 n.6, 41 n.6.) Here, the Board properly found that Stein's undisputed refusals to bargain with the Teamsters and Laborers violated the Act

because the bargaining units historically represented by the Teamsters and Laborers remained appropriate. As shown below, the Board’s findings are reasonable and supported by substantial evidence.

B. The Board Acted Within Its Broad Discretion in Finding Appropriate the Historical Teamsters’ and Laborers’ Bargaining Units

1. The Court rarely disturbs the Board’s findings on unit appropriateness

The Board has broad discretion regarding bargaining units in the successorship context, and “is never required to determine the *most* appropriate unit, only *an* appropriate unit.” *Publi-Inversiones De Puerto Rico, Inc. v. NLRB*, 886 F.3d 142, 145 (D.C. Cir. 2018). *See also* 29 U.S.C. § 159(b) (authorizing the Board to determine “the unit appropriate for the purposes of collective bargaining”). Moreover, the Court’s standard of review when considering challenges to historical units is “quite limited.” *Dean Transp., Inc. v. NLRB*, 551 F.3d 1055, 1063 (D.C. Cir. 2009).

In assessing whether the bargaining unit of the predecessor employer remains appropriate, the Board applies a presumption, approved by the Court, that the historical unit constitutes an appropriate bargaining unit. *Cnty. Hosps.*, 335 F.3d at 1085. *See also Trident*, 101 F.3d at 118. The Board further “appropriately attache[s] significant weight” to bargaining history in assessing the unit’s appropriateness. *S. Power Co. v. NLRB*, 664 F.3d 946, 951 (D.C. Cir. 2012). The

party challenging a historical unit faces “a heavy evidentiary burden” to show that the unit is no longer appropriate. *Trident*, 101 F.3d at 118 (quoting *Banknote Corp. v. NLRB*, 84 F.3d 637, 647 (2d Cir. 1996)). To meet that burden, Stein would have to show that the historical units are “repugnant to Board policy,” that “compelling circumstances . . . overcome the significance of bargaining history,” that the units “hamper employees in fully exercising rights guaranteed by the Act,” or that the units “no longer conform reasonably well to other standards of appropriateness.” *Id.* (citations omitted). In other words, “a historical unit can be rejected only if truly inappropriate.” *Publi-Inversiones De Puerto Rico*, 886 F.3d at 146 (quoting *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008)). Historical units are not entitled to less deference simply because they were not certified by the Board. *See Trident Seafoods, Inc.*, 318 NLRB 738, 739 n.5 (1995), *enforced in pertinent part*, 101 F.3d 111 (D.C. Cir. 1996).

2. Stein failed to meet its burden of showing that the historical units are no longer appropriate

The Board applied its Court-approved, longstanding precedent and determined that the historical bargaining units remained appropriate. (JA 10 n.6, 41 n.6.) Specifically, the Board found that the “historical bargaining units’ breakdown by work classifications still ‘conform[ed] reasonably well to other standards of appropriateness.’” (JA 10 n.6, 41 n.6, *quoting Deferiet Paper Co. v. NLRB*, 235 F.3d 581, 583 (D.C. Cir. 2000)). For decades, various employers

undertook the slag/scrap operations at AK Steel using three separate units of employees: operators and mechanics, drivers, and laborers. Throughout the years and multiple changes of employer, “[e]ach unit performed discrete tasks within its jurisdiction.” (JA 20.) The operators and mechanics, represented by the Operating Engineers, ran the heavy equipment needed to load and separate slag and serviced the vehicles. The drivers, represented by the Teamsters, operated the large off-road dump trucks needed to transport the slag, the water trucks, and pickup trucks. The laborers, represented by the Laborers, handled safety, fire watch, cleaning, lancing/torching, and knockouts. (JA 20.)

The units also “maintained their own separate identities and collective-bargaining agreements.” (JA 29; JA 654-57 ¶¶7-13, 769.) For example, among other differences, the three unions’ collective-bargaining agreements with predecessor TMS set out varying wage rates and premium pay, separate pension systems, and different probationary periods. (JA 691, 694, 703-04, 706-08, 721, 723, 729, 732-33.) Experienced master mechanics and operators in the Operating Engineers’ unit were the highest paid, and entry-level drivers in the Teamsters’ unit the lowest paid. (JA 691, 706, 723-24.)

Based on these findings, the Board reasonably determined that the historical units were not repugnant to the Act’s policies simply because they had “some interaction and shared some of the same terms and conditions of employment.”

(JA 10 n.6, 41 n.6.) Although a combined unit might also be an appropriate unit for bargaining, separate units based on the unions' traditional work, where each distinct group had separate job duties, were also appropriate under Board precedent. *See, e.g., Cadillac Asphalt Paving*, 349 NLRB 6, 9 (2007) (separate unit of drivers remained appropriate despite operational changes where they continued to drive the same trucks and assist the same work crews of laborers and operators). Given the Board's findings related to job classification, job tasks, and separate identities, Stein's claim (SBr. 30) that the Board's unit appropriateness findings are "based on nothing more than the job classification itself" is in error.

In making its unit appropriateness finding, the Board also properly considered the long history of bargaining in three separate units enjoyed by these employees. *See Trident*, 101 F.3d at 118. Under longstanding policy, the Board avoids "uproot[ing] bargaining units that have enjoyed a history of collective bargaining unless the units no longer conform reasonably well to other standards of appropriateness." *Cadillac Asphalt*, 349 NLRB at 9. And it places the burden of proof on the party challenging the continued appropriateness of the historical units. *Trident*, 101 F.3d at 118.

The Board did not abuse its broad discretion to determine appropriate bargaining units by finding Stein failed to meet that burden here. Stein challenged the continued appropriateness of the historical units by arguing that its cross-

training and cross-jurisdictional assignment of work made a plant-wide unit the only appropriate unit. (JA 10 n.6, 41 n.6.) The Board rejected this argument because Stein’s limited changes were “not so regular and widespread as to alter the appropriateness of the three historical units.” (JA 28, 58.)

As an initial matter, the operative date for determining whether the historical units remain appropriate is January 1, when Stein commenced operations (see p. 36 below). At that point, there was no evidence of any cross-training having occurred. Moreover, as the Board fully explained, the cross-training that transpired after January 1 was “limited” and did not affect the appropriateness of the historical units. (JA 10 n.6, 41 n.6.) Specifically, the Board found that three months after Stein commenced operations, only 6 of its 60 employees—5 laborers, 1 operator, and no drivers—had been cross-trained and performed some cross-jurisdictional work. (JA 28-29, 58.) Only four had been cross-trained by mid-February; two did not perform cross-jurisdictional work until March. In addition, those employees “continued to spend a majority of their work time performing their traditional job duties” two months after Stein took over from TMS. (JA 29, 58.) Stein’s area manager, Doug Huffnagel, admitted that after Stein assumed operations, each job classification still “primarily” performed its traditional work. (JA 626-30.) Thus, under this Court’s precedent, Stein’s limited changes do not cast doubt on the Board’s finding that the historical units remain appropriate. *See*

Harter Tomato, 133 F.3d at 938; *United Food & Commercial Workers Int'l Union, Local 152 v. NLRB*, 768 F.2d 1463, 1473-74 (D.C. Cir. 1985) (“*UFCW*”).

Employees’ testimony supports this finding. For example, driver Bowling testified that his duties under Stein were the “same as . . . always,” and he was “doing the same thing” for Stein that he had been doing for TMS. Both Bowling and driver Wise testified that not only did their work not change, they continued to drive the “same truck” they drove for TMS. (JA 157, 268.) Driver Wise testified that although he had seen laborers driving bobcats and an operator drive a dump truck (traditionally Teamsters’ work), those employees “primarily” did their traditional work. (JA 289-92, 295-96.)

