

Nos. 08-60347, 08-60432

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

COASTAL INTERNATIONAL SECURITY, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND
CROSS-APPLICATION FOR ENFORCEMENT OF
AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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STATEMENT REGARDING ORAL ARGUMENT

The Board believes this case involves the application of settled principles of law to largely undisputed facts, making oral argument unnecessary. If argument is held, however, the Board requests that the parties be given equal time to assist the Court in resolving the issues in this case.

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This case is before the Court on the petition of Coastal International Security, Inc. (“Coastal”) to review, and the cross-the application of the National Labor Relations Board (“Board”) to enforce, a Board Order against Coastal. The Board had subject matter jurisdiction over the underlying unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act (“the Act”), 29

U.S.C. §§ 151, 160(a). The Board submits that this Court has jurisdiction over this case under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), because the Board's Order is a final order issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act, 29 U.S.C. § 153(b). (D&O 1 n.3.)¹ Venue in this judicial circuit is proper under Section 10(e) and (f) of the Act because the unfair labor practice occurred in Fort Worth, Texas.

The Board's Decision and Order was issued on March 28, 2008, and is reported at 352 NLRB No. 46, 2008 WL 896074. (D&O 1-9.)² Coastal's petition for review, filed on April 21, 2008, was timely, as was the Board's cross-application for enforcement, filed on May 15, 2008. The Act places no time limitation on such filings.

¹ In 2003, the Board sought an opinion from the United States Department of Justice's Office of Legal Counsel ("the OLC") concerning the Board's authority to issue decisions when only two of its five seats were filled, if the two remaining members constitute a quorum of a three-member group within the meaning of Section 3(b) of the Act. The OLC concluded that the Board had the authority to issue decisions under those circumstances. *See Quorum Requirements*, Department of Justice, Office of Legal Counsel, 2003 WL 24166831 (O.L.C., Mar. 4, 2003).

² Pursuant to Fifth Circuit Rule 30.2, record references in this brief are to the original record on review. References to "D&O" are to the Decision and Order of the Board, which is contained in Coastal's Excerpts of Record. "Tr." refers to the transcript of the unfair labor practice hearing, "GCX" refers to the General Counsel's exhibits, and "RX" refers to Coastal's exhibits. "Br." refers to Coastal's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board's conclusion that Coastal, in violation of Section 8(a)(5) and (1) of the Act, unilaterally changed working conditions established under its predecessor's collective-bargaining agreement by paying newly-hired guards below the contractual wage rate during their initial training period, without giving the Union notice and an opportunity to bargain over the change.

STATEMENT OF THE CASE

Based upon unfair labor practice charges filed against Coastal by the United Government Security Officers of America, Local 2033 ("the Union"), the Board's General Counsel issued a complaint alleging that Coastal unilaterally changed employees' working conditions in violation of Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by paying newly-hired guards \$5.15 per hour, rather than the contractual wage rate, during their initial training period.³ (GCX 1(a)-(f).) Coastal filed an answer denying that its actions violated the Act. (GCX 1(g).)

³ 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). Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7 [of the Act]," which includes employees' "right . . . to bargain collectively through representatives of their own choosing," 29 U.S.C. §§ 158(a)(1), 157. A violation of Section 8(a)(5) results in a
(continued . . .)

An administrative law judge took evidence and heard arguments during a one-day hearing on October 18, 2007. (D&O 1-9.) Shortly thereafter, the judge issued a decision finding that Coastal violated Section 8(a)(5) and (1) of the Act as alleged in the complaint. (*Id.*)

The Board (Chairman Schaumber and Member Liebman) affirmed the judge's rulings, findings, and conclusions and adopted his recommended order. (D&O 1.) The Board's findings of fact, along with its Decision and Order, are summarized below.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. **Background: The Federal Government Hires a Series of Firms To Provide Security Services; Those Firms Consistently Pay Newly-Hired Guards the Contractual Wage Rate During Their Initial Training Period**

The United States General Services Administration ("GSA") contracts with private firms to provide security guards for federal buildings in the Fort Worth, Texas area. (D&O 2; Tr. 148-49.) GSA has awarded that contract to a series of different firms over the years. As is common in the security industry, each successful bidder for the contract has typically hired the security guards who were

derivative violation of Section 8(a)(1). *See Electrical Mach. Co. v. NLRB*, 653 F.2d 958, 960 (5th Cir. 1981).

employed by the preceding contractor, thus creating continuity in the security workforce from one contract to the next. (D&O 2; Tr. 26-34.)

In 2000, the Fort Worth-area GSA contract was held by the security firm Sooner Process and Investigation (“Sooner”). (D&O 2; Tr. 26.) Sooner required newly-hired guards to undergo an initial training period, typically lasting 4 to 6 weeks, before they obtained the necessary credentials to perform security-guard duties under the GSA contract. (D&O 2; Tr. 26-28.) During that brief training period, the guards received the same hourly wage as those who were already performing their security duties at a GSA post. (*Id.*)

While Sooner continued to perform under the GSA contract, the Union began representing its guards as their collective-bargaining agent. (D&O 2; Tr. 28-29.) Sooner and the Union then negotiated a collective-bargaining agreement. Under that agreement, Sooner continued to pay newly-hired guards undergoing training at the same rate it paid guards serving at a GSA security post. (D&O 2; Tr. 29-30.)

In 2001, GSA awarded the Fort Worth-area security contract to another firm, Security Consultants, Inc. (“Security Consultants”). (D&O 2; Tr. 29-30.) Having hired many of Sooner’s former security guards, Security Consultants recognized the Union as their representative. (D&O 2; Tr. 31.) It also decided to adhere to the terms of the predecessor’s collective-bargaining agreement, including Sooner’s

practice of paying newly-hired guards at the contractual rate during their training period. (*Id.*)

Later, in September 2001, Security Consultants and the Union negotiated a new agreement. (D&O 2; Tr. 32, GCX 2.) That agreement defined the unit of employees represented by the Union as follows:

all security officers as defined in Section 9(b)(3) of the National Labor Relations Act, as amended, employed by the company under the GSA security services contract #GS-7P-00-HHD-0035 or any successor contract, in Fort Worth, TX, and surrounding areas

(GCX 2-Art. III § 1.) The same provision explicitly excludes from the bargaining unit “all office clerical employees, professional employees, and supervisors as defined in the Act.” (*Id.*) Under the collective-bargaining agreement with Security Consultants, guards undergoing their initial training period continued to be paid at the contractual wage rate, and their seniority was measured from the start of their training period. (D&O 2; Tr. 43-47, 55.)

