

**ORAL ARGUMENT SCHEDULED ON 03/11/2021**

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

IN THE

United States Court of Appeals  
For the District of Columbia CircuitTHE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18,  
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,  
Respondent/Cross-Petitioner,

and

STEIN, INC.,

Petitioner/Cross-Respondent

and

TRUCK DRIVERS CHAUFFEURS &amp; HELPERS,

LOCAL UNION NO. 100, affiliated with THE INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS,

Intervenor/Respondent/Cross-Petitioner

and

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA,  
LOCAL NO. 534,Petitioners/Cross-Respondents/IntervenorOn Petition for Review of Decisions and Orders of the National Labor Relations Board and Cross-  
Application for Enforcement**FINAL OPENING BRIEF FOR PETITIONER/CROSS-RESPONDENT,  
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18.**

RESPECTFULLY SUBMITTED,

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## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

### **I. Parties and Amici**

#### **A. Parties, intervenors, and amici who appeared before the National Labor Relations Board, Case No. 09-CA-215131, Case No. 09-CA-219834, Case No. 09-CB-215147**

1. Respondent: Stein, Inc. (“Stein”)
2. Respondent: International Union of Operating Engineers, Local 18 (“Local 18” or “Union”).
3. Charging Party: Laborers’ International Union of North America, Local 534 (“Laborers”).

#### **B. Parties, intervenors, and amici who appeared before the National Labor Relations Board, Case No. 09-CA-214633, Case No. 09-CB-214595,**

1. Respondent: Stein, Inc. (“Stein”)
2. Respondent: International Union of Operating Engineers, Local 18 (“Local 18”).
3. Charging Party: Truck Drivers, Chauffeurs and Helpers Local Union No. 100, a/w International Brotherhood of Teamsters (“Teamsters”).

#### **C. Parties, intervenors, and amici who appeared in this Court**

1. Petitioner/Cross-Respondent: Local 18
2. Respondent/Cross-Petitioner: National Labor Relations Board (“NLRB” or “Board”)
3. Petitioner/Cross-Respondent: Stein
4. Respondent/Cross-Petitioner: Teamsters

## 5. Respondent/Cross-Petitioner/Intervenor: Laborers

### II. Rulings Under Review

The first Board Decision and Order under review is *Operating Engineers Local 18 and Truck Drivers, Chauffeurs and Helpers Local Union No. 100, a/w International Brotherhood of Teamsters*, 369 NLRB No. 11 (2020), Case Nos. 09-CB-214595. This decision was issued on January 28, 2020 by Chairman Ring and Members Kaplan and Emanuel. The rulings, findings, conclusions, and recommended Order affirmed and adopted by the Board were issued by Administrative Law Judge Andrew S. Gollin on January 24, 2019.

The second Board Decision and Order under review is *Operating Engineers Local 18 and Truck Drivers, Chauffeurs and Laborers' International Union of North America, Local 534*, 369 NLRB No. 10 (2020), Case Nos. 09-CB-215147. This decision was issued on January 28, 2020 by Chairman Ring and Members Kaplan and Emanuel. The rulings, findings, conclusions, and recommended Order affirmed and adopted by the Board were issued by Administrative Law Judge Andrew S. Gollin on January 24, 2019.<sup>1</sup>

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<sup>1</sup> The Board's Decisions and Orders will be part of the Deferred Joint Appendix, to be filed pursuant to the Court's July 29, 2020 Brief Scheduling Orders in Case Nos. 20-1050, 20-1083, 20-1097, 20-1098.

### III. Related Cases

The Decisions and Orders under review have not been previously before this Court or any other Court. There are no other related cases on review currently before any courts.