Laborers similarly testified that they continued primarily to perform their traditional tasks. Laborer Venters testified that when he began operating certain pieces of equipment for Stein, he mostly used that equipment to clean around the plants, the same work he did for TMS with a shovel. Using the mechanized equipment simply made his traditional duties easier. (JA 421-24.) Laborer Wilhoite testified that while his work for Stein included operating equipment, he used much of that equipment for cleaning around the plants, work he also did for TMS. (JA 451-52, 454-55, 460, 466, 471-79.) Laborer Karoly testified that he was “doing the same thing” for Stein as for TMS, and his job “really didn’t change at all.” (JA 217-18.) Laborers Young and Cross began operating equipment like

bobcats and backhoes for Stein, primarily for the same cleaning work they did previously for TMS. (JA 520-21, 554-55.) Thus, “[e]ach of the former TMS employees hired to work for Stein testified that he continued to perform the same duties and tasks, using essentially the same equipment, as when employed by TMS.” (JA 23, 53.)

Moreover, Stein’s limited cross-training and cross-jurisdictional work assignment were as not as novel for these employees as Stein suggests. (SBr. 16.) TMS Vice President Bob Huseman testified that TMS cross-trained operators to drive trucks, and, several times a year, assigned mechanics to drive trucks when Teamsters were not available. (JA 318, 349-50, 353-54.) Similarly, laborers Venters and Wilhoite both testified that when working for TMS, they operated the manlift, equipment the operators also used. Under the Laborers’ collective-bargaining agreement with TMS, all laborers were required to complete a manlift certification class. (JA 365-66, 435-38, 688.) Driver Bowling testified that when working for TMS, employees had been “rented out” to AK Steel for years to do jobs they “don’t normally do.” (JA 153.) Moreover, the Laborers’ and Operating Engineers’ collective-bargaining agreements with predecessor TMS specifically allowed cross-training. (JA 688, 720.)

In addition, the collective-bargaining agreement that Stein reached with the Operating Engineers maintains the traditional job classifications and distinguishes between those classifications in terms of wages. Under the new agreement, mechanics are at the top of the wage scale (\$26.25), and general laborers at the bottom (\$15.00). (JA 629-30, 691, 706-07, 723-24, 741, 750.) Operator Kingery testified that when working for Stein, he may also drive a truck or “grab a shovel,” tasks he did not undertake for TMS. But when he did, he continued to be paid at the higher operator pay rate. (JA 646-50.) The pay difference shows that the three classifications continue to have different terms and conditions of work and different interests, evidence supporting the Board’s finding that the historical units remain appropriate. *Cf. Pennsylvania Transformer Tech., Inc. v. NLRB*, 254 F.3d 217, 223-24 (D.C. Cir. 2001) (successor had duty to bargain despite operational changes, including fewer job classifications and increased employee responsibility); *Harter Tomato*, 133 F.3d at 937 (successor had duty to bargain despite changes to, among other things, wages, training, and managerial philosophy); *UFCW*, 768 F.2d at 1470, 1473-74 (successor had duty to bargain despite operational changes).

As the Supreme Court explained in *Fall River*, “of particular significance” is the question whether, from the employees’ perspective, their jobs changed. 482 U.S. at 44. *Accord Trident*, 318 NLRB at 739. Clearly, from the perspective of

Stein's employees, it did not. That is especially so given this Court's teaching that an employer's reliance (SBr. 19-20) on a laundry list of differences "is unresponsive to the question we face. We ask not whether [the employer's] view of the facts supports its version of what happened, but whether the Board's interpretation of the facts is reasonably defensible." *Pennsylvania Transformer*, 254 F.3d at 224 (internal quotation marks and citations omitted). Because the Board's decision here is reasonably defensible, "the case is over, even if [Stein's] version might support a contrary result." *Dean Transp.*, 551 F.3d at 1061 (quoting *Harter Tomato*, 133 F.3d at 938).

That the Board has, in cases cited by Stein (SBr. 32, 39), determined that a successor met its burden to show the historical units were no longer appropriate does not compel such a decision here. In *Rock-Tenn Company*, for example, the Board found compelling circumstances that the former two-plant unit was no longer appropriate because of "significant changes in the organizational structure and operations of the two plants," including their "completely separate corporate and operational structure," lack of functional integration, and lack of interchange or contact between employees. 274 NLRB 772, 773 (1985). Similarly, in *Crown Zellerbach Corporation*, the Board again found compelling circumstances to disregard bargaining history in a two-plant unit, where the parties to the historical bargaining relationship sought a single-plant unit, and a question had been raised

as to whether the employees at one plant continued to support their representative. 246 NLRB 202, 204 (1979). Although the Court in *Bentson Contracting Company* found that the Board failed to “sufficiently take into account” new terms and conditions of employment, including cross-training, that case did not involve successorship and is inapplicable here because it involved the expiration of a construction industry pre-hire agreement under Section 8(f) of the Act (see pp. 45-49 below for additional explanation of Section 8(f)). 941 F.2d 1262, 1270 (D.C. Cir. 1991). In any event, the Court noted that if there had been a prior contract under Section 9, as there was here, the “history of collective bargaining is a valid consideration in determining appropriate units.” *Id.* at 1269 n.8. While the Court in *Bentson* faulted the Board for failing to consider whether the employer’s changes affected the historical units’ appropriateness, the Board made that determination here. As the discussion above shows, the Board’s findings that Stein’s changes were “limited,” and the historical units therefore remained appropriate, are fully supported by the record evidence. (JA 10 n.6, 41 n.6.)

3. The administrative law judge did not abuse his discretion by limiting Stein to three months of documentary evidence while allowing Stein to question witnesses without limit

Stein (SBr. 45-56) failed to show that the administrative law judge's decision, affirmed by the Board, to limit its evidence to changes made at the time it assumed operations and immediately thereafter, was an abuse of discretion. (JA 10 n.6, 28 n.20, 41 n.6, 58 n.19.) *See Perdue Farms, Inc., Cookin' Good Div. v. NLRB*, 144 F.3d 830, 834 (D.C. Cir. 1998) (reviewing judge's evidentiary rulings for abuse of discretion). At the hearing in the proceedings below, the judge allowed Stein to introduce documentary evidence of cross-training and cross-jurisdictional work assignments for three months after it assumed operations. He did not place time limits on Stein's ability to question witnesses regarding their duties and cross-training. (JA 28 n.20, 58 n.19.)

Nevertheless, even three months after it began operations, Stein showed only that 6 of 60 employees had been cross-trained and performed some cross-jurisdictional work. (JA 28-29, 58.) Moreover, those employees continued to primarily perform their traditional duties. (JA 29, 58.) That Stein intended—sometime in the undefined future—to train additional employees and assign different tasks, is irrelevant to the question before the Board: whether Stein proved by compelling evidence that the historical units were no longer appropriate for bargaining. Employee “rights do not get put on hold—much less substituted with a

union of [Stein’s] choice—while [Stein] spends months . . . training additional employees and deciding whether and how it wants to modify” its operations. *Ford Motor Co.*, 367 NLRB No. 8, slip op. at 12 (2018).⁴

The Board’s decision is consistent with historical *Burns* case law, notwithstanding Stein’s claim otherwise. (SBr. 46.) The Board measures the “continued appropriateness of a bargaining unit for successorship purposes . . . at the time the bargaining obligation attaches.” *Cadillac Asphalt*, 349 NLRB at 9. Here, Stein’s obligation to bargain with the Teamsters and Laborers attached on January 1 when it began operations with a majority of employees coming from TMS. (JA 14, 44.) Changes made later—such as those assertedly shown in Stein’s rejected documents covering work assignments after March—are “irrelevant to [the Board’s] determination of the successorship issue.” *Id.* See also *Banknote Corp. of Am.*, 315 NLRB 1041, 1043 (1994) (evidence of changes in job duties

⁴ Stein incorrectly claims (SBr. 45-46) that the judge shifted the burden to the General Counsel to show the cross-training ended. The judge simply noted that, even if he allowed Stein’s additional documentation of cross-training, the General Counsel could rebut it, and, moreover, Stein had the opportunity to ask witnesses whether the cross-training continued. (JA 411-12, 414-15.) Board law does not apply a burden-shifting framework to historical units, and neither did the judge here. Even if one applied, there would be no need for the General Counsel to rebut the documentation because Stein failed to prove that its cross-training and cross-jurisdictional work assignment had ever been regular and widespread such that the historical units were no longer appropriate. In short, Stein always had the burden and failed to meet it given the quality, not just the quantity, of its evidence.

made after bargaining obligation attached insufficient to show historical units no longer appropriate), *enforced*, 84 F.3d 637 (2d Cir. 1996). Stein has therefore failed to show that the judge abused his discretion by limiting Stein to three months of documentary evidence.

