

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

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

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In The  
United States Court of Appeals  
For the District of Columbia Circuit

THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 18  
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,  
Respondent/Cross-Petitioner,

and

STEIN, INC.,  
Petitioner/Cross-Respondent

and

TRUCK DRIVERS CHAUFFEURS & 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/Intervenor

On Petition for Review of Decisions and Orders of the National Labor Relations  
Board and Cross-Application for Enforcement

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**PETITIONER/CROSS-RESPONDENT INTERNATIONAL UNION OF  
OPERATING ENGINEERS, LOCAL 18'S FINAL REPLY BRIEF**

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### Other Authorities

None

## GLOSSARY

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

## INTRODUCTION AND SUMMARY OF ARGUMENT

In its Brief, the NLRB failed to identify any evidence that the Teamsters or Laborers properly represented a majority of workers in an appropriate bargaining unit; a necessary element in demonstrating that a successor bargaining relationship exists under the NLRA. Instead, the NLRB argues that the burden of proof fell on Local 18 and Stein. Alternatively, the NLRB argues that Local 18 and Stein's challenges to the evidence of majority support are time-barred.

Both arguments are without merit. Indeed, while it is often presumed or stipulated, the presence of Section 9(a) relationship is still a fundamental part of the General Counsel's case. Here, the Board's failure to account for this requirement renders its decision both arbitrary, unreasonable, and contrary to law. Moreover, the Board's statute of limitations arguments are misplaced as NLRA's limitations provision applies to the filing of labor practice charges, and not to challenges of the General Counsel's prima facie case.

### ARGUMENT

#### **A. The Burden of Proof as it Relates to Section 9(a) Status Rests with the NLRB.**

In its brief, the NLRB argues that Section 9(a) bargaining representatives 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." (NLRB's Reply, p.

45.) The Board further argues that the burden of proof is on the “party challenging the incumbent unions’ majority status.” (NLRB’s Reply, p. 46.) While correct, both arguments miss the point.

To begin, in refusal-to-bargain cases, “[t]he initial determination to be made is whether the union charging such a violation qualifies as a bargaining representative.” *NLRB v. Tragniew, Inc.*, 470 F.2d 669, 672 (9th Cir. 1972) (collecting cases). To this end, “[t]he burden rests with the union to establish its status as a majority representative.” *Id.* See also *Stoner Rubber Co.*, 123 NLRB 1440, 1445 (1959); *NLRB v. Dayton Motels, Inc.*, 474 F.2d 328, 331 (6th Cir. 1973). In order to satisfy this initial burden, the proponent must demonstrate either: “Board certification or voluntary recognition by the employer – in a contract, for example.” See, e.g., *Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 766, 399 U.S. App. D.C. 213, 221, 2012 BL 38878, 8 (D.C. Cir. 2012); *NLRB v. Oklahoma Installation Co.*, 219 F.3d 1160, 1163 (10th Cir. 2000).

If the initial burden is met, then the NLRB’s burden-shifting/presumption analysis applies. See, e.g., *Raymond F. Kravis Ctr. for the Performing Arts, Inc. v. NLRB*, 550 F.3d 1183, 1188, 384 U.S. App. D.C. 77, 82, 2008 BL 287422, 3 (D.C. Cir. 2008); *Machinists Lodge 1746 v. NLRB*, 416 F.2d 809, 811, 135 U.S. App. D.C. 53, 55 (D.C. Cir. 1969). But if the initial burden is not met: “The failure of a union to establish its majority status exonerates the employer from charges of refusal to

bargain.” *NLRB v. Tragniew, Inc.*, 470 F.2d 669, 672 (9th Cir. 1972) (collecting cases). Thus, contrary to the Board’s argument, Section 9(a) status is not automatically achieved or presumed, even when a union and an employer execute a collective bargaining agreement containing a recognition clause. Instead, the question of Section 9(a) status must be answered by reference to Board certification or voluntary recognition. *See, e.g., Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 766, 399 U.S. App. D.C. 213, 221, 2012 BL 38878, 8 (D.C. Cir. 2012); *NLRB v. Oklahoma Installation Co.*, 219 F.3d 1160, 1163 (10th Cir. 2000).