*/s/ Timothy R. Fadel*  
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TIMOTHY R. FADEL (0077531)

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## **I. GLOSSARY**

1. AK (AK Steel Holding Corporation)
2. Middletown (AK's Steel Mill Located in Middleton, Ohio)
3. CBA (Collective Bargaining Agreement)
4. NLRA or Act (National Labor Relations Act)
5. NLRB or Board (National Labor Relations Board)
6. TMS (TMS International, LLC)

## **II. STATEMENT OF JURISDICTION**

Original jurisdiction over this matter was conferred upon the Board under Section 10(a) of the Act, 29 U.S.C. § 160(a). The Board's Decisions and Orders subject to Local 18's Petition for Review were entered on January 28, 2020. Jurisdiction is conferred upon the United States Court of Appeals for the District of Columbia Circuit by Sections 10(e) and (f) of the Act, 29 U.S.C. §§ 160(e) and 160(f).

## **III. STATEMENT OF THE ISSUES**

To the extent they are consistent with the arguments raised herein, the Union adopts the Statement of the Issues contained in Stein's brief.

#### IV. STATUTES AND REGULATIONS

Pertinent statutes and regulations contained in this Brief are attached in an addendum bound to the Brief and located as provided by the foregoing table of contents.

#### V. STATEMENT OF THE CASE

For generations, AK Steel Holding Corporation (“AK”) has owned and operated a steel mill in Middletown, Ohio (“Middletown”). (J.A. at 653-654.) As part of the steelmaking process, Middletown produces a byproduct known as slag which is used in road construction projects. (J.A. at 084-087, 099, 141.) For decades, AK has subcontracted slag reclamation work to third-party service providers. Over the last fifty years, a variety of entities have performed that slag work including, in chronological order: McGraw Construction Co.; International Mill Services, Inc.; Tube City Inc. d/b/a/ Olympic Mill Service; Tube City LLC d/b/a IMS Division Tube City IMS; Tube City LLC; Tube City IMS, LLC; and TMS. (J.A. at 654-655.)

No single witness was able to definitively state when or how Local 18 first negotiated a collective bargaining agreement (“CBA”) covering slag work at Middletown. (J.A. at 303-305.) By some estimates, because the earliest known contractor that performed slag work at Middletown was engaged in the construction industry, the prevailing wisdom within Local 18 was that the first series of CBAs might have been a Section 8(f) pre-hire agreement. *See Ohio Valley Carpenters Dist.*

*Council*, 131 NLRB 854, 856 (1961) (“McGraw is an Ohio corporation with its principal place of business in Middletown, Ohio, engaged in the building and construction business, including work performed by it in constructing additions to the steel mills of the Armco Corporation, hereinafter called Armco, in Middletown, Ohio”). While the genesis of Local 18’s first CBA at Middletown may be a mystery, Local 18’s representational status is not in doubt.

As early as 1999, Local 18 presented Tube City, Inc. d/b/a, Olympic Mill Services - the contractor then performing slag reclamation work at Middletown — with signed authorization cards demonstrating that a majority of the employees operating equipment wished to designate Local 18 as their bargaining representative. (J.A. at 306-308; JA-966.) Armed with those cards, Local 18 demanded voluntary recognition. In response, Tube City, Inc. d/b/a, Olympic Mill Services reviewed the authorization cards submitted by the Union, determined that Local 18 did, in fact, represent a majority of the relevant employees, and agreed to recognize Local 18 as the duly authorized bargaining representative for those employees. (*Id.*)

From the moment it achieved voluntary recognition and continuing until the present day, Local 18 negotiated a continuous series of CBAs covering slag reclamation work at Middletown. (J.A. at 303-304.) For example, Tube City, Inc. d/b/a, Olympic Mill Services would later merge with International Mill Services to form Tube City IMS, which would later become TMS International, LLC (“TMS”),

the slag contractor in place immediately prior to Respondent Stein. As the name and/or identity of each slag contractor changed, Local 18 always ensured that it maintained a valid and unexpired collective bargaining agreements based upon a showing of majority support within each employer's relevant bargaining unit.

In addition to its agreement with Local 18, TMS also maintained separate CBAs with two other unions. Under one agreement, the truckdrivers that transport slag by haul truck were represented by the Teamsters (J.A. at 088-089, 102-103, 173-176; TR 790.) Under another agreement, the laborers that perform site safety, site cleaning, and manual work were represented by the Laborers. (J.A. at 090-094, 104-105, 107-109, 113, 154-155, 158-159, 180; TR 286). Both agreements were set to expire on December 31, 2017.