4. In successorship situations, the Board is not required to conduct the same community-of-interest analysis it would if determining, for the first time, whether a unit is appropriate

Finally, Stein argues that the Board erred by failing to conduct a community-of-interest analysis, failing to apply a presumption in favor of a plant-wide unit, and giving too much weight to bargaining history. (SBr. 30-39.) Each of those claims, however, rests “on the flawed assumption that the Board was compelled to apply the traditional community-of-interest test for bargaining units” in the successorship context. *Trident*, 101 F.3d at 118.

As the Court has recognized, the Board conducts a community-of-interest analysis and applies the plant-wide presumption “only when delineating units of previously unrepresented employees, not, as here, when it is assessing historical units that have had long periods of successful collective bargaining.” *Id.*

Similarly, the Board gives “substantial weight to prior bargaining history” in successorship situations, finding that a “mere change in ownership should not uproot such units as long as they remain appropriate and retain their separate identity.” *Id.* (internal quotation marks and citations omitted). As this Court has

explained, “[o]nce an appropriate bargaining unit has been established, the statutory interest in stability and certainty in bargaining obligations requires adherence to that unit.” *Boise Cascade Corp. v. NLRB*, 860 F.2d 471, 475 (D.C. Cir. 1988).

In addition, the Board has certainly applied the plant-wide presumption in an initial bargaining situation and found that it continued to be appropriate in successorship bargaining, as in *Border Steel Rolling Mills, Inc.*, 204 NLRB 814 (1973), cited by Stein (SBr. 36). But Stein failed to cite a case that requires the Board to apply such a presumption rather than its court-approved presumptions in favor of historical bargaining units and the continued majority status enjoyed by incumbent unions. *Trident*, 101 F.3d at 118.

Similarly, Stein argues that it has created a functionally integrated plant and the Board erred by approving “micro-units.” (SBr. 36-38, citing *The Boeing Co.*, 368 NLRB No. 67 (2019).) But again, as a successor, it was Stein’s burden to prove that the historical units were no longer appropriate, whether by functional integration or otherwise. As the Board found, “changes here did not result in the three units becoming so functionally integrated that they no longer maintained their separate identities.” (JA 29, 58.) Stein’s premise—that the Board is “statutorily” prohibited from approving micro-units in functionally integrated facilities—is based on its incorrect assumptions that the Board must conduct a community-of-

interest analysis in a successorship situation and that it proved its facility is functionally integrated.

In addition, Stein is simply incorrect that the Board did not consider “whether compelling circumstances are present that overcome the significance of bargaining history” or whether requiring Stein to recognize three unions would “hamper employees in fully exercising rights guaranteed by the Act” (SBr. 38-39, quoting *Trident*, 101 F.3d at 118). The Board explicitly considered—and rejected—Stein’s claims on these points, finding that Stein’s cross-training failed to present compelling circumstances that overcame bargaining history and that the existing units did not hamper employee rights. (JA 28-29 & n.20, 57-58 & n.19.)

Further, although Stein claims (SBr. 34-35) that this Court’s decision in *Deferiet Paper Company* requires the Board to first determine whether the historical units were appropriate, nothing in that case suggests that the Board must conduct a community-of-interest analysis in a successorship situation. Instead, the Court admonished the Board to consider whether the successor “had shown by ‘compelling evidence’ that the old unit no longer conformed to the Board’s contemporaneous standards of appropriateness.” *Deferiet*, 235 F.3d at 584. The Board and this Court agree that the starting point is not a blank slate, but a “presumption in favor of historical units.” *Id.* (observing that historical units will be found appropriate even if they would not be appropriate if organized for first

time). (JA 10 n.6, 41 n.6.) Not only did the Board here find that the decades-old units were appropriate based on job classifications, skills, tasks, identities, and bargaining history, it further found that Stein failed to show compelling evidence that they no longer conformed to those standards. (JA 10 n.6, 29, 41 n.6, 58.)

Finally, Stein's complaint that three separate units of employees is "grossly" and "woefully inefficient" (SBr. 3, 15) does not defeat its obligation to bargain with the unions chosen by its employees. Under settled law, Stein cannot override its employees' Section 7 right to select their own bargaining representatives. *See, e.g., Burns*, 406 U.S. at 279-80. The proper way to deal with any "operational inefficiencies" (SBr. 2) was to bargain with the existing unions over ways to streamline, not unilaterally jettison two of the three unions in favor of one union chosen by Stein. The Board's decision thus comports with decisions of the Supreme Court and this Court that "in a successorship situation, industrial peace is best maintained by honoring the employees' original choice of bargaining representative." *Dean Transp.*, 551 F.3d at 1066 (citing *Fall River*, 482 U.S. at 39-40).

C. The Board Reasonably Rejected Stein’s and the Operating Engineers’ Attacks on the Majority Status of the Teamsters and the Laborers

Stein, joined by the Operating Engineers, claims it had no obligation to bargain with either the Teamsters or the Laborers because their agreements with the predecessor employers were pre-hire agreements under Section 8(f) of the Act, and as a result, those unions did not enjoy the continuing presumption of majority support under Section 9(a) of the Act. (SBr. 41-43, OEBr. 16-24.) There are two problems with these claims: Section 10(b)’s time limit bars any challenge to the initial recognition of those unions, and Stein is not a construction industry employer under Section 8(f). The Board therefore reasonably rejected their arguments. (JA 10 n.6, 41 n.6.)

1. Section 10(b) of the Act Bars Stein and the Operating Engineers From Challenging the Teamsters’ and Laborers’ Majority Status Based on the Origins of the Parties’ Relationships

The Teamsters and Laborers have represented their respective units of drivers and laborers at AK Steel for decades. Stein now defends its refusal to bargain with these unions by claiming they are not majority representatives. Under Section 10(b) of the Act, 29 U.S.C. §160(b), the proper time to challenge the legitimacy of the recognition granted to the Teamsters and Laborers was within six months of the original recognition. *Local Lodge No. 1424, Int’l Assn. of Machinists v. NLRB*, 362 U.S. 411, 416-17, 419 (1960) (“*Bryan*”). *Accord S.*

Power Co. v. NLRB, 664 F.3d 946, 950 (D.C. Cir. 2012); *Raymond F. Kravis Ctr. for Performing Arts, Inc. v. NLRB*, 550 F.3d 1183, 1189-90 (D.C. Cir. 2008); *NLRB v. Marin Operating, Inc.*, 822 F.2d 890, 894 (9th Cir. 1987). The claims by Stein and the Operating Engineers, therefore, come too late.