Here, the NLRB pointed to no evidence whatsoever showing the General Counsel satisfied its initial burden. Nothing shows that the Teamsters or the Laborers ever properly demonstrated that they represented a majority of the workers in an appropriate bargaining unit as a result of a Board-certified election. Although the record contains collective bargaining agreements, stand-alone collective bargaining agreements, even ones with recognition clauses, cannot prove a Section 9(a) bargaining relationship exists. Moreover, the contracts the General Counsel points to were expired and did not contain any evidence or statement indicating that either union ever demonstrated majority support in the bargaining unit. Accordingly, by failing to address whether the Charging Parties ever enjoyed majority support, 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. *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 639, 431 U.S. App. D.C. 283, 292, 2017 BL 266437, 8 (D.C. Cir. 2017).

**B. The NLRB erroneously applied a limitations period to the defense that the General Counsel failed to meet its burden of proof.**

The NLRB claims that the General Counsel's failure to meet his burden of proof is time-barred because Stein and Local 18 were required to assert the defense decades ago before the charges were filed. (NLRB's Reply, pp. 41-45.) This argument is totally non-sensical and would effectively prevent anyone from challenging the General Counsel's failure to meet his burden of proof as to a Section 9(a) bargaining relationship. By arguing that the Act's six-month limitations period precludes Local 18 from asserting the Intervenors lack representational status as a defense to a claim of successor liability, the Board has essentially utilized the Act's limitation period to render the Section 9(a) requirement a nullity in the successorship context. That is, by framing 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.

Here, the NLRB's argument is based on the limitations provision contained in Section 10(b) of the NLRA, which provides in part: "... 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 . . . .” 29 U.S.C. § 160. This limitations provision plainly applies only to “the filing of complaints with the Board.” *NLRB v. Dayton Motels, Inc.*, 474 F.2d 328, 332-333 (6th Cir. 1973). But the U.S. Supreme Court extended its application to affirmative defenses to avoid the resurrection of “stale unfair labor practice charges.” *Id.*; *Machinists Local Lodge 1424 v. NLRB*, 362 U.S. 411, 424, 428, 431, 438, 80 S. Ct. 822, 4 L. Ed. 2d 832, (1960) (“*Bryan*”). As such, Section 10(b)’s limitations provision does not properly apply when the defense is not used to resurrect any stale unfair labor practice charges but rather to “shed light on the true character of matters occurring within the limitations period.” *Bryan*, 362 U.S. at 416-417; *see also Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531, 539, 356 U.S. App. D.C. 267, 275 (D.C. Cir. 2003) (collecting cases). Such is the case when the defending party is merely “defending itself by challenging the validity of the evidence of voluntary recognition that is the basis of the Board’s complaint.” *Am. Automatic Sprinkler Sys., Inc. v. NLRB*, 163 F.3d 209, 222 fn.6 (4th Cir. 1998).

In this case, there is simply no merit to the NLRB’s statute of limitations argument. Local 18 and Stein were not trying to resurrect any stale claims. They were not trying to prove any unfair labor practice charges or other unlawful activity. They were simply challenging the General Counsel’s evidence.

Respectfully submitted,

Dated: January 15, 2021

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7) and Circuit Rule 32(a), I hereby certify that this Petitioner/Cross-Respondent International Union of Operating Engineers, Local 18's Reply Brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7). The Brief contains 1,244 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B).

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

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 5th day of February, 2021, I filed the foregoing Petitioner/Cross-Respondent International Union of Operating Engineers, Local 18's Reply Brief through this Court's CM/EFT system, which will send an electronic notice of filing to the following:

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