In the summer of 2017, just prior to the expiration of TMS' agreements with the Teamsters and the Laborers, AK Steel opened up its slag contract to competitive bidding. (J.A. at 657.) In response to this news, Local 18 began procuring signed representation cards from its members then working at Middletown. By late September of 2017, the Union was in possession of signed authorization cards from all 42 of its members employed by TMS. (J.A. at 131, 485; J.A. at 968.) At that time, TMS' slag processing operations also employed 15 Teamsters and 14 Laborers'. (J.A. at 658-660.)

Shortly after gathering authorization cards from its membership, Local 18 learned that Stein – a fierce competitor to TMS - submitted what would become the winning bid for slag work at Middletown. (J.A. at 129.) On October 27, 2017, Stein entered into a slag processing agreement with AK Steel which would become effective at 12:01 a.m. on January 1, 2018. (J.A. at 657.) Upon winning the bid, Stein announced that it would be changing the way TMS operated because it intended to assign work to its employees regardless of their union affiliation. Instead of being siloed into their traditional crafts where only Teamsters drive, only Laborers labor, and only Local 18 members operate equipment, Stein would instead cross-train all employees in all aspects of the slag processing business so that any given employee could perform any task.

On December 31, 2017, the CBA between TMS and the Laborers' and the CBA between TMS and the Teamsters both expired. The following day, Stein began work using 56 of the 71 individuals previously employed by TMS. (J.A. at 660-662.) Of those 56 employees, 34 – a clear majority – were Local 18 members. (J.A. at 661-662.)

Unlike the Laborers and the Teamsters, Local 18's agreement with TMS was still in effect when Stein assumed control of the slag operations at Middletown. In early January of 2018, Local 18 officials presented Stein with authorization cards signed by a majority of employees working at Middletown. (J.A. at 488-489; J.A. at

968.) These cards confirmed that 34 of the employees hired by Stein on January 1<sup>st</sup> designated Local 18 as their bargaining representative. (J.A. at 488-489; JA-968.) After comparing the cards submitted by Local 18 to its roster of employees, Stein voluntarily recognized Local 18 as the duly authorized bargaining representative for all its employees. Local 18 and Stein then promptly negotiated a collective bargaining agreement covering those employees. Under that agreement, the employees working at the facility would no longer be siloed into their own craft-specific jobs but would instead be trained to perform all aspects of the slag reclamation process regardless of traditional craft jurisdiction.

The Laborers and the Teamsters eventually filed a series of unfair labor practice charges with the Board alleging Local 18's acceptance of recognition from Stein as the bargaining representative for all employees performing slag work at Middletown violated the Act. Thereafter, the Board's General Counsel issued a Complaint alleging that, because it did not represent a majority of employees in the units formerly represented by the Laborers and the Teamsters, Local 18 violated both Sections 8(b)(1)(A) and 8(b)(2) of the Act when it: accepted recognition from Stein; bargained with Stein; and subsequently entered into a CBA with Stein that covered all the employees at Middletown. Notably, the Complaint issued by the Board's General Counsel specifically avers that both the Laborers and the Teamsters enjoyed

a Section 9(a) bargaining relationship with TMS (J.A. at 788, 839, 883), thus providing the basis for Stein's purported bargaining obligation as a successor.

In response, the Union argued that Stein was under no obligation to recognize either the Teamsters or the Laborers because there was no evidence that either union ever entered into a Section 9(a) bargaining relationship with TMS based upon a showing of majority support in the relevant bargaining units. Local 18 further argued that, because it was the only Union that ever demonstrated majority support in any unit, including the larger unified unit, Stein was free to recognize it as the bargaining agent for all of its employees at Middletown .