Neither Stein's status as a successor employer nor its lack of knowledge at the time of recognition changes the time limits of Section 10(b). *S. Power*, 664 F.3d at 950; *Marin Operating*, 822 F.2d at 894; *Eye Weather*, 325 NLRB 973 (1998). Although Stein complains that it could not have filed a timely charge because it had no knowledge at the time (SBr. 42), that claim has been definitively rejected. The Board and the courts have agreed that the principles underlying Section 10(b) and *Bryan* preclude an employer, as here, from seeking to escape an established 9(a) bargaining relationship based upon a stale claim that its employees' exclusive representative lacked majority status in the first instance. *See, e.g., S. Power*, 664 F.3d at 950; *Kravis*, 550 F.3d at 1189-90; *Marin Operating*, 822 F.2d at 893-94).⁵ And contrary to Stein's claim (SBr. 42), the Board and courts have not limited the application of the Section 10(b) time bar to

⁵ Thus, despite the Operating Engineers' assertion (OEBr. 22), *Bryan* and Section 10(b) can bar a refusal-to-bargain *defense* that a bargaining relationship was unlawfully established. *See, e.g., Marin Operating*, 822 F.2d at 893-94; *Eye Weather*, 325 NLRB at 973; *North Bros. Ford, Inc.*, 220 NLRB 1021, 1021-22 (1975).

situations in which “the same employer” sought to challenge a bargaining relationship after the six-month limitations period expired. Both *Southern Power* and *Marin Operating* involved successor employers that were not involved in the initial grant of recognition. *S. Power*, 664 F.3d at 950; *Marin Operating*, 822 F.2d at 893-94.⁶

In any event, the Supreme Court in *Bryan* held that maintenance and enforcement of a contract more than six months after recognition of a minority union did not violate the Act, relying in part on legislative history indicating that Congress specifically intended Section 10(b) to apply to agreements with minority unions in order to stabilize bargaining relationships. *Bryan*, 362 U.S. at 425-26, 428. Not only does the six-month statute of limitations in Section 10(b) promote that stability, it also protects parties from confronting allegations about “past events after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused[.]” *Id.* at 419.

⁶ *James Julian*, 310 NLRB 1247 (1993), cited by Stein (SBr. 42), is inapplicable here. It involves a construction industry employer and whether a construction union successfully established that it had received recognition under Section 9(a). It concerns neither a successor relationship outside the construction industry nor Section 10(b).

Moreover, the Section 10(b) policy considerations that seek to avoid forcing parties to confront stale allegations concerning the basis of established relationships are amply demonstrated in this case. The Operating Engineers' argument (OEBr. 17-21) consists of speculation that the absence of evidence the Teamsters and Laborers demonstrated majority support decades ago means they did not in fact possess majority support at that time or at any time thereafter. Moreover, neither Stein nor the Operating Engineers acknowledge their own undisputed conduct in signing a collective-bargaining agreement before Stein demanded or received proof of that union's majority status. Indeed, Stein only requested proof of majority status from the Operating Engineers as an afterthought, once the Teamsters demanded recognition and bargaining. (JA 53; JA 135-37.) Stein's own lack of evidence serves only to underscore the propriety of the Board's judicially-approved rule barring such stale claims.⁷

In light of the clear statutory policy of Section 10(b), Stein is precluded from challenging the origins of TMS's bargaining relationship with the Teamsters and Laborers. Because Stein is barred from such a challenge, the Board reasonably

⁷ As the Board noted, the Laborers' attorney informed Stein on February 20 not only that it did not have a Section 8(f) pre-hire agreement with predecessor employers but that it maintained signed authorization cards for 100 percent of the employees in that unit. (JA 23-24; JA 352, 769, 1111, 1118.)

found that both the Teamsters and Laborers are entitled to a presumption of majority support and, as a *Burns* successor, Stein is required to bargain with them.

2. Section 8(f) does not apply because Stein’s employees at AK Steel are not engaged in construction industry work

Exclusive bargaining representatives under Section 9(a) of the Act are entitled to a “conclusive” presumption of majority support during the term of any collective-bargaining agreement, up to three years, and are entitled to a rebuttable presumption of majority support once the agreement expires. *Kravis*, 550 F.3d at 1188 (quoting *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996)). Section 8(f) of the Act, 29 U.S.C. §158(f), creates a “narrow” exception to the usual requirement of a continued bargaining relationship after contract expiration, limited to employers in the construction industry. *Kravis*, 550 F.3d at 1189.

Despite the best efforts of Stein and the Operating Engineers (SBr. 41-43, OEBr. 16-24), “the statutory text simply does not extend to non-construction employers,” and their “attempts to nudge its contracts into the § 8(f) paradigm are thus unavailing.” *Id.* As the Board noted, Stein and the Operating Engineers stipulated that Stein is not a construction employer and the work performed by its employees at AK Steel was not, and *had never been*, construction work. (JA 10 n.6, 41 n.6; JA 665-66 ¶29.) Given their admission, Stein and the Operating Engineers should not now be heard to claim otherwise. *See also Strand Theatre of*

Shreveport Corp. v. NLRB, 493 F.3d 515, 520 (5th Cir. 2007) (rejecting successor's argument that Section 8(f) applies outside the construction industry).

Nevertheless, Stein and the Operating Engineers claim that the collective-bargaining relationship between TMS and the Teamsters and Laborers operated under Section 8(f) of the Act, not Section 9(a), arguing that the Unions never provided proof of their majority status, and their collective-bargaining agreements used hiring hall language. (SBr. 9, 41, OEBr. 21-22.) Each of these arguments is unfounded.

First, despite both Stein's and the Operating Engineers' contention (SBr. 41-42, OEBr. 16-21) that the General Counsel or the Teamsters and Laborers had the burden to prove majority status, the Board has long held otherwise: the burden is on the party challenging the incumbent unions' majority status. *Tragniew, Inc.*, 185 NLRB 962, 963 (1970), *enforced*, 470 F.2d 669 (9th Cir. 1972). *Accord Trident*, 101 F.3d at 118. In the successorship context, as discussed above, as long as substantial continuity with the predecessor exists from the employees' perspective, and the majority of the successor's employees worked for the predecessor, the requisite majority interest is present. *See generally, Pennsylvania Transformer*, 254 F.3d at 222.

The presumption of continued majority status allows a union "to safeguard its members' rights and to develop a relationship with the successor," a rationale

that is “particularly pertinent” in successorship situations. *Fall River*, 482 U.S. at 39. *Accord Harter Tomato*, 133 F.3d at 937. Neither Stein nor the Operating Engineers provided any evidence to the Board or in their briefs to the Court that would cast doubt on the Teamsters’ or Laborers’ continuing majority status. They therefore failed to meet their burden, and the presumption that the Teamsters and the Laborers are the lawful bargaining representatives of their respective units remains intact.⁸

Next, Stein and the Operating Engineers argue that because the Teamsters’ and Laborers’ collective-bargaining agreements included hiring hall language, the parties must have intended to establish a Section 8(f) agreement. (SBr. 9, OEBR. 21.) As the Board explained, however, the parties’ intent is irrelevant here because they are not engaged in the construction industry; Section 8(f) simply does not apply. (JA 30.) Stein further suggests, incorrectly, that hiring hall language is unlawful if included in collective-bargaining agreements under Section 9(a). (SBr. 9 n.5.) Collective-bargaining agreements covering non-construction industries may lawfully include hiring hall language. *See Local 357, Int’l Bhd. of Teamsters*,

⁸ Contrary to the Operating Engineers’ claim (OEBR. 18), the General Counsel’s complaint allegation that the Teamsters and Laborers were the Section 9(a) representatives of the drivers’ and laborers’ units does not create an evidentiary burden of proving their majority status. As shown, those unions enjoy a presumption of continuing majority status unless Stein and the Operating Engineers prove their defenses. *See, e.g., Trident*, 101 F.3d at 118.