**B. GSA Awards the Fort Worth Security Contract to Coastal;
Coastal Hires the Predecessor’s Guards and Expressly
Adopts Its Collective-Bargaining Agreement with the Union**

In December 2003, Coastal became the next firm to successfully bid on the GSA contract. (D&O 2; Tr. 154.) Before assuming the contract, Coastal hired all of Security Consultants’ guards who applied for work. (D&O 2; Tr. 47-48.) Coastal gave those guards no indication that it planned to change the terms or

conditions of employment they enjoyed under their collective-bargaining agreement with Security Consultants. (*Id.*)

Coastal began performance on the GSA contract in April 2004. (D&O 2; Tr. 34.) A short while later, on July 30, 2004, Coastal expressly adopted the collective-bargaining agreement between Security Consultants and the Union. (D&O 2; GCX 3.) Specifically, Coastal and the Union signed a letter of agreement providing for an increase in the guards' hourly wage and benefit payments and declaring that "[a]ll other provisions, terms[,] and conditions" of Security Consultants' collective-bargaining agreement "shall continue in full force and effect." (*Id.*) Coastal and the Union extended that arrangement for another year when, in June 2005, they signed a letter of agreement instituting further pay increases and otherwise agreeing that "[a]ll other provisions, terms[,] and conditions" of the existing agreement "shall continue in full force and effect." (D&O 2; GCX 5.)

C. The Union Discovers that Coastal Is Paying the Minimum Wage to Newly-Hired Guards During Their Initial Training Period; It Files a Contractual Grievance and Complains to the Board and Another Government Agency

Beginning with a class of guards it trained before assuming the GSA contract, Coastal instituted a practice of paying newly-hired guards the Federal minimum wage of \$5.15 per hour during their time in training. (D&O 2; GCX 14, Tr. 157.) Coastal did not inform the Union of this practice—either at the time it

began, or at the time Coastal assumed control of the GSA contract. (D&O 2; Tr. 35.) Instead, Union officials learned of it only after speaking with the newly-hired guards after they had completed their training. (*Id.*)

On September 9, 2004, the Union filed a grievance on behalf of “all new hire personnel,” protesting that they were being paid minimum wage instead of rates established in the collective-bargaining agreement. (D&O 2; GCX 8.) The Union also lodged complaints with two government agencies. First, it filed an unfair labor practice charge with the Board alleging that Coastal’s payment of the lower wage to guards during their initial training period was a unilateral change in working conditions in violation of the Act. (D&O 2; GCX 1(a).) Second, it filed a complaint with the U.S. Department of Labor alleging that Coastal’s actions violated the Service Contract Act, 41 U.S.C. §§ 351-58 (“SCA”).⁴ (D&O 2; Tr. 53.)

⁴ Congress enacted the SCA to prevent government service contractors from underbidding one another by cutting their employees’ wages or fringe benefits. *See Fort Hood Barbers Ass’n v. Herman*, 137 F.3d 302, 309 (5th Cir. 1998). To that end, the SCA directs the Secretary of Labor to issue special minimum wage orders, called “wage determinations,” for each class of service worker employed in a particular locality, and it forbids contractors from paying less than the applicable wage determinations. 41 U.S.C. § 351(a)(1). In addition, the SCA prohibits a successor contractor from paying its employees less than the wage rates provided in the predecessor’s collective-bargaining agreement. *Id.* § 353(c). The failure of a contractor to comply with the SCA and its concomitant regulations may result in the Department of Labor’s imposing monetary liability for overdue wages and debarring the contractor from future government contracts. *Id.* § 354(a).

The Board conducted an initial investigation of the Union's charge. (D&O 3; GCX 18.) Upon learning that the charge's allegations were also the subject of a pending contractual grievance, the Board followed its longstanding policy of deferring unfair labor practice proceedings until the grievance process had run its course.⁵ (*Id.*) Pursuant to that policy, the Board's decision to defer was contingent on Coastal's agreeing to waive any procedural barriers to the processing of the grievance to arbitration. (*Id.*)

The Department of Labor pursued its investigation of the Union's SCA complaint. After reviewing pay records submitted by Coastal, the Department informed Coastal of its determination that "14 employees were underpaid in the amount of \$32,286.65 . . . as a result of not paying according to the Wage Decisions, incorporating a collective bargaining agreement, included in the Contract for certain training time." (D&O 2; RX 1.) Then, on November 22, 2005, the Department notified Coastal that it was requesting that GSA withhold contract payments "to satisfy the back wage finding." (*Id.*) Shortly thereafter, Coastal issued a check to the Department of Labor for the full amount of back wages due. (*Id.*)

⁵ See *NLRB v. Columbus Printing Pressmen Union No. 252*, 543 F.2d 1161, 1167 (5th Cir. 1976); *Collyer Insulated Wire*, 192 NLRB 837 (1971).

D. Coastal Continues its Practice of Paying Newly-Hired Guards Below the Contractual Wage Rate; After Coastal Refuses To Arbitrate the Union's Grievance, the Board Issues a Complaint

Notwithstanding the Union's grievance, or its complaints to the Board and the Department of Labor, Coastal continued to pay newly-hired guards the Federal minimum wage during their initial training period. (D&O 3; GCX 11 & 14, Tr. 71.) On February 1, 2005, the Board asked the parties to report on the status of the Union's grievance. Coastal's representative noted that no further action had been taken on the grievance; the Union's representative informed the Board that the Union desired "to go to arbitration." (D&O 3; GCX 20, RX 4.) Shortly thereafter, the Union sent Coastal a formal demand for arbitration of its grievance. (D&O 3; RX 4.) In response, Coastal asserted that the arbitration request was invalid both because the Union had not filed another grievance in response to the Board's deferral decision and because the Union had not followed the steps of the contractual grievance procedure. (D&O 3; GCX 17, RX 5.)

The Union filed two additional grievances in December 2005—one relating to the payment of minimum wage to guards in training, and the other relating to the calculation of those guards' seniority dates. (D&O 3; GCX 9 & 10.) The grievances continued through the contractual grievance procedure, and, on March 28, 2006, the parties held a pre-arbitration conference call. (D&O 3-4; Tr. 86-90.) During that call, Coastal claimed that it had been required to pay the back wages

by the Department of Labor only because of “a clerical error.” (*Id.*) Coastal also asserted that, during their initial training periods, guards were not subject to the wage rates of the collective-bargaining agreement because they were not Coastal employees. (*Id.*) Later, in an exchange of emails, Coastal’s representative asserted that Coastal did not “recognize [the Union’s] claim to represent [the trainees] or [its] ability to file grievances on their behalf.” (D&O 4; GCX 16.) Coastal therefore declared that it would not process the Union’s grievances any further. (*Id.*)

The parties’ letter of agreement adopting the prior collective-bargaining agreement expired in September 2006. (D&O 2; GCX 5.) Although Coastal and the Union negotiated a new agreement, GSA awarded the security contract to another firm, and Coastal ceased performing services for GSA in the Fort Worth area in early October 2006. (D&O 2; GCX 6, Tr. 129-30.) The Board’s General Counsel revoked its earlier deferral of the Union’s unfair labor practice charge and, on May 29, 2007, issued the instant complaint against Coastal. (D&O 4; GCX 1(e).)