The Board disagreed and found that Stein unlawfully unified the three units previously maintained by TMS and Local 18 unlawfully accepted and effectuated representation of the employees in the unified bargaining unit. In so doing, the Board rejected the Union's claims that the Laborers' and Teamsters' demands to Stein for recognition were themselves unlawful due to the Intervenors' failure to demonstrate that their respective bargaining relationships with the predecessor employer -TMS - were based upon a showing of majority support in their respective units. Pointing to the Supreme Court's decision in *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960), the Board held that any attempt to challenge whether the Intervenors' initial recognition was based upon a showing of majority support within each respective unit is time-barred under the six month statute of limitations period

specified in Sec. 10(b). According to the Board's rationale, the only time anyone could challenge whether the relationship between TMS was based upon Section 9(a) and its attendant showing of majority support was within the first six months after recognition was first extended, whenever that was. The Board further held that the Intervenors initial recognition could not have been under 8(f) because the parties "stipulated that the slag/scrap processing performed at the AK Steel facility is not 'building and construction' work as the terms are used in Sec. 8(f)." This appeal timely followed.

## **VI. SUMMARY OF THE ARGUMENT**

The Board's holding that Section 10(b) of the Act time bars any attempt to challenge whether the Laborers' and Teamsters' initial recognition by TMS was based upon a showing of majority support misses the point. The question is not whether Section 10(b) precludes Local 18 or Stein from asserting that the Laborers' and Teamsters' never established majority support in their own respective units. The question is whether a claim for successor liability can stand in the absence of any evidence of an underlying Section 9(a) bargaining relationship that was the product of free a choice made the majority of employees in the relevant bargaining unit. Binding precedent answers this question in the negative. Local 18 asks the Court to do so as well.

## VII. STANDING

Local 18 was an object of the Board's Decision and Order under review in the Union's Petition. Specifically, the Board adopted the ALJ's recommended Order that Local 18 violated Section 9(a) of the Act.

## VIII. STANDARD OF REVIEW

The Union adopts the Standard of Review contained in the Brief submitted by Stein.

## IX. ARGUMENT

Representational status under Section 9(a) carries "numerous benefits, including a conclusive presumption of majority status during the term of any collective-bargaining agreement." *Colo. Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031 at 1038, 2018 BL 202847 (D.C. Cir. 2018) (quoting *Raymond F. Kravis Center for the Performing Arts, Inc. v. NLRB*, 550 F.3d 1183, 1188, 384 U.S. App. D.C. 77 (D.C. Cir. 2008) (citation omitted)). This is because the "raison d'être of the National Labor Relations Act's protections for union representation is to vindicate the employees' right to engage in collective activity and to empower employees to freely choose their own labor representatives." *Id.* (quoting *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 738-739, 81 S. Ct. 1603, 6 L. Ed. 2d 762 (1961)). The successorship rights doctrine recognizes the important role employee free choice plays in the context of successorship obligations by requiring

the presence of a Section 9(a) bargaining relationship before obligating a successor employer to recognize and bargain with an incumbent union. In *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 287, 92 S. Ct. 1571, 1582, 32 L. Ed. 2d 61, 73 (1972), the Supreme Court stated that “source” of a successor employer’s duty to bargain with the union “is \*\*\* the fact that it voluntarily took over a bargaining unit that was largely intact and that had been *certified* within the past year.” The Board itself has also recognized that a successor’s bargaining obligation “derives from both the specific mandate of Sections 8(a)(5) and 9(a) of the Act that an employer must bargain with ‘representatives *designated or selected for the purposes of collective bargaining by the majority of the employees*[.]’” *Sch. Bus Serv., Inc.*, 312 NLRB 1, 3 (1993), *enfd.*, *Marquez v. McKay*, 46 F.3d 1143 (9th Cir. 1995) (emphasis added).

Given the important role that Section 9(a) status plays in the successorship doctrine, a fundamental precondition to any finding of successorship liability is the existence of a collective-bargaining relationship between an incumbent union and predecessor employer that is based upon a showing of majority support within that unit. Proof of majority support in the successorship context is usually mere *pro forma*. In most instances, the requirement is fulfilled by reference to a certification of representation issued by the Board after a majority of employees select a union as a bargaining representative during a Board supervised election. In other cases, proof of majority support is found by reference to the terms of a collective bargaining

agreement coupled with “strong evidence of employee majority support in the record, such as authorization cards signed by employees[.]” *Colo. Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031, 211 LRRM 3117 (D.C. Cir. 2018). In either instance, the obligation of all employers, including successors, to recognize and bargain[] with a union, reflects the statutory objective \*\*\* to ensure that only unions chosen by a majority of employees enjoy Section 9(a)'s enhanced protections[.]” *Colo. Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031, 1039.<sup>2</sup>