Chauffeurs, Warehousemen & Helpers of Am. v. NLRB, 365 U.S. 667, 673 (1961) (in case involving the trucking industry, explaining that hiring halls “are not illegal per se”). In any event, as the Board explained, if the hiring hall language were unlawful, the Board would invalidate the unlawful portion, not the entire agreement. (JA 30, citing cases.)⁹ Thus, the mere fact that the collective-bargaining agreements with the Teamsters and Laborers contained hiring hall language does not establish an arrangement under Section 8(f). Nor could it, given the undisputed fact that the work performed by Stein’s employees at AK Steel is not construction industry work. (JA 665-66 ¶29.)¹⁰

In sum, not only is Stein not a construction industry employer under Section 8(f) of the Act, it failed to provide compelling evidence that the historical units no longer conformed to the Board’s standards of appropriateness. The Board,

⁹ Stein’s citation (SBr. 9 n.5) to *NLRB v. National Maritime Union of America*, 175 F.2d 686, 688 (2d Cir. 1949), is inapposite. In that case, the court affirmed the Board’s finding that the union’s discriminatory operation of a hiring hall was unlawful. It did not pass on the Board’s finding that the hiring hall provision was lawful on its face. *Id.* See also *Pittsburgh Press Co. v. NLRB*, 977 F.2d 652, 656-57 (D.C. Cir. 1992) (explaining the history of hiring halls under the Act, particularly in the maritime industry, and Congress’s “endorsement of the hiring hall”).

¹⁰ Moreover, should hiring hall language have proved fatal to the majority status of the Teamsters and Laborers, the Operating Engineers would suffer the same fate. (JA 347-48, 351.) The Engineers’ collective-bargaining agreement with TMS contained referral language very similar to that in the Teamsters’ agreement with TMS. (Compare JA 702 Art. 4, Sec. 2 with JA 721 Sec. 8.3.)

therefore, did not abuse its broad discretion by finding that the historical units remained appropriate and Stein had an obligation to bargain with the unions representing them.

D. Because the Teamsters and Laborers Were the Majority Bargaining Representatives of their Respective Units, the Board Is Entitled to Affirmance of the Remaining Unfair Labor Practices

Stein and the Operating Engineers do not contest that if the Court affirms the Board's determination that Stein had a duty to bargain with the Teamsters and Laborers, then the Board's additional findings that Stein committed violations of Section 8(a)(1), (2) and (3) of the Act, and that the Operating Engineers committed related violations of Section 8(b)(1)(A) and (2) of the Act, should also be affirmed. (JA 10 & n.8, 41-42 & n.8.)

An employer violates Section 8(a)(2) of the Act by recognizing and entering into a collective-bargaining agreement with a union that has not been selected by a majority of the employees in the bargaining unit, regardless of whether the employer believes in good faith that the union has majority support. The minority union violates Section 8(b)(1)(A) of the Act by accepting that recognition and entering the agreement. *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 739 (1961). If the resulting collective-bargaining agreement includes a union security clause—which requires employees, as a condition of employment, to become union members and remit dues—the employer violates Section 8(a)(3) of

the Act, and the minority union violates Section 8(b)(2). *Int'l Union of Petroleum & Indus. Workers v. NLRB*, 980 F.2d 774, 777-78 (D.C. Cir. 1992). An employer violates Section 8(a)(2) and (1) of the Act by providing a minority union with access to the jobsite and assistance in distributing membership applications and dues-checkoff cards, and the minority union violates Section 8(b)(1)(A) by accepting that assistance. *Duane Reade, Inc.*, 338 NLRB 943, 943-44 (2003), *enforced*, 99 F. App'x 240 (D.C. Cir. 2004). Finally, an employer that threatens employees with discipline or loss of work if they do not join a minority union violates Section 8(a)(1) of the Act. *Cadillac Asphalt*, 349 NLRB at 7, 24. A minority union that engages in the same threatening conduct violates Section 8(b)(1)(A). *Planned Bldg. Servs.*, 318 NLRB 1049, 1049, 1063 (1995).

As shown above, because the drivers and laborers were represented by the Teamsters and the Laborers, Stein was obligated to bargain with those unions as a successor. It follows, then, that with regard to the Teamsters and Laborers unit employees, Stein violated Section 8(a)(1), (2), and (3) of the Act by recognizing and bargaining with the Operating Engineers as their bargaining representative, applying its collective-bargaining agreement with the Operating Engineers to them, maintaining and enforcing union-security and dues-checkoff provisions against them, and providing access and assistance to the Operating Engineers to distribute membership and dues deduction forms to them. *See Dean Transp., Inc.*, 350

NLRB 48, 60 (2007), *enforced*, 551 F.3d 1055 (D.C. Cir. 2009) (imposition of union and deducting of dues violates Section 8(a)(1), (2), and (3) of the Act). It further follows that Stein violated Section 8(a)(1) of the Act by telling Teamsters and Laborer unit employees that all jobs would be under the Operating Engineers and by threatening to remove them from the work schedule if they did not submit a membership application and dues deduction form to the Operating Engineers. *See Cadillac Asphalt*, 349 NLRB at 7, 24. Similarly, the Operating Engineers' concomitant behavior—accepting recognition as the representative of the drivers and laborers, entering a collective-bargaining agreement requiring them to join the Operating Engineers and remit dues and fees, receiving those dues and fees, accepting assistance from Stein to distribute membership and dues deduction forms, and threatening those employees with loss of work if they did not join—violated Section 8(b)(1)(A) and (2) of the Act. *See Dean Transp.*, 350 NLRB at 60.

E. Substantial Evidence Supports the Board's Finding that Stein Violated Section 8(a)(5) and (1) of the Act by Discharging Employee Karoly Under a Probationary Period Stein Unlawfully Unilaterally Extended

As discussed above (p. 22), Stein had the right under *Burns* to set the initial terms and conditions of employment. Stein took advantage of this right on November 9, when it announced, among other things, that “[a]ll prospective employees will be subject to a 90 day probationary period.” (JA 12; JA 741.)

Once Stein made that announcement, however, it could not change the probationary period without first bargaining with the Teamsters and Laborers, the lawful majority representatives of the drivers' and laborers' units. *See Banknote Corp. of Am.*, 315 NLRB 1041, 1042-44 & n.9 (1994), *enforced*, 84 F.3d 637 (2d Cir. 1996).

But that is precisely what Stein did. When Stein decided to discharge laborer Ken Karoly, it did so by applying not the 90-day probationary period it announced to employees on November 9, but a new provision in its collective-bargaining agreement with the Operating Engineers that set a probationary period of "90 days of actual work." (Compare JA 741 with JA 761 ¶17.05.)¹¹ When Stein discharged Karoly on April 18, 2019, he had completed the initially announced 90-day probationary period, but was within the longer contractual period. Stein, however, had not negotiated a change to that probationary period with the Laborers, Karoly's bargaining representative. (JA 12.) The Board therefore found that Stein discharged Karoly in violation of the Act "pursuant to a

¹¹ Under the Stein-Operating Engineers agreement, Stein "exclusive[ly] determined" layoffs or discharges of probationary employees. (JA 12; JA 761 ¶17.05.) After the probationary period, employees acquired notice and appeal rights. (JA 750 Sec.7.)

probationary period that it had unlawfully unilaterally extended from ‘90 day[s]’ to ‘90 days of actual work’.” (JA 12.)¹²

