

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PARAGON SYSTEMS, INC.

and

Case 5-CA-116070

FEDERAL CONTRACT GUARDS OF
AMERICA (FCGOA) INTERNATIONAL UNION

EXCEPTIONS OF COUNSEL FOR THE GENERAL COUNSEL

Counsel for the General Counsel excepts to the following findings and conclusions of law:

1. To the judge's framing of the issue as how specific a successor employer must be in informing employees of its predecessor about the changes in the terms and conditions of their employment. (ALJD 4:14-15).
2. To the judge's finding that Respondent made the change in "guard mount" time on October 1 and mischaracterization of the evidence of the offer letters. (ALJD 3:36; 2:25-28).
3. To the judge's finding that Respondent did not change its initial terms and conditions of employment. (ALJD 4:21-23). Supporting evidence is found in ALJD 2: 27-28; 3:36-38; 4:23; Tr. 95-96.
4. To the judge's Conclusion of Law that Respondent did not forfeit its right to set initial terms of employment by failing to specify all the changes that would be implemented upon its taking over the ICE contract on October 1, 2013. (ALJD 4:32-38).

5. The judge failed to address *Banknote Corp. of America*, 315 NLRB 1041 (1994), *enf'd Banknote Corp. of America v. NLRB*, 84 F.3d 637, 647 n.5 (2d Cir. 1996), and their other cases on which counsel for the General Counsel relied.

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**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF
EXCEPTIONS**

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I. OVERVIEW

This case was heard by Administrative Law Judge Arthur J. Amchan (ALJ) on March 31, 2014, in Washington, DC.¹ On May 8, 2014, he issued his decision (ALJD) finding no violation of Section (8)(a)(5) of the Act. This case concerns security guards working at the ICE building located at 500 12th Street, SW, Washington, DC. Prior to October 1, 2013², MVM provided security services at ICE headquarters. MVM had a collective bargaining agreement with the Federal Contract Guards of America International Union (Union) whose term was effective from January 14, 2011 to January 13, 2014. Paragon Systems, Inc. (Respondent) was awarded the contract and took over operations on October 1, 2013. Respondent held job fairs in November 2012, April 2013 and September 2013.³

Applicants at these job fairs were presented with offer letters which outlined the changes Respondent would be making to employees' terms and conditions of employment, which would be different than they were under the predecessor's contract. The judge found that because Respondent outlined some changes it was going to make, that it did not mislead employees in believing that they were accepting employment with Respondent under the terms and conditions set forth in the Union's collective bargaining agreement with MVM. The judge found that because Respondent made it clear to employees that there would be some changes, Respondent did not forfeit its right to set initial terms of employment by failing to specify all the changes that would be implemented upon taking over the contract on October 1. (ALJD

¹ Hereafter the National Labor Relations Board will be referred to as the "Board" and the National Labor Relations Act as the "Act". The Immigrations and Customs Enforcement building located at 500 12th Street, SW, Washington, DC will be referred to as the "ICE Building"; the Federal Contract Guards of America International Union will be referred to as "the Union" and Respondent Paragon Systems, Inc. will be referred to as "Respondent" or the "Employer". With respect to the record developed in the case, the transcript will be designated as "Tr."; the Administrative Law Judge's Decision as "ALJD" followed by the page then line numbers; the General Counsel's exhibits as "GC-", and Respondent's exhibits as "R-".

² All dates hereafter are 2013 unless otherwise specified

³ The majority of MVM's employees were hired by Respondent by September 25 and the bargaining obligation attached no later than October 1, 2013. (Tr. 67; ALJD 2:42-45).

4:32-38). Therefore, he concluded, the change in paid guard mount time which took place on October 1 was permitted.

The General Counsel excepts to this finding because it is contrary to Board law and requests the Board reverse the judge and order an appropriate remedy.

II. FACTS

a. Background

The facts here are largely undisputed. When they received their first paycheck, unit employees became aware of a change in their compensation. Employee Andrew Durand testified that he was paid for only 5-minutes of “gear up” time prior to arriving at his guard post and 5-minutes of “gear down” time after leaving his post (this is also commonly referred to as guard mount time). (Tr. 38; ALJD 3:2-5). This gear up and gear down time is paid in addition to their work time performing guard functions. This 5-minute paid time at the beginning and end of their shifts represented a major change from their previous gear up and gear down allotments of 20-minutes at the beginning of the shift and 10-minutes at the end. (Tr. 38; 96). The established practice of the prior contractor, MVM, was to pay for 20-minutes of guard mount time prior the guard assuming his or her post and 10-minutes of gear down time after leaving his or her post (Tr. 37, 55). MVM also paid for guard mount time on weekends, which Respondent does not. (Tr. 37, 55). The contract between MVM and the Union specified that when the employer required a gear up and gear down period prior to and after a normal work shift, the time spent in such activities would be considered as time worked. (Tr. 75; ALJD 3:11-13; GC 3). Union President Guy James testified that the 20/10-minute periods became an established practice during MVM’s tenure, first via a verbal agreement and later pursuant to an arbitrator’s award. (Tr. 75; GC-3; ALJD 3: 10-14).

**b. Respondent makes unilateral change to guard mount time on or after
October 1, 2013**

There is no dispute that Respondent did not give the Union or unit employees any specific prior notice before changing the amount of time paid for “gear up, gear down.” (Tr. 95, 96; R. 8; ALJD 3: 33; ALJD 4:23-24). Respondent made these changes sometime after starting operations at ICE on October 1, 2013, although the Union and unit employees did not become aware of the changes until several weeks later and it was never announced prior to the bargaining obligation attaching. (Tr. 95; R. 8; ALJD 3: 33).