II. THE BOARD’S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board found that Coastal, as a successor to Security Consultants, violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1) by unilaterally changing employees’ working conditions by

paying newly-hired guards \$5.15 per hour, rather than the contractual wage rate, during their initial training period. (D&O 1.) The Board's Order requires Coastal 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 their statutory rights. (*Id.* at 8.) Affirmatively, the Board's Order requires Coastal to make its employees whole for any losses resulting from its unlawful unilateral changes. (*Id.*) The Board's Order also requires Coastal to post copies of a remedial notice. (*Id.*)

SUMMARY OF ARGUMENT

Coastal admits that it is a successor employer under the Act. Like many successor employers, Coastal decided, not only to recognize and bargain with the Union, but also to expressly adopt its predecessor's collective-bargaining agreement without relevant modifications. Having exercised that option, Coastal was bound to follow its predecessor's working conditions and to bargain with the Union before implementing any changes to the status quo.

The Board found that Coastal violated Section 8(a)(5) and (1) of the Act by unilaterally deciding that it would pay guards undergoing their initial training below the contractual wage rate—contrary to its earlier commitment to maintain the working conditions established by its predecessor. The Board has reasonably construed the Act to require an employer in Coastal's position to follow both the

express terms of an adopted agreement and any longstanding past practices under that agreement. In addition, substantial evidence supports the Board's finding that Coastal departed from an established practice of paying guards the contractual wage rate during their initial training period.

Notwithstanding its clear-cut and largely undisputed violation of the Act, Coastal advances a host of arguments for why its conduct should be deemed lawful. Those arguments are all unavailing.

First, contrary to Coastal's assertions, the unit of employees represented by the Union includes newly-hired guards who are undergoing their initial training period. As such, Coastal could not change their compensation without first bargaining with the Union. The Board's conclusion in that regard is supported by the provisions of the Act dealing with collective-bargaining units containing guards, by the provisions of the adopted collective-bargaining agreement, and by the indisputable past practice of Coastal's predecessors.

Second, because Coastal expressly adopted its predecessor's collective-bargaining agreement, it forfeited any right it otherwise had to set the wage rate of trainees as an initial term of employment. In any event, a successor's ability to set initial terms under the Act does not extend to Coastal's attempts to redefine an existing bargaining unit or to changes in working conditions made without notification to the Union or the employees.

Finally, Coastal is simply wrong to contend that the Board was an improper forum for adjudicating this dispute. This case is not a mere contract dispute, but rather an action to enforce the duties of a successor employer under Act. In addition, Coastal cannot be heard to complain that this case was litigated before the Board, when Coastal refused to arbitrate the Union's grievance challenging the unilateral changes. Therefore, it was entirely proper for the Board to assert jurisdiction and find that Coastal's actions constituted an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act.

STANDARD OF REVIEW

This Court's role in reviewing the Board's Order is limited. On factual matters, the Board's findings must be upheld if they are supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e). In making that evaluation, this Court will "not make credibility determinations or reweigh the evidence." *NLRB v. Allied Aviation Fueling of Dallas LP*, 490 F.3d 374, 378 (5th Cir. 2007) (per curiam). Nor will it displace the Board's choice between two fairly conflicting views of the evidence, even it "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).

By virtue of the Board's specialized expertise in labor law, its legal interpretations of the Act receive deference so long as they are "reasonably

defensible.” *NLRB v. Superior Prot., Inc.*, 401 F.3d 282, 287 (5th Cir. 2004); accord *J. Vallery Elec., Inc. v. NLRB*, 337 F.3d 446, 450 (5th Cir. 2003). “Stated another way, as an administrative agency, [the Board] is entitled to the deference announced by the Court in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).” *Trencor, Inc. v. NLRB*, 110 F.3d 268, 279 (5th Cir. 1997). The Board’s legal rulings in areas outside the Act, as well as its interpretations of labor contracts, are subject to plenary review. See *Strand Theatre of Shreveport Corp. v. NLRB*, 493 F.3d 515, 518 (5th Cir. 2007).

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S CONCLUSION THAT COASTAL, IN VIOLATION OF SECTION 8(a)(5) AND (1) OF THE ACT, UNILATERALLY CHANGED WORKING CONDITIONS ESTABLISHED UNDER ITS PREDECESSOR’S COLLECTIVE-BARGAINING AGREEMENT BY PAYING NEWLY-HIRED GUARDS BELOW THE CONTRACTUAL WAGE RATE DURING THEIR INITIAL TRAINING PERIOD, WITHOUT GIVING THE UNION NOTICE AND AN OPPORTUNITY TO BARGAIN OVER THE CHANGE

The basic command of Section 8(a)(5) and (1) of the Act is that an employer must recognize and bargain with a labor organization selected by a majority of its employees. *NLRB v. Pinkston-Hollar Constr. Servs., Inc.*, 954 F.2d 306, 310 (5th Cir. 1992). That obligation extends to an employer who acquires a unionized business and is found to be a “successor employer” to the predecessor. *NLRB v. Burns Int’l Sec. Servs.*, 406 U.S. 272, 287-88 (1972). A successor employer is one who “makes a conscious decision to maintain generally the same business and to

hire a majority of its employees from the predecessor,” and the imposition of an obligation to bargain follows from the new employer’s intention “to take advantage of the trained work force of its predecessor.” *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 (1987); *see also NLRB v. Houston Bldg. Servs., Inc.*, 936 F.2d 178, 180-81 (5th Cir. 1991) (“*HBS I*”).

As Coastal admits (Br. 39), it is a successor employer under the Act. Like many successor employers, Coastal decided, not only to recognize and bargain with the Union, “but also to observe the pre-existing contract rather than to face uncertainty and turmoil.” *Burns*, 406 U.S. at 291. When an employer such as Coastal exercises that option—either by expressly adopting its predecessor’s agreement or by holding itself out as if it will do so—it must adhere to that agreement and bargain with the union before implementing any changes to the status quo. *See NLRB v. Houston Bldg. Servs., Inc.*, 128 F.3d 860, 864 n.6 (5th Cir. 1997) (“*HBS II*”); *NLRB v. Amateyus, Ltd.*, 817 F.2d 996, 998 (2d Cir. 1987). A change in working conditions made without bargaining violates Section 8(a)(5) and (1) of the Act.⁶ *HBS II*, 128 F.3d at 864 n.6.