In making that finding, the Board agreed with the judge that Karoly’s discharge violated Section 8(a)(5) and (1) of the Act. (JA 12.) But the Board reached its decision under a different rationale than that of either the judge or the General Counsel. In the complaint, the General Counsel alleged that Stein unlawfully changed the probationary period without first bargaining with the Teamsters or Laborers, and, in the alternative, that Stein exercised discretion when it discharged Karoly under the unilaterally changed probationary period. (JA 885-87.) For his part, the judge found that Stein, by engaging in unfair labor practices, forfeited its right to set the initial terms and conditions of employment and could not lawfully apply a longer probationary period than the one specified in its predecessor’s expired collective-bargaining agreement with the Laborers. (JA 12, 33-34; JA 694.) As explained in more detail in Section II below, the Board disagreed with the judge’s conclusion that Stein forfeited its right to set the initial terms and conditions of employment. (JA 11.) Instead, Stein could—and did—set those terms on November 9, when it distributed a handout notifying employees

¹² Stein can argue in a subsequent compliance proceeding that it would have discharged Karoly in the absence of its unlawful unilateral extension of the probationary period. (JA 12 n.12.)

they would be subject to a “90 day probationary period.” (JA 12; JA 741.) But the Board found that Stein could not then change the announced 90-day probationary period without first bargaining with the Teamsters and Laborers. (JA 12.) *See Banknote*, 315 NLRB at 1044 n.9. By doing so, Stein unilaterally changed a term and condition of employment in violation of Section 8(a)(5) and (1) of the Act.¹³ *See NLRB v. Katz*, 369 U.S. 736, 743, 747 (1962). *Accord Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 410-11 (D.C. Cir. 1996).

Stein argues that the Board violated its due process rights by finding the violation under a different theory than that advanced by the General Counsel. (SBr. 43-45.) But as the Board explained, it has, with court approval, “repeatedly found violations for different reasons and on different *theories* from those of administrative law judges or the General Counsel, even in the absence of exceptions, where the unlawful *conduct* was alleged in the complaint.” (JA 70, quoting *Local 58, IBEW*, 365 NLRB No. 30, 2017 WL 680502, at *5 n.17 (emphasis in original), *enforced*, 888 F.3d 1313 (D.C. Cir. 2018).) *See also Davis*

¹³ Although Stein emphasizes that the General Counsel’s argument to the judge was based on *Total Security Mgmt. Illinois 1, LLC*, 364 NLRB No. 106 (2016), *overruled*, *800 River Road Operating Co.*, 369 NLRB No. 109 (2020), neither the judge nor the Board reached this “alternate argument,” instead making findings based on Stein’s status as a successor. (JA 12, 34.) *Total Security Management* required employers to provide unions with notice and opportunity to bargain over discretionary portions of an existing disciplinary policy before imposing serious discipline. *Total Security Mgmt.*, 364 NLRB No. 106, at *2.

Supermarkets, Inc. v. NLRB, 2 F.3d 1162, 1169 (D.C. Cir. 1993); *Jefferson Elec. Co.*, 274 NLRB 750, 750-51 (1985), *enforced*, 783 F.2d 679 (6th Cir. 1986); *NLRB v. WTVJ, Inc.*, 268 F.2d 346, 347-48 (5th Cir. 1959).

Further, under the Board’s Rules and Regulations, the “General Counsel is not required to set forth a precise legal theory in the complaint.” (JA 70.) Those rules only require that the complaint provide a “clear and concise description of the acts which are claimed to constitute unfair labor practices. . . .” 29 C.F.R. §102.15(b). The complaint easily met that standard by alleging that Stein “unlawfully exercised its discretion in discharging Karoly based on an unlawful unilateral change to his probationary period without providing prior notice and an opportunity to bargain” to the Laborers.¹⁴ (JA 69-70.) The Board therefore reasonably determined that this “plain statement” constituted a “sufficient recitation of the facts for the complaint to satisfy Section 102.15 of the Board’s Rules and Regulations.” (JA 70.)

Stein does not dispute that it is an ordinary *Burns* successor. Nor does it allege that it would have presented different evidence or called different witnesses if it had been apprised of the Board’s theory. In these circumstances, there is no prejudice to Stein “because the facts and circumstances surrounding Karoly’s

¹⁴ Stein does not argue that the complaint failed to delineate a “clear and concise description of the acts which are claimed to constitute unfair labor practices.”

discharge were fully litigated at the hearing.” (JA 70.) *See Davis*, 2 F.3d at 1169 (“When an employer is not prejudiced by the Board’s reliance on a theory not specifically addressed in the complaint or at the hearing, the employer’s due process rights are not violated”).¹⁵

Stein argues in the alternative that it had no obligation to bargain with the Teamsters and Laborers over any change in the probationary period until they demanded bargaining, which occurred after the change became effective on January 1. (SBr. 44-45.) To support this argument, Stein claims the Board found that its bargaining obligation arose on January 10 (Teamsters) or February 20 (Laborers). (SBr. 44-45.)

As an initial matter, Stein misreads the Board’s Orders. The judge and Board ordered Stein to notify the Teamsters and Laborers of all unilateral changes made on or after January 1, the date on which it began operations, and to rescind

¹⁵ Nothing in *Collective Concrete, Inc. v. NLRB* indicates, as Stein suggests (SBr. 44), that Section 10 of the Act precludes *the Board* from finding a violation on a different theory than that advanced below. Rather, the Court found the employer forfeited its right to argue an issue because it never raised the issue below, “relevant facts . . . were not fully developed in the record[,] and the ALJ made no findings” on that issue. 786 F. App’x 266, 267 (D.C. Cir. 2019). Similarly, in *Henry Bierce Co. v. NLRB*, 23 F.3d 1101 (6th Cir. 1994), also cited by Stein (SBr. 45), the General Counsel amended the complaint to allege a new violation on the hearing’s final day. The Court found that the new allegations “involve[d] different elements of proof, and [were] clearly distinct” from the original complaint allegations; if given earlier notice, the company could have called additional witnesses. 23 F.3d at 1106-08. None of those considerations applies here.

those changes upon request.¹⁶ (JA 14, 36, 44, 65.) The Board and courts have long held that the date a successor begins operations is the date the bargaining obligation attaches “with respect to any subsequent changes the [successor] wished to make in terms and conditions of employment.” *Banknote Corp. of Am.*, 315 NLRB 1041, 1041 (1994), *enforced*, 84 F.3d 637 (2d Cir. 1996). *Cf. Dean Transp., Inc.*, 350 NLRB 48, 54, 60 (2007) (successor required to bargain with union on date it started operations, not three months later when union requested bargaining), *enforced*, 551 F.3d 1055 (D.C. Cir. 2009). *But see Prime Serv., Inc. v. NLRB*, 266 F.3d 1233, 1239 (D.C. Cir. 2001) (recognizing the *Banknote* line of authority but expressing no opinion in light of its finding that the union demanded bargaining prior to the successor beginning operations).¹⁷ Thus, under the explicit

¹⁶ To the extent Stein argues that there is an inconsistency between the judge’s alternative language that the bargaining obligation arose “at least” as of the dates of the bargaining demands (JA 28, 57) and the judge’s and Board’s findings that Stein’s bargaining obligation began on January 1 when it commenced operations, Stein did not raise that issue to the Board, including in its motion for reconsideration. The Court therefore has no jurisdiction to consider it. *See* 29 U.S.C. §160(e) and discussion at p. 65 below.

¹⁷ The requirement that a union first demand bargaining before the successor is obligated to bargain arises where there is a hiatus between the predecessor’s closing and the successor’s reopening of a business or the successor gradually builds up its workforce. *Fall River*, 482 U.S. at 51-52. In a situation like this one and in *Burns*, where the successor immediately takes over operations from the predecessor and a majority of its employees formerly worked for the predecessor, “the ‘triggering’ fact” for the successor’s bargaining obligation is the composition of its workforce. *Fall River*, 482 U.S. at 46. *See also Burns*, 406 U.S. at 295.

terms of the judge's and Board's orders, Stein had an obligation to bargain with the Teamsters and Laborers on January 1.