Acknowledging the critical role Section 9(a) status plays in the successorship doctrine, the Complaints issued by the Board’s General Counsel in the underlying administrative proceedings specifically aver that TMS enjoyed a Section 9(a) relationship with the Laborers and the Teamsters. (J.A. at 788, 839, 883). The inclusion of this specific allegation in each Complaint reflects the Board’s long-established policy that the General Counsel maintains the burden of demonstrating Section 9(a) status in cases where there is an allegation that an employer failed to

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<sup>2</sup> “Board-conducted elections provide the most reliable basis for determining whether employees desire representation by a particular union because employees cast their votes ‘under laboratory conditions and under the supervision of a Board agent.’” *Whittier Hosp. Med. Ctr. Advice Memo*, NLRB No. 21-CA-36404, p. 3 (Jan. 4, 2005) (quoting *Dana Corp.*, 341 NLRB 1283, 1283 (2004). Given that “[t]here are no such guarantees of laboratory conditions or impartiality when voluntary recognition is extended based on some other showing of majority support . . . the Board and the courts have long held employers and unions to a strict showing of actual majority support when recognition is granted privately, rather than based on a Board-conducted election.” *Id.*

recognize a union as the bargaining representative. *See Royal Coach Lines, Inc.*, 282 NLRB 1037, 1037, fn. 2 (1987), *enf. denied on factual grounds*, 838 F.2d 47 (2d Cir. 1988). *See also Stoner Rubber Co.*, 123 NLRB 1440, 1445 (1959) (“It is elementary that, in a refusal-to-bargain case, the General Counsel has the burden of proving the union’s majority”).

Here, the record is bereft of any evidence that would suggest, let alone establish, that TMS enjoyed a Section 9(a) relationship with any union at Middletown other than Local 18. (J.A. at 101, 169-170, 200-201, 248, 280, 322, 596.) For its part, the General Counsel argued that Section 9(a) relationship was implied by virtue of the parties’ stipulation that TMS and Stein were not engaged in the construction industry at the Middletown Facility.

ALJ: So as I'm hearing this case, this is not a situation in which there is an argued conversion of an alleged 8(f) relationship to a 9(a) relationship based on contractual language? \*\*\* Is that what I'm hearing from General Counsel?

[Counsel for the General Counsel]: General Counsel's position is that these have been 9(a) relationships from the get-go. They couldn't have been 8(f) relationships. It's not building and construction work.

ALJ: So your argument is that there’s been no conversion or a creation of a 9(a) relationship based on language in a collective bargaining agreement? Your argument [is] it’s not 8(f), and it therefore has to be 9(a), because these entities are not engaged in construction at this particular job site?

[Counsel for the General Counsel]: Correct, yes, Your Honor.

(J.A. at 083; J.A. at 770-785.) Meanwhile, the Teamsters and the Laborers both acknowledged that they did not possess any evidence that would indicate that they were, at any time, recognized under Section 9(a) or otherwise as a result of demonstrating majority support within any unit of employees at the Middletown Facility. (J.A. at 770-785; J.A. at 080-082, J.A. at 246-247.) Neither the Teamsters nor the Laborers produced any union authorization cards demonstrating that any employee desired to be represented by them. Neither presented any CBA language demonstrating that recognition as a bargaining representative was achieved as a result of majority support by the relevant unit. Despite the lack of any evidence that would even suggest the existence of a Section 9(a) bargaining relationship with TMS, the Board determined that that Stein was a *Burns* successor and was therefore obligated to recognize and bargain with the Laborers' and Teamsters'.