III. JUDGE’S FINDINGS REGARDING CHANGE

The ALJ framed the issue as, “how specific a successor employer must be in informing employees of its predecessor about the changes in the terms and conditions of their employment.” (ALJD 4:14-15). He then concluded that since Respondent never told prospective employees that they would be paid for 30-minutes of guard mount time, then Respondent was free to change it. (ALJD 4:23). This conclusion is not supported by any case law and is contrary to the Board’s holding in *Banknote Corp. of America*, 315 NLRB at 1041. The ALJ further concluded that under controlling precedent, *Spruce Up Corporation*, 209 NLRB 194 (1974) and *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), that Respondent did not forfeit its right to set initial terms of employment by failing to specify all the changes that would be implemented upon its taking over the ICE contract on October 1, 2013. (ALJD 4: 32). He concluded that Respondent did not mislead employees into believing that they were accepting employment with Respondent under the terms and conditions set forth in the Union’s collective bargaining agreement with MVM, because Respondent made it clear to employees that there would be changes. (ALJD 4:37).

IV. ANALYSIS

Respondent violated section 8(a)(5) of the Act by making unlawful unilateral changes to the paid guard mount time employees received without notice to or bargaining with the Union after the bargaining obligation attached. The ALJ erred in framing the issue as how specific a successor employer must be in informing employees of its predecessor about changes in terms and conditions of their employment (Exception 1); finding that Respondent made the changes in “guard mount” time on October 1 (Exception 2); finding that Respondent did not change its initial terms and conditions of employment (ALJD 4:21-23) (Exception 3); finding that Respondent did not forfeit its right to set initial terms of employment by failing to specify all the changes that would be implemented upon its taking over the ICE contract on October 1, 2013. (ALJD 4:32-38) (Exception 4); and by failing to address *Banknote Corp. of America v. NLRB*, 315 NLRB 1041 (1994), *Banknote Corp. of America v. NLRB*, 84 F.3d 637, 647 n.5 (2d Cir. 1996), and other relevant case law cited by counsel for the General Counsel (Exception 5).

a. Applicable Board Law

The ALJ acknowledged only some of the applicable Board law in his analysis and conclusions of law. The law is clear that 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....” Section 8(d) of the Act defines the duty to bargain collectively as, “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....” It is well-settled under those provisions that, upon acquiring a business, a new employer is obligated to bargain with the union that represented its predecessor's employees if the employer conducts essentially the same business as the

former employer, and a majority of the work force was formerly employed by the predecessor. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 (1987) (*Fall River*); *Burns* 406 U.S. at 279-81; *Cnty. Hosps. of Cent. California v. NLRB*, 335 F.3d 1079, 1083 (D.C. Cir. 2003). Because the composition of the successor's work force is a “triggering fact” in determining whether it is obligated to bargain with the union, the bargaining obligation is typically not established until the successor has hired “a substantial and representative complement.” *Fall River*, 482 U.S. at 46-52. Accordingly, a successor employer is “ordinarily free to set initial terms on which it will hire the employees of a predecessor,” without bargaining with the incumbent union. *Burns*, 406 U.S. at 294 (emphasis supplied); *Holiday Inn of Victorville*, 284 NLRB 916, n.2 (1987). As an exception to this rule, a successor is not free to set initial terms in those “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.” *Burns*, 406 U.S. at 195. *Spruce Up*, 209 NLRB at 194-195. See also *Morris Healthcare & Rehabilitation Center*, 348 NLRB 1360, n.2 (2006) (perfectly clear successor not free to set initial terms when it did not inform employees about wages and/or benefits before takeover); *East Belden Corp.*, 239 NLRB 776, 793 (1978), *enfd.*, 634 F.2d 635 (9th Cir. 1980) (once perfectly clear successor hired predecessor employees, it was not free thereafter to unilaterally change terms of employment; it did not clearly inform the employees before hire of the nature of the intended changes and instead made an announcement “couched in generalized and speculative terms”).

Furthermore, the successor that retains the right to set its own initial terms still must recognize and bargain with the incumbent union after it assumes operations regarding any

subsequent changes it wishes to make in those terms and conditions of employment. *Bronx Health Plan*, 326 NLRB 810, 813 (1998), *enfd*, 203 F.3d 51 (D.C. Cir. 1999) (successor unlawfully announced unilateral change to leave policy 5 days after takeover; *Zim's Foodliner, Inc. v. NLRB*, 495 F.2d 1131, 1143-1144 (7th Cir. 1974) (successor accepted existing employment terms pretakeover, but 3 weeks after takeover, it unlawfully unilaterally changed those terms); *301 Holdings, LLC*, 340 NLRB 366, 368 (2003) (successor made unlawful unilateral changes to wages and benefits when it departed from the initial terms in its job offer). In *Banknote Corp. of America*, the Board held that successor Banknote lawfully set initial terms because it told the unions before it took over the predecessor's operations that it would not honor the collective-bargaining agreements and would set new employment terms and conditions. 315 NLRB at 1043. Thus, Respondent was free to implement the changes it had outlined to the unions before its duty to bargain attached on April 19, when the employees began working for Banknote. However, the Board held that Banknote unlawfully changed other employment terms on about April 23, only four days after the takeover, because they were not among those initially announced to the union. *Supra.* at 1041-1042. As the Second Circuit explained on enforcement, a successor employer is