In any event, as the Board explained, a bargaining request would have been futile: Stein admittedly had already decided to jettison the Teamsters and Laborers and bargain with only the Operating Engineers. (10DO 19 n.19.) And it negotiated and signed a collective-bargaining agreement with that union before hiring employees or beginning operations. (JA 9, 22; JA 135-36, 958, 960, 963.) Because a request for bargaining would have been futile, the Teamsters and Laborers had no obligation to demand recognition and bargaining. *See Comau, Inc.*, 364 NLRB No. 48, 2016 WL 3853834, at *1 (union had no obligation to request bargaining over a closure and work transfer because employer presented it with “a fait accompli”). Moreover, regardless of the Teamsters' and Laborers' bargaining demands, because the changes in the Stein-Operating Engineers' agreement differed from the terms Stein initially announced—including the longer probationary period applied to Karoly—they were separately unlawful as the product of the unlawful bargaining relationship and cannot justify Karoly's discharge. (JA 12 n.11 (not passing on Section 8(a)(5) allegation for applying the Operating Engineers' agreement because it would not affect remedy in light of Section 8(a)(2) and 8(b)(1)(A) findings).)

II. The Board’s Finding that Stein Did Not Forfeit Its Right To Set the Initial Terms and Conditions of Employment Was Not Arbitrary or Clearly Erroneous, and the Remedy Was Well Within the Board’s Broad Remedial Discretion

A. The Board’s Decision Not To Apply Its Forfeiture Doctrine to Stein Was Not Arbitrary or Clearly Erroneous

Generally speaking, under *Burns*, “a successor employer is, like any non-union employer, free to set the initial terms upon which it offers employment.” *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1007 (D.C. Cir. 1998). But the Board has recognized that successors may forfeit their *Burns* right to set initial terms and conditions due to unlawful conduct. The Board has applied forfeiture in two types of cases: the *Love’s Barbeque* line of cases, where the successor discriminates in hiring to avoid its obligation to bargain with the incumbent union; and the *Advanced Stretchforming* line of cases, where the successor tells employees there will be no union or it will not recognize the union. *Love’s Barbeque Rest. No. 62*, 245 NLRB 78, 82 (1979), *enforced in relevant part sub nom. Kallmann v. NLRB*, 640 F.2d 1094 (9th Cir. 1981); *Advanced Stretchforming, Int’l, Inc.*, 323 NLRB 529 (1997), *enforced in relevant part*, 208 F.3d 801 (9th Cir. 2000); *amended* 233 F.3d 1176 (9th Cir. 2000). *See also Adams & Assocs., Inc.*, 363 NLRB No. 193, 2016 WL 2894791 (2016), at *1, 18 (explaining different types of forfeiture), *enforced*, 871 F.3d 358, 379 (5th Cir. 2017).

By extending the forfeiture doctrine to those cases where the successor informed employees that there would be “no union” but did not discriminate in hiring, the Board reasoned that the statement “blatantly coerce[d] employees in the exercise of their Section 7 right[s]. . . .” *Advanced Stretchforming*, 323 NLRB at 530. Such a statement “serves the same end as a refusal to hire employees from the predecessor’s unionized work force. It block[s] the process by which the obligations and rights of such a successor are incurred.” *JLL Rest., Inc.*, 347 NLRB 192, 205 (2006) (internal quotation marks and citation omitted), *enforced mem.*, 325 F. App’x 577, 579 (9th Cir. 2009). As in the discriminatory hiring cases, the only way to restore the pre-unfair labor practice status quo was to rescind the employer’s unlawful unilateral change (the “no union” requirement), as well as the other unilaterally imposed terms and conditions that enhanced the employer’s current bargaining position, and require bargaining from the predecessor’s terms. *Advanced Stretchforming*, 323 NLRB at 530-31.

There is no contention here that Stein discriminated in hiring to avoid its obligation to bargain; the *Love’s Barbeque* line of cases, therefore, does not apply. Stein did engage in other unfair labor practices—namely refusing to recognize the Teamsters and Laborers and providing assistance to the Operating Engineers—but the Board declined to require Stein to forfeit its *Burns* right to set the initial terms and conditions of employment on the basis of this conduct. (JA 11.) Instead, the

Board found that Stein retained the right to set the initial terms and conditions of employment because it “did not tell employees that there would be no union, nor did it refuse to recognize the employees’ Section 7 right to collectively bargain.” (JA 11.) The Board’s decision comports with longstanding precedent. *See, e.g., Capital Cleaning*, 147 F.3d at 1008 (forfeiture because successor refused to hire predecessor employees); *JLL Rest.*, 347 NLRB at 205 (forfeiture because successor told employees there would be no union at its facility). Because the Board’s application of the law to the facts of this case was not “arbitrary or otherwise erroneous,” *Harter Tomato*, 133 F.3d at 937, it should be upheld.

As the Teamsters’ and Laborers’ failure to cite a single case to the contrary shows, the Board does not usually apply forfeiture to cases like this one where the successor favors one union over another. Indeed, as the Teamsters and Laborers acknowledge (LTBr. 22), in *Burns* itself, the successor provided unlawful assistance to another union but was not required to forfeit its right to set initial employment terms. *Burns*, 406 U.S. at 276, 294-96. In subsequent cases, the Board has reached the same conclusion. *See, e.g., Dean Transp., Inc.*, 350 NLRB 48, 61 (2007) (successor ordered to recognize incumbent union and cease giving effect to collective-bargaining agreement reached with non-incumbent union, but not ordered to reinstate prior terms and conditions), *enforced*, 551 F.3d 1055 (D.C. Cir. 2009); *Planned Bldg. Servs., Inc.*, 318 NLRB 1049, 1049 & n.4 (1995)

(successor had right to set initial employment terms despite providing unlawful assistance to another union, among other violations); *Reliable Trailer & Body*, 295 NLRB 1013, 1019-20 (1989) (same). The Teamsters and Laborers attempt to distinguish *Reliable Trailer* because the employer there had an arguable claim that its preexisting collective-bargaining agreement could be lawfully extended to other employees (LTBr. 23). But Stein’s conduct here is similar and also based on a belief—though ultimately incorrect—that it was bargaining with the union that “represented a majority of the employees in what it considered to be an appropriate bargaining unit.” (JA 11.)

Because Stein bargained with the union it believed represented a majority of employees in what it considered to be an appropriate unit, Stein “did not engage in the kind of wholesale repudiation of employees’ Section 7 rights that occurred in *Advanced Stretchforming*.” (JA 11.) The Board, therefore, properly found the circumstances to be analogous to *Burns*, rather than *Advanced Stretchforming*, and did not abuse its discretion by finding that Stein retained its right to set the initial terms and conditions of employment. (JA 12.)¹⁸

¹⁸ The Board did not create a new bright line rule as the Unions claim. (LTBr. 21.) The Board recognized that it has not applied forfeiture to situations like this in the past, and it was unwilling to do so here. *See Planned Bldg. Servs.*, 318 NLRB at 1049 & n.4.

B. The Board Acted Within Its Broad Remedial Discretion by Declining To Order Stein To Reimburse the Teamsters' and Laborers' Pension Funds

Section 10(c) of the Act authorizes the Board, upon finding an unfair labor practice, to order the violator “to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of [the Act].” 29 U.S.C. § 160(c). A reviewing court must enforce the Board’s choice of remedy unless the challenging party shows “that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943); accord *United Food & Commercial Workers Union v. NLRB*, 447 F.3d 821, 827 (D.C. Cir. 2006).