Although this Court recognizes “the Board's substantial expertise in evaluating unfair labor practices” and will affirm “the Board's order as long as its factual findings are supported by substantial evidence,” it still requires the Board to ground its analysis in the complete record “and \*\*\* grapple with evidence that ‘fairly detracts from the weight of the evidence supporting [its] conclusion.’” *Colo. Fire Sprinkler, Inc.*, 891 F.3d at 1037-38 (citations omitted). In this case, the Board failed to account for the complete lack of any evidence supporting the existence of a Section 9(a) relationship. While this issue is often an afterthought in most

successorship cases, in this case the existence of a Section 9(a) bargaining relationship is crucial and determinative. That is, it cannot be said that Stein was under any obligation to bargain with the Teamsters and the Laborers as a successor unless there is some proof that the collective bargaining relationship with the predecessor employer – TMS – was based upon Section 9(a) of the Act. *Burns*, 406 U.S. at 287; *Sch. Bus Serv., Inc.*, 312 NLRB at 3. To hold otherwise would ignore the central “premise of the [National Labor Relations] Act \* \* \* to assure freedom of choice and majority rule in employee selection of representatives.” *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 738-739, 81 S. Ct. 1603, 6 L. Ed. 2d 762 (1961).

Here, the Board’s decision that Stein is a *Burns* successor to TMS fails to address the fact that when it comes to establishing the essential element of Section 9(a) representational status, “[n]one of the usual indicia of majority support— authorization cards or votes—was introduced; \*\*\* [and] apparently does not exist.” *Colo. Fire Sprinkler, Inc.*, 891 F.3d at 1040. Nor did the Board grapple with the evidence demonstrating that the CBAs in place between the Intervenors and TMS bore all the hallmarks of 8(f) agreements; *to wit*; both CBAs have long contained exclusive hiring hall provisions applied to the slag reclamation/metal recovery services at the Middletown Facility. (J.A. at 194-195, 241, 347, 355-356, 431, 481, 518, 519, 528-529, 563-565.) Instead of reflecting upon the information contained

in the record and addressing the contrary evidence, the Board simply ignored it. In so doing, the Board failed to adequately consider the issues raised by the parties and the Court should remand for the Board to determine whether the Teamsters or the Laborers can assert a successor relationship with Stein despite the lack of any record evidence establishing a Section 9(a) bargaining relationship.

This Court should also reverse the Board's decision because it arbitrarily applies established law to the facts. The six-month limitation period identified in the Act does not absolve the need to establish the existence of a Section 9(a) bargaining relationship in order for successorship liability to attach. In fact, the six-month limitation period set forth in 29 U.S.C. § 160(b) expressly applies only to the "Complaint." By ruling that the Act's six-month limitations period improperly precludes Local 18 and Stein from asserting the Intervenors lack representational status as a defense to a claim of successor liability, the Board has essentially utilized Section 10(b)'s limitation period to render the Section 9(a) requirement a nullity in the successorship context. That is, by framing the Section 9(a) question as whether Local 18 challenged TMS' initial unlawful recognition within six months of its first occurrence, the Board sidesteps the actual issue of whether a claim for successor liability can stand in the absence of any evidence of an underlying Section 9(a) bargaining relationship.

By applying the Act's limitations provisions to the Section 9(a) successorship requirement, the Board has essentially replaced the General Counsel's burden of proof as it relates to a determinative issue in this case with an irrebuttable presumption that a majority of employees support a union regardless of the evidence supporting that conclusion. In so doing, the Board arbitrarily and capriciously adopts a rule of law that would leave in potentially "careless employer and union hands the power to completely frustrate employee realization of \* \* \* freedom of choice and majority rule in employee selection of representatives." *Garment Workers' Union*, 366 U.S. at 738-739. Indeed, the application of the Act's six-month limitations period to the Section 9(a) element constitutes a failure to engage in reasoned decision making because it does not examine the relevant question of whether employee free choice is being honored and it fails to articulate any explanation for its decision to preclude any examination of the intervenors' Section 9(a) status. The Board's application of the limitation period also ignores the fact that, by specifically alleging the existence of a Section 9(a) bargaining relationship between TMS and the Intervenors, the Complaints issued by the NLRB's General Counsel in this case squarely places Intervenor's Section 9(a) status as one of the issues to be litigated and as an element of the case. The Board's decision also fails to address why the General Counsel should be alleviated of the burden of establishing the elements laid out in its Complaint. Because the Board's decision "entirely fail[s] to consider an

important aspect of the problem" and "offer[s] an explanation for its decision that runs counter to the evidence before the agency", this Court's deferential standard of review no longer applies. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983).