⁶ By contrast, if a successor does not adopt the predecessor’s collective-bargaining agreement, it generally will not be bound to follow it. *Burns*, 406 U.S. at 282-90. Instead, such an employer can “institute its own initial terms and conditions of employment by giving the employees prior notice of its intention.” *HBS II*, 128 F.3d at 864 n.6. Once those initial terms are in place, however, the employer must bargain over subsequent changes in working conditions. *Id.*

The Board found that Coastal violated its obligations under Section 8(a)(5) and (1) by unilaterally deciding that it would pay guards undergoing their initial training below the contractual wage rate—contrary to an earlier commitment to maintain the working conditions established by its predecessor. The Board has reasonably construed the Act to require an employer in Coastal’s position to follow both the express terms of an adopted agreement and any longstanding past practices under that agreement. In addition, substantial evidence supports the Board’s finding that Coastal departed from an established practice of paying guards the contractual wage rate during their initial training period. Thus, as we now show, the Board is entitled to enforcement of its Order finding that Coastal violated Section 8(a)(5) and (1) of the Act.

A. The Board Reasonably Concluded that Coastal Obligated Itself To Follow the Terms of Its Predecessor’s Agreement, as Well as Any Established Past Practices Under that Agreement

In both word and deed, Coastal manifested its intention to be bound by the working conditions that its employees enjoyed under their collective-bargaining agreement with Coastal’s predecessor. That is demonstrated, first, by its conduct when hiring the guards who had previously worked for Security Consultants. As Coastal admits (Br. 39 n.11), it offered employment to all the incumbent guards who applied for a position, thereby “cho[*o*]s[*ing*] to rehire a workforce that had grown accustomed to new owners adopting the collective bargaining arrangements

of former employers.” *HBS I*, 936 F.2d at 181. The Board reasonably found that Coastal said nothing to those guards during the hiring process indicating that jobs were being offered on different terms. (D&O 2; Tr. 47-48.) Coastal’s silence on that account communicated to employees that it would maintain the same working conditions as its predecessor. *See HBS I*, 936 F.2d at 180. In other words, Coastal “did nothing to combat the impression that any reasonable employee would have in these circumstances that the ‘new’ job merely was a continuation of the old.” *Id.*

Second, and far more crucially, Coastal expressly adopted the collective-bargaining agreement of its predecessor, without any relevant changes. In 2004, shortly after it began performing the GSA contract, Coastal and the Union signed a letter of agreement declaring that, apart from an agreed increase in the employees’ hourly wage and benefit payments, “[a]ll other provisions, terms[,] and conditions” of the predecessor’s collective-bargaining agreement were to “continue in full force and effect.” (GCX 3.) The parties renewed that arrangement the following year with another letter of agreement, which extended terms of the predecessor’s collective-bargaining agreement until September 2006. (GCX 5.) The only changes those letters of agreement made to the employees’ compensation were to increase—rather than decrease—the pay and benefits they enjoyed under the predecessor’s contract. (D&O 2; GCX 3 & 5.)

Based on Coastal's adoption of its predecessor's agreement, the Board reasonably concluded that Coastal was bound to follow the express terms of that agreement, as well as any longstanding past practices under it. (D&O 7.) As this Court has observed, "[w]here a collective bargaining agreement embodies a particular working condition and past practice demonstrates that an employer had administered that working condition in a particular manner, the employer is forbidden from changing that condition unilaterally." *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 853 (5th Cir. 1986); *see also United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960) (noting that the "practices of the . . . shop" are "equally a part of the collective bargaining agreement" even if "not expressed in it"). And, when a successor employer commits to following the working conditions established by its predecessor, the obligation to observe past practice remains in force.⁷ *See, e.g., NLRB v. Pepsi-*

⁷ Coastal makes a half-hearted effort to maintain (Br 39 n.11) that it "does not concede that it was a 'perfectly clear' successor on the GSA contract." *Cf. Burns*, at 294-95 ("[T]here will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms."). Coastal relegates that contention to a single footnote devoid of any developed argument or supporting authority. An argument so inadequately presented should be treated as waived. *See United States v. Torres-Aguilar*, 352 F.3d 934, 936 n.2 (5th Cir. 2003); *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 356 n.7 (5th Cir. 2003). At any rate, Coastal's status as a "perfectly clear" successor is beside the point, since its obligation to
(continued . . .)

Cola Distrib. Co., 646 F.2d 1173, 1175-76 (6th Cir. 1981) (holding that a successor that assured the union and employees that their pay structure would remain the same was bound to follow the predecessor's practice of conferring Christmas bonuses—even though the successor was previously unaware of the practice, and the practice was not expressly set forth in the predecessor's collective-bargaining agreement); *Rosdev Hospitality*, 349 NLRB No. 20, slip op. at 2 (2007) (holding that an employer that bound itself to follow its predecessor's working conditions must observe the predecessor's established practice of granting seniority on a more generous basis than required by the literal terms of the collective-bargaining agreement). Thus, the Board reasonably determined that Coastal could not unilaterally alter the existing working conditions—whether they were established by the collective-bargaining agreement itself or by the predecessor's past practice—without violating Section 8(a)(5) and (1).

B. Substantial Evidence Supports the Board's Conclusion that Payment of the Contractual Rate to Newly-Hired Guards During Their Initial Training Was an Established Working Condition and that Coastal Violated the Act by Unilaterally Changing that Practice

Employees' wages are at the very heart of the collective-bargaining process and therefore fall squarely in the category of working conditions that an employer

adhere to the existing working conditions arises from its adoption of the predecessor's collective-bargaining agreement. *See Burns*, 406 U.S. at 291.

must maintain until a new agreement is made or negotiations run their course. *See Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982) (holding Section 8(a)(5) requires an employer to bargain over changes in employees' compensation). Here, the Board reasonably found that payment of the contractual rate to newly-hired guards during their initial training was established by both the adopted agreement itself and the past practice of Coastal's successors. That being so, Coastal's admitted departure from that practice without negotiating with the Union violated the Act.

Substantial evidence supports the Board's finding (D&O 7) that the status quo prior to Coastal's actions was to pay newly-hired guards the contractual rate during their training period. Indeed, that practice was well grounded in the terms of the adopted agreement. The article of the agreement dealing with wages mandates a single rate of pay for guards, and it expressly provides that "new hire and incumbent personnel" will receive the contractual rate during training. (D&O 5; GCX 2-Art. XV §§ 1-2.)

Furthermore, the payment of the contractual wage rate during initial training was firmly established in past practice. At least as early as 2000—that is, even *before* the Union began representing the guards who worked on the Fort Worth-area GSA contract—Sooner paid all guards the same rate, regardless of whether they were undergoing initial training. (D&O 2; Tr. 26-28.) That practice

continued after the Union began representing the guards and entered a collective-bargaining agreement with Sooner. (D&O 2; Tr. 29-30.) Thereafter, Security Consultants observed the same practice, including under the very agreement that was later expressly adopted by Coastal. (D&O 2; Tr. 30-32.) In short, there is abundant evidence that the represented guards were entitled to every expectation that this practice would continue under the agreement adopted by Coastal unless it sought to bargain with the Union for a different arrangement.

Nevertheless, as Coastal freely admits (Br. 10-11), it unilaterally decided to pay newly-hired guards below the contractual rate during their initial training period. Although Coastal suggests that it reached its unilateral decision in good faith and was not aware of the predecessor's past practice (*id.* at 8), well-meaning ignorance provides no defense. *See Pepsi-Cola Distrib.*, 646 F.2d at 1175-76. As the Supreme Court has explained, an employer's unilateral change in working conditions will violate Section 8(a)(5) and (1) even in the absence of a "failure of subjective good faith." *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962). That is because such unilateral changes are "tantamount to a flat refusal to bargain." *Pinkston-Hollar Constr. Servs.*, 954 F.2d at 310.

In any event, Coastal is simply wrong to contend that it had "no way of obtaining knowledge" of the predecessor's past practices regarding the payment of guards undergoing their initial training. (Br 8.) It easily could have sought such

information from the Union, whose then-Vice President knew of the relevant past practice. (D&O 2; Tr. 43-47, 55.) And once the Union brought the departure from past practice to Coastal's attention by filing a grievance, it had no excuse for continuing to pay guards below the contractual rate during their initial training. Thus, the Board reasonably concluded that Coastal violated Section 8(a)(5) and (1) of the Act, and it acted within its broad discretion by ordering an appropriate remedy to make employees whole for that violation.

C. Coastal's Challenges to the Board's Order Are Without Merit

As we have shown, the Board's finding of a violation is clear-cut and largely undisputed: Coastal explicitly adopted its predecessor's collective-bargaining agreement, and it admits to unilaterally changing the predecessor's practice with respect to the payment of guards undergoing their initial training. Nevertheless, Coastal spills a great deal of ink arguing that its conduct was consistent with its obligations under the Act. These arguments come in the wake of several excuses that Coastal initially urged and then abandoned along the way—including claiming that the guards at issue were not even Coastal employees. (D&O 3; Tr. 86-90.) Its latest crop of excuses fares no better. Contrary to Coastal's claims, the unit of employees represented by the Union includes newly-hired guards who are undergoing their initial training period. Also, because Coastal expressly adopted its predecessor's collective-bargaining agreement, it forfeited any right to set the

wage rate of trainees as an initial term of employment. Finally, Coastal is simply wrong to contend that the Board was an improper forum for adjudicating this dispute.

1. The Board properly concluded that the bargaining unit includes guards undergoing their initial training

Coastal's primary argument on appeal (Br. 24-38) is that newly-hired guards undergoing their initial training are—for that brief period of 4 to 6 weeks—excluded from the bargaining unit represented by the Union. Accordingly, Coastal contends that it had no obligation to bargain with the Union before effecting any changes to their working conditions. The Board properly rejected that argument, finding instead that the unit does include guards who are undergoing their initial training period. (D&O 6-7.) The Board's conclusion in that regard is supported by the provisions of the Act dealing with guards, the terms of the collective-bargaining agreement itself, and an unbroken historical practice of including those guards in the unit.

a. Newly-hired guards were not excluded from the Act's definition of "guards" solely because of their training status

The collective-bargaining agreement adopted by Coastal defines the unit of represented employees as follows:

all security officers as defined in Section 9(b)(3) of the National Labor Relations Act, as amended, employed by the company under

the GSA security services contract #GS-7P-00-HHD-0035 or any successor contract, in Fort Worth, TX, and surrounding areas

(GCX 2-Art. III § 1.) The same provision explicitly excludes from the bargaining unit “all office clerical employees, professional employees, and supervisors as defined in the Act.” (*Id.*) Coastal claims that, because the newly-hired guards are not actively engaged in guarding persons or property during their initial training period, they are not “guards” within the meaning of Section 9(b)(3) of the Act, 29 U.S.C. § 159(b)(3), and are therefore outside the scope of the contractual bargaining unit that explicitly references that statutory provision.⁸ (Br. 25-30.)

But that argument rests on a misreading of the body of Board precedent delineating the duties that qualify an employee as a statutory “guard” under Section 9(b)(3).

⁸ Section 9(b)(3) of the Act provides that the Board shall not decide that a particular unit of employees is appropriate for collective bargaining if:

[the proposed unit] 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.

29 U.S.C. § 159(b)(3). Although the collective-bargaining agreement uses the term “security officers,” rather than the term “guards” found in Section 9(b)(3), that bit of inartful drafting should not frustrate the otherwise clear intent of the original contracting parties. *See First Nat’l Bank of Birmingham v. United States*, 358 F.2d 625, 630 (5th Cir. 1966). As we explain in greater detail below, that intent was to include newly-hired guards in the bargaining unit as soon as they begin their initial training period.

Properly understood, the Board's precedent makes clear that the guards undergoing their initial training period here are statutory "guards" and should therefore be included in the bargaining unit set forth in the collective-bargaining agreement.

The Board has determined that employees are "guards" under Section 9(b)(3) of the Act "if they are charged with guard responsibilities that are not a minor or incidental part of their overall responsibilities." *Boeing Co.*, 328 NLRB 128, 130 (1999). "Guard responsibilities" are, in turn, those duties "typically associated with traditional police and plant security functions," including:

enforcement of rules directed at other employees; the possession of authority to compel compliance with those rules; *training in security procedures; weapons training* and possession; participation in security rounds or patrols; the monitor and control of access to the employer's premises; and wearing guard-type uniforms or displaying other indicia of guard status.

Id. (emphasis added). Because the Board looks at the employee's "overall responsibilities" to determine guard status, *id.*, it does not restrict its inquiry to a particular timeframe. Instead, the entirety of the employees' responsibilities—past, present, and future—are taken into account. *See United States Steel Corp.*, 188 NLRB 309, 309-10 (1971) (holding that guards who had been temporarily assigned to work involving no guard duties remained eligible to vote in an election for a guards-only unit).

Under that standard, the Coastal employees at issue easily satisfy the statutory definition of guards. At the outset of their employment, they spend

virtually all of their time engaged in the established guard responsibilities of “training in security procedures” and “weapons training.” *Boeing*, 328 NLRB at 130; *see also Purolator Courier Corp.*, 300 NLRB 812, 814-15 (1990) (examining whether employees alleged to be guards participated in “training and instruction regarding the protection and safety of customer property” and “train[ing] . . . to use physical force or weapons”). Thus, even on Coastal’s blinkered view of the facts—which treats newly-hired guards undergoing their initial training as a wholly separate category of employees—those employees satisfy the requirements of Section 9(b)(3) because they exclusively receive training that is recognized as a “guard responsibility” under the Board’s precedent.⁹ *Boeing*, 328 NLRB at 130. Moreover, once the guards’ brief initial training period is complete, Coastal cannot dispute that they spend their time performing a wide range of guard responsibilities, such as enforcing rules, participating in security patrols, monitoring and controlling access to the premises, and wearing guard-type uniforms. *Id.*

⁹ It would be anomalous indeed to suggest that employees are excluded from a unit of guards while they are receiving the very training that distinguishes them from non-guard employees. Thus, in *Old Dominion Security, Inc.*, 289 NLRB 81, 81-83 (1988), where a traditional security-guard union sought to represent a unit of guards that included “guards in training,” the Board gave no indication that certification of such a unit would be improper under Section 9(b)(3).

Furthermore, excluding employees from the bargaining unit during their brief initial training would not serve the overarching purpose of Section 9(b)(3). That provision forbids the Board from certifying a labor organization to represent so-called “mixed-guard units”—*i.e.*, bargaining units that include both guards and nonguards. *International Transp. Serv., Inc. v. NLRB*, 449 F.3d 160, 164 & n.1 (D.C. Cir. 2006). Congress enacted Section 9(b)(3) “to minimize the danger of divided loyalty that arises when a guard is called upon to enforce the rules of his employer against a fellow union member.” *Wackenhut Corp. v. NLRB*, 178 F.3d 543, 546 (D.C. Cir. 1999) (quoting *Drivers Local No. 71 v. NLRB*, 553 F.2d 1368, 1373 (D.C. Cir. 1977)); *see also* Robert A. Gorman & Matthew W. Finkin, *BASIC TEXT ON LABOR LAW* § 5.3, at 97 (2d ed. 2004).

No potential for divided loyalties exists here because the record evidence contains no hint that guards who have completed their initial training would be called upon to enforce rules against guards who are still undergoing that training. Indeed, the initial training period is but a brief prelude to a guard’s performance of all of the same duties as his fellow bargaining-unit members. Thus, the interests of guards at these fleetingly different stages of their employment are aligned—just as the Board has repeatedly recognized that trainees for a particular job share a community of interest with those already performing the trained-for job. *See Johnson’s Auto Spring Serv.*, 221 NLRB 809, 809 n.1 (1975); *Afro Jobbing & Mfg.*

Corp. 186 NLRB 19, 19-20 (1970); *Leone Indus.*, 172 NLRB 1463, 1464-65 (1968). The Board therefore permissibly concluded that the guards at issue were included in the bargaining unit.

b. The provisions of the collective-bargaining agreement support the Board's conclusion that the bargaining unit includes newly-hired guards undergoing initial training

Numerous provisions of the collective-bargaining agreement adopted by Coastal buttress the Board's conclusion that the bargaining unit includes guards undergoing their initial training. First, the agreement's definition of the bargaining expressly excludes several categories of employees—namely, “all office clerical employees, professional employees, and supervisors as defined in the Act.” (GCX 2-Art. III § 1) The parties therefore knew quite well how to specifically exclude classes of employees from the bargaining unit when they intended to do so. Yet, the exclusion provision in the unit's definition does not identify “candidates,” “trainees,” or any of the other various names Coastal has tried to apply to guards undergoing their initial training. Thus, consistent with the standard canons of contract interpretation, the Board properly concluded (D&O 6) that the parties did not intend for those guards to be specifically excluded from the unit's definition. *See Branson v. Greyhound Lines, Inc., Amalgamated Council Ret. & Disability Plan*, 126 F.3d 747, 758 (5th Cir. 1997) (applying doctrine of *expressio*

unius est exclusio alterius to the interpretation of collective-bargaining agreements).

Second, the agreement’s seniority provisions virtually mandate that guards become members of the bargaining unit as soon as their initial training begins. The agreement provides for two types of seniority: “Government Seniority” and “Bargaining Unit Seniority.” (GCX 2-Art. XXXII §§ 1-2.) It defines “Government Seniority” as “[t]he total length of time spent by an employee *in any capacity* in the continuous service of [Coastal]”; meanwhile, “Bargaining Unit Seniority” runs from “an employee’s date of hire into the bargaining unit” (*Id.* (emphasis added).) Importantly, the agreement declares that “[i]t is understood by all parties” that the two seniority dates “will be *the same . . . in most circumstances.*” (*Id.* § 3 (emphasis added).)

Coastal admits (Br. 10 n.2, 37 n.10) that guards are Coastal employees during their initial training period; thus, their “Government Seniority” begins to run at the time their training begins. (GCX 2-Art. XXXII § 1 (providing that such seniority starts when employed by Coastal “in any capacity”).) Yet, under Coastal’s reading of the contract, those guards would not become part of the bargaining unit—and, therefore, would not begin accruing “Bargaining Unit Seniority”—until *after* their training had completed. (*Id.* § 2.) Thus, in contravention to what was “understood by all parties,” Coastal all but concedes

(Br. 10-11 n.2) that its approach results in two seniority calculations that will *not* be “the same . . . in most circumstances.” (GCX 2-Art. XXXII § 3.) By contrast, a reading of the unit description that includes guards undergoing their initial training period comports perfectly with the parties’ explicit understanding because the “Government Seniority” and “Bargaining Unit Seniority” of newly-hired guards would generally begin at the same time.¹⁰

Lastly, the provision of the agreement governing applications for vacant positions counsels against any interpretation of the bargaining unit’s definition that would exclude guards undergoing their initial training. That provision states that, in order to be “eligible” to apply for a vacant position, the employee must “have passed all initial . . . Government Contract and Company qualifications.” (GCX 2-Art. XXX § 1.) Because Coastal contends that bargaining-unit employees must, by definition, already have those initial qualifications (Br. 29), its strained reading of the contract would render those additional eligibility requirements meaningless. Such a result contravenes the well-settled principle that “the terms of the [collective-bargaining agreement] should be interpreted so as to avoid . . . superfluous provisions.” *Noe v. PolyOne Corp.*, 520 F.3d 548, 552 (6th Cir.

¹⁰ As discussed in greater detail below (pp. 34-35), this result comports with the relevant past practice. The uncontested testimony in the hearing confirmed that Coastal’s predecessor calculated guards’ seniority dates from the beginning of their training periods. (Tr. 55.)

2008); *see also Transitional Learning Cmty. v. U.S. Office of Pers. Mgm't*, 220 F.3d 427, 431 (5th Cir. 2000) (“[A] contract should be interpreted as to give meaning to all of its terms—presuming that every provision was intended to accomplish some purpose, and that none are deemed superfluous.”). By contrast, if guards undergoing initial training are considered part of the bargaining unit, the eligibility requirements in the vacancy provision are given meaning because they render newly-hired guards ineligible to apply for a vacancy until they have successfully completed their training.

Indeed, by giving independent meaning to those eligibility requirements, the collective-bargaining agreement is harmonized with the “Statement of Work” (RX 2), on which Coastal places such great reliance. That document expressly contemplates that newly-hired guards must undergo initial training and certification, and it provides that until a guard completes that process he “shall [not] be permitted to work under this Task Order.” Thus, the terms of the collective-bargaining agreement, when read as a whole, strongly support the Board’s conclusion.

In any event, Coastal’s reliance on the “Statement of Work” is misplaced. (Br. 29-30.) That document is not part of the collective-bargaining agreement. Instead, GSA issued it to Coastal for purposes of bidding on the GSA contract. (Tr. 162-63.) As such, it does not—and, indeed, could not—purport to limit the

scope of a bargaining unit that had already been in existence for several years. *See United Steel Workers of Am., Local 14693*, 345 NLRB 754, 755 n.3 (2005). The same is true of the Department of Labor’s opinion letter, which concluded that guards undergoing initial training were not required to be paid in accordance with wage determinations under the SCA until they are stationed at a guard post.

(RX 1.) As Coastal acknowledges (Br. 34-35 & nn.8-9), an employer’s obligations under the SCA are not the same as its obligations under a collective-bargaining agreement. Moreover, the Department of Labor’s opinion letter does not reference the existence of a collective-bargaining agreement, which is the source of Coastal’s obligations here. The judge therefore correctly concluded that the outcome of the Department of Labor’s SCA investigation is not relevant to deciding the unfair labor practice at issue.¹¹ (D&O 5-6.)

¹¹ Still, the judge was also correct in observing that Coastal’s explanation for paying back wages to a group of guards undergoing training “makes no sense.” (D&O 4.) Coastal asserts that, due to a clerical error, it mistakenly submitted the guards’ timesheets to GSA for reimbursement. Federal law imposes harsh penalties for making a false claim for payment to the government. *See* 31 U.S.C. § 3729. It is therefore puzzling that Coastal—rather than attempting to correct the error with GSA—would instead seek closure on the issue by merely compensating its guards for hours that were admittedly billed to the government improperly.

c. Clear past practice supports the Board's conclusion that the bargaining unit includes newly-hired guards undergoing initial training

Past practice firmly cements the Board's conclusion that the bargaining unit includes guards undergoing their initial training. Although Coastal attempts to dispute the significance and extent of the past practice supporting the Board's conclusion, its arguments ignore the undisputed evidence adduced before the Board.

When interpreting a contract, it is well settled that the key determination is the intention of the parties at the time the agreement was made. *See Scapa Dryers, Inc. v. Abney Mills*, 269 F.2d 6, 12 (5th Cir. 1959). The most accurate measure of that intention is often the parties' actual course of dealings upon entering the agreement. *Id.* (determining the intent of the parties to a contract by looking "at the situation of the parties and their undertakings at the time their agreement was made"); *see also Restatement (Second) of Contracts* § 202(4), comment g (1981) ("The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning."). Such evidence of past practice should hold particular weight when determining the composition of an existing bargaining unit because "there is a strong presumption favoring the maintenance of historically recognized bargaining units." *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 114 (D.C. Cir. 1996).

Even in the face of its concession (Br. 30) that its predecessor paid newly-hired guards the contractual wage rate during their initial training (D&O 2; Tr. 43-47, 55), Coastal claims that “there is no evidence that the predecessor contractor recognized the trainees as members of the bargaining unit.” (Br. 30.) In making that claim, Coastal surmises that its predecessor followed that practice “for recruiting reasons.” (Br. 30-31.) That is rank speculation, which is belied by the fact that Coastal was able to attract candidates for training while only paying them the Federal minimum wage. (D&O 3; GCX 11 & 14, Tr. 71.) Thus, even if the evidence of past practice were limited to the predecessor’s payment of the contractual rate, that evidence would strongly support the Board’s conclusion that the bargaining unit has historically included guards undergoing their initial training.

More to the point, the evidence of past practice including guards in the bargaining unit during their initial training is far more extensive than Coastal recognizes. In addition to the predecessor’s payment of the contractual rate to guards undergoing initial training, former Union Vice-President John Mulholland testified without contradiction that Coastal’s immediate predecessor, Security Consultants, paid guards a contractual wage supplement for health and welfare benefits during the initial training period (Tr. 44-45), and, furthermore, that it calculated the guards’ seniority dates from the beginning of their initial training

period (*id.* at 55). That testimony is corroborated by the language of the agreement itself. The provision concerning health and welfare benefits states that the employees shall receive, in addition to their regular hourly wage, a wage supplement used to purchase health and welfare benefits. (GCX 2-Art. XXIX.) That provision further states that the wage supplement shall be paid to employees during time spent “training.” (*Id.*) And, as previously discussed, the agreement’s seniority provision announces the “underst[anding] by all parties” that guards’ “Government Seniority” (which runs from the time an employee begins working for Coastal “in any capacity”) and “Bargaining Unit Seniority” (which runs from an employee’s “date of hire into the bargaining unit”) “will be the same . . . in most circumstances.” (GCX 2-Art. XXXII §§ 1-3.) Thus, substantial evidence supports the Board’s conclusion that Coastal’s predecessors had treated guards as part of the bargaining unit during their training periods.¹²

¹² Coastal also argues (Br. 31) that the bargaining unit does not include guards undergoing their initial training because there is “no evidence that a majority of [them] signed authorization cards.” Yet, the very case on which Coastal relies demonstrates that the relevant inquiry is not whether a union seeking recognition has the support of a particular sub-group of employees, but whether it has majority support within the *entire* unit. *See Decision, Inc.*, 166 NLRB 464, 465-66 (1967). At any rate, if Coastal wanted to cast doubt on the Union’s majority status, it was up to Coastal to prove the absence of majority support as an affirmative defense to the charged violation. *See Seaport Printing & Ad Specialties Inc.*, 344 NLRB 354, 357 (2005), *enforced*, 192 Fed. Appx. 290 (5th Cir. 2006).

In sum, the Board properly found (D&O 6) that the unit of employees represented by the Union has historically included guards who are undergoing their initial training. Its conclusion in that regard is amply supported by the terms of the collective-bargaining agreement, as well as the past practice of Coastal's predecessors. Therefore, Coastal was under an undeniable obligation to bargain with the Union over any changes in those employees' terms of employment.

2. Coastal did not have the right to set initial terms of employment for newly-hired guards that differed from those of its predecessor

Coastal further argues that, notwithstanding the past practice of its predecessor, it was privileged under Board precedent to set the initial terms of employment—including the wage rate paid to newly-hired guards during their initial training. (Br. 38-42.) This argument fails at several levels. First, the right to set initial terms is reserved for those successors who do *not* adopt their predecessors' collective-bargaining agreements. *See Burns*, 406 U.S. at 284, 291; *HBS II*, 128 F.3d at 864 n.6. By entering a letter of agreement with the Union pledging that all “provisions, terms[,] and conditions” of the predecessor’s contract “shall continue in full force and effect” (GCX 3 & 5), Coastal opted to avoid the “uncertainty and turmoil” that could accompany setting initial terms that employees might find objectionable. *Burns*, 406 U.S. at 291. Having received the benefit of that stability, Coastal was required to adhere to its predecessor’s working

conditions and bargain with the Union before implementing any changes to the status quo. *See HBS II*, 128 F.3d at 864 n.6; *Pepsi-Cola Distrib.*, 646 F.2d at 1175-76.

Second, Coastal's argument rests on a gross mischaracterization of its actual conduct. Coastal did not simply implement new wage rates for certain employees covered by the collective-bargaining agreement. Instead, it declared—and continues to assert—that those employees are not part of the bargaining unit at all. Although a successor may initially set a number of different working conditions, the definition of the bargaining unit is not one of them. *SFX Target Ctr. Mgmt, LCC*, 342 NLRB 725, 725 n.3, 735-36 (2004); *see also Hess Oil & Chem. Corp. v. NLRB*, 415 F.2d 440 (5th Cir. 1969) (acknowledging that changes to the scope of the bargaining unit may not be implemented without both parties' consent). As the District of Columbia Circuit so cogently explained:

The reasons why the law does not sanction a unilateral change by the employer in the scope of the bargaining units are as simple as they are fundamental. . . . [U]nilateral changes in the unit description are unlawful first, because a union has a right to have its authority recognized in the collective bargaining agreement, and second, because the existence of a defined unit is a prerequisite to bargaining over terms and conditions of employment, for parties cannot bargain unless they know which employees a union represents. More basically, if an employer could vary unit descriptions at its discretion, it would have the power to sever the link between a recognizable group of employees and its union as the collective bargaining representative of these employees. This, in turn, would have the effect both of undermining a basic tenet of union recognition in the

collective bargaining context and of greatly complicating coherence in the negotiation process.

Boise Cascade Corp. v. NLRB, 860 F.2d 471, 475 (D.C. Cir. 1988) (citations and quotation marks omitted).

Finally, even if Coastal had the option of implementing unilateral changes to the guards' terms of employment, it did not observe the procedures required to make that change effective. That is, a successor employer can institute its own initial terms only if it "giv[es] the employees prior notice of its intention." *HBS II*, 128 F.3d at 864 n.6. If an employer fails to apprise the union of its proposed changes, or only discloses those changes to a limited number of employees, it forfeits the privilege to make the unilateral change. *Canteen Corp. v. NLRB*, 103 F.3d 1355, 1362 (7th Cir. 1997); *Rosdev Hospitality*, 349 NLRB No. 20, slip op. at 2. Here, Coastal did not disclose to the Union its plans to pay guards below the contractual rate during their initial training period; on the contrary, it entered an agreement expressly pledging that, aside from a negotiated pay increase, all "provisions, terms[,] and conditions" of the predecessor's agreement would "continue in full force and effect." (D&O 2; GCX 5, Tr. 35.) And, although Coastal informed new hires that they would only make minimum wage, it did not make clear to all employees that it intended to establish initial terms that were different from the predecessor's. (D&O 2; Tr. 47-49.) Thus, Coastal's claim that it was entitled to make the change in working conditions is without merit.

3. The Board was an appropriate forum for adjudicating the legality of Coastal's unilateral change in working conditions

In a last-ditch effort to avoid enforcement of the Board's Order, Coastal argues that the Board was not an appropriate forum for this dispute. Instead, argues Coastal, this matter is a simple contract dispute that should have been resolved through the contractual grievance procedure or suit in federal court under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185.¹³ (Br. 42-46.) This argument is the reddest of herrings.¹⁴

Contrary to Coastal's assertion (Br. 44-45), this case is not a mere contract dispute. Rather, it concerns the enforcement of Coastal's obligations as a successor employer under the Act, which in this case required it to maintain the predecessor's working conditions unless and until it bargained with the Union over

¹³ That statute provides, in relevant part, that "[s]uits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties." 29 U.S.C. § 185(a). The Supreme Court has interpreted Section 301 as authorizing federal courts to fashion a body of federal law for the enforcement of collective-bargaining agreements. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 451-57 (1957).

¹⁴ To be sure, Coastal's precise argument on this issue is less than clear. At points, it appears to claim that the Board lacked jurisdiction to hear this dispute (Br. 43-44); at other points, it seems to merely assert that this Court should conduct *de novo* review of the Board's interpretation of collective-bargaining agreements (*id.* at 42). If its argument is only the latter, the Board agrees that *de novo* review is appropriate for questions of pure contract interpretation. *See Strand Theatre*, 493 F.3d at 518.

any changes. The Board's role is especially appropriate in this context because the aim of its successorship doctrine is to encourage stability in collective-bargaining relationships at a time when "a union is in a peculiarly vulnerable position." *Fall River Dyeing & Finishing*, 482 U.S. at 38-39.

Moreover, as this Court has recognized, "[w]here the contract violation is also a unilateral change by the employer in working conditions subject to mandatory bargaining, as is the situation in this case, there can be both a contract violation and a [Section] 8(a)(5) violation." *BASF Wyandotte*, 798 F.2d at 857 (citing *NLRB v. C. & C. Plywood Corp.*, 385 U.S. 421 (1967)); *see also Bath Marine Draftmen's Ass'n v. NLRB*, 475 F.3d 14, 21 (1st Cir. 2007) (noting that the Board is empowered to interpret the parties' collective-bargaining agreement when it is "raised by the employer as a defense to an unfair labor practice charge"). In such situations, neither Section 301 of the LMRA nor a contractual grievance procedure displaces the Board's authority to adjudicate unfair labor practices. *See Smith v. Evening News Ass'n*, 371 U.S. 195, 197 (1962); *D.E.W., Inc. v. Local 93, Laborers' Int'l Union*, 957 F.2d 196, 202 (5th Cir. 1992).

Finally, Coastal cannot be heard to complain that this case was litigated before the Board, rather than through arbitration. When the employer in *BASF Wyandotte* raised a similar argument, this Court roundly rejected it, observing that "it is the company's own adamant refusal that barred the issue of contract violation

from properly being considered through the grievance procedures.” 798 F.2d at 857. The same is true here, as Coastal has firmly declared that it had no obligation to arbitrate the Union’s grievance because the Union did not represent guards during their initial training period. (Br. 45, GCX 16.) Therefore, it was entirely proper for the Board to assert jurisdiction and find that Coastal’s actions constituted an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION

For the reasons stated above, the Board respectfully requests that this Court grant the Board's cross-application for enforcement and deny Coastal's petition for review.

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National Labor Relations Board
September 2008

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NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	
)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by overnight delivery service the required number of copies of the Board's brief in the above-captioned case, and has served two copies of that brief by overnight delivery service upon the following counsel at the addresses listed below:

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the ___ day of September 2008

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(C) because it contains 10,104 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman type.

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