The underlying policy of Section 10(c) is “a restoration of the situation, as nearly as possible, to that which would have obtained” but for the unlawful conduct. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). The Supreme Court has described the Board’s power to order make-whole relief, in particular, as a “broad, discretionary one, subject to limited judicial review.” *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964). Accord *Federated Logistics & Ops. v. NLRB*, 400 F.3d 920, 934 (D.C. Cir. 2005). Here, the Board acted well within its remedial discretion by declining to order Stein to reimburse the pension funds of the Teamsters and Laborers.

As explained above, the Board, in disagreement with the administrative law

judge, found that Stein did not forfeit its right to set the initial terms and conditions of employment. Instead, the Board found that Stein retained that right and exercised it on November 9 when it distributed a handout listing new employment terms and directing employees to speak to the Operating Engineers about their pension benefits. (JA 12; JA 741.)

Consistent with that finding, the Board deleted paragraph 9 from the judge's conclusions of law. That paragraph stated that Stein forfeited its right and violated the Act by applying the terms of the Operators' collective-bargaining agreement to the Teamsters' and Laborers' units and by unilaterally changing the existing terms and conditions of employment, including discontinuing pension fund contributions to the Teamsters' and Laborers' pension funds. (JA 12-13, 35, 43, 65.) The Board then amended the judge's recommended remedy so as not to require Stein to retroactively restore the preexisting terms and conditions of employment found in the Teamsters' and Laborers' collective-bargaining agreements with predecessor TMS. (JA 12-13, 35, 43, 65.) Instead, it ordered Stein to rescind any departures from the terms and conditions of employment that existed immediately prior to its unlawful recognition of the Operating Engineers, should the Teamsters and Laborers request it to do so.¹⁹ (JA 14, 44.) The terms that existed immediately

¹⁹ The Board found that Stein recognized the Operating Engineers on December 22 when it entered a collective-bargaining agreement with them. (JA 9 & n.5, 40 &

prior to its unlawful recognition of the Operating Engineers included the initial terms and conditions of employment established by Stein in the November 9 handout. (JA 13, 43.)

To the extent the Teamsters and Laborers argue, apart from the forfeiture doctrine, 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, that claim is not properly before the Court. (LTBr. 24-26.) The Teamsters and Laborers never presented that argument to the Board; accordingly, Section 10(e) of the Act bars the Court from considering it. 29 U.S.C. §160(e) ("no objection that has not been urged before the Board. . . shall be considered by the Court" absent extraordinary circumstances). Because the Board sua sponte rejected the pension reimbursement remedy, the Teamsters and Laborers needed to file a motion for reconsideration with the Board to claim a remedial error. *Nova Se. Univ. v. NLRB*, 807 F.3d 308, 316 (D.C. Cir. 2015). By failing to do so, they deprived this Court of jurisdiction to consider their challenge to the Board's remedy. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (Section 10(e) of the Act precludes court of appeals from reviewing claim not raised to the Board).²⁰

n.5.)

²⁰ In addition, no party raised the issue of pension fund reimbursement in the

In any event, by declining to require reimbursement, the Board has not abused its remedial discretion. As the Board has previously explained, where a successor retains its *Burns* right to set initial employment terms, it is “immaterial” that some of the terms offered were benefits provided by a union that the employer “could not lawfully impose” on the employees. *Harbor Cartage, Inc.*, 269 NLRB 927, 928 (1984). Stein retained the right to set terms, those terms included changes to pension benefits, and the employees agreed to those terms by accepting employment. (JA 741.) Had Stein “offered such terms or similar ones without regard to an agreement with [the Operating Engineers], it would have been free to do so under the principles of *Burns* and its progeny.” *Id.* Stein’s liability, therefore, is limited to reimbursement of dues unlawfully withheld from employees’ pay. *Id.* See also *Ford Motor Co.*, 367 NLRB No. 8, slip op. at 5, 15 (Board did not order make-whole remedy for loss of pension where successor failed to recognize incumbent union).

Thus, the Board did not “ignore[] Stein’s entire course of conduct” as the Teamsters and Laborers argue. (LTBr. 25-26.) Rather, it followed the dictates of *Burns*, under which a successor employer having announced changes in terms and

proceedings before the administrative law judge or the Board. Should the Court agree with the Teamsters and Laborers that Stein forfeited its right to set initial terms, Stein would be required to reimburse the pension funds as described in the judge’s recommended order. (JA 36, 65.)

conditions of employment upon hiring retains the right to set those terms. *Burns*, 406 U.S. at 276, 294-96. As an ordinary *Burns* successor, Stein did not “incur[] any backpay liability beyond that which is required to reimburse its drivers for the membership dues” it unlawfully deducted. *Harbor Cartage*, 269 NLRB at 928. *See also Capital Cleaning*, 147 F.3d at 1012 (cautioning that Board Orders should be remedial rather than punitive).

CONCLUSION

The Board respectfully requests that the Court deny the petitions for review and enforce the Board's Orders in full.

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National Labor Relations Board
February 2021

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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v.)	
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)	20-1078, 20-1083,
and)	20-1091, 20-1097,
)	20-1098
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18)	
)	
Petitioner/Cross-Respondent)	
and)	
)	
LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 534,)	
)	
Petitioner/Intervenor)	
and)	
)	
TRUCK DRIVERS, CHAUFFEURS & HELPERS LOCAL UNION NO. 100, A/W THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS)	
)	
Petitioner)	
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), the Board certifies that its brief contains 15,598 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 365. This

document also complies with the typeface requirements of FRAP 32(a)(5)(A) and the type-style requirements of FRAP 32(a)(6).

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Dated at Washington, DC
this 5th day of February 2021

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TRUCK DRIVERS, CHAUFFEURS & HELPERS LOCAL)	
UNION NO. 100, A/W THE INTERNATIONAL)	
BROTHERHOOD OF TEAMSTERS)	
)	
Petitioner)	

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 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 using the appellate CM/ECF system. I further

certify that the foregoing document was served on all the parties or their counsel of record through the CM/ECF system.

/s/David Habenstreit

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Dated at Washington, DC
this 5th day of February 2021

ADDENDUM A

STATUTORY AND REGULATORY ADDENDUM

STATUTORY AND REGULATORY ADDENDUM
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THE NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (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 of the Act (29 U.S.C. § 158) provides in relevant part:

- (a) 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.
 - (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;

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

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

(b) 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: 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; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(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.

(f) 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 section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor

organization has not been established under the provisions of section 9 of this Act 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 section 8(a)(3) of this Act: 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 9(c) or 9(e).

Section 9 of the Act (29 U.S.C. § 159) provides in relevant part:

(a) 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) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, 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 votes 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.

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six- month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or

amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28, United States Code.

(c) The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act [subchapter]: Provided, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2) [subsection (a)(1) or (a)(2) of section 158 of this title], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or

within such further period as the Board may authorize, such recommended order shall become the order of the Board and become affective as therein prescribed.

(e) 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 proceeding, as provided in section 2112 of title 28, United States Code. 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 question 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) 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) of this section, 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.

THE BOARD'S RULES AND REGULATIONS

29 C.F.R. § 102.15. Complaint. When and by whom issued; contents; service.

After a charge has been filed, if it appears to the Regional Director that formal proceedings may be instituted, the Director will issue and serve on all parties a formal complaint in the Board's name stating the alleged unfair labor practices and containing a Notice of Hearing before an Administrative Law Judge at a fixed place and at a time not less than 14 days after the service of the complaint. The complaint will contain:

(a) A clear and concise statement of the facts upon which the Board asserts jurisdiction, and

(b) A clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of Respondent's agents or other representatives who committed the acts.