## **X. CONCLUSION AND RELIEF SOUGHT**

The record in this case lacks any evidence to establish that either or both of the Laborers or the Teamsters were, at any time, Section 9(a) representatives – by virtue of Board-certified election or voluntary recognition – for any employees working at Middletown. Absent such evidence, it cannot be said that Stein was a *Burns* successor when it assumed operations at Middletown and was therefore obligated to recognize and bargain with Laborers or the Teamsters. As such, the factual findings underpinning the Board's determination that Local 18 violated the NLRA by accepting recognition from Stein are not supported by substantial evidence in the law. Moreover, the Board has arbitrarily applied established law to the facts. Accordingly, for all of the foregoing reasons, the Board's decisions and orders should be denied enforcement by this Court.

**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed.R.Ap.P. 32(g) Circuit Rule 32(g), I certify this brief complies with the compliance with the type-volume limitations set forth in Fed.R.Ap.P. 32(a)(7), D.C.Cir. Rule 32(a)(7), and this Court's July 29, 2020 Brief Scheduling Orders in Case Nos. 20-1050, 20-1083, 20-1097, 20-1098 because this brief contains 3,928 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(f) and D.C.Cir.R. 32(f).

*/s/ Timothy R. Fadel*  
\_\_\_\_\_  
TIMOTHY R. FADEL (0077531)

**CERTIFICATE OF SERVICE**

I certify that, on February 5, 2021, a copy of the foregoing was electronically filed and served by operation of the Court's CM/ECF system to all parties indicated on the electronic filing receipt.

*/s/ Timothy R. Fadel*  
\_\_\_\_\_  
TIMOTHY R. FADEL (0077531)

**ADDENDUM: STATUTES AND REGULATIONS**

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## 29 U.S.C. § 160. Prevention of unfair labor practices

(a) Powers of Board generally — The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) 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 predominantly 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 subchapter or has received a construction inconsistent therewith.

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable — 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.

(c) Reduction of testimony to writing; findings and orders of Board — 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 back pay, as will effectuate the policies of this subchapter: Provided, That where an order directs reinstatement of an employee, back pay 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 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 back pay, 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 effective as therein prescribed.

(d) Modification of findings or orders prior to filing record in court — Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

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

recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Review of final order of Board on petition to court — Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) 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.

(g) Institution of court proceedings as stay of Board's order — The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) Jurisdiction of courts unaffected by limitations prescribed in chapter 6 of this title — When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by chapter 6 of this title.

(i) Repealed. Pub. L. 98-620, title IV, Sec. 402(31), Nov. 8, 1984, 98 Stat. 3360

(j) Injunctions — The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Hearings on jurisdictional strikes — Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the

Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) Boycotts and strikes to force recognition of uncertified labor organizations; injunctions; notice; service of process — Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: Provided further, That such officer or regional attorney shall not apply for any restraining order under section 158(b)(7) of this title if a charge against the employer under section 158(a)(2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b)(4)(D) of this title.

(m) Priority of cases — Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 158 of this title, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (l) of this section.

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

(a) Exclusive representatives; employees' adjustment of grievances directly with employer — Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

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

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

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

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

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

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

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

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

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

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

(d) Petition for enforcement or review; transcript — Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) Secret ballot; limitation of elections

(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

**29 U.S.C. § 158. Unfair labor practices**

(a) Unfair labor practices by employer — It shall be an unfair labor practice for an employer—

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

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

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

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

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

(b) Unfair labor practices by labor organization — It shall be an unfair labor practice for a labor organization or its agents—

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

membership therein; 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) of this section 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;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or selfemployed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own

employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including

consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) Expression of views without threat of reprisal or force or promise of benefit — The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) Obligation to bargain collectively — For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded

as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) Enforceability of contract or agreement to boycott any other employer; exception — It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

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

(g) Notification of intention to strike or picket at any health care institution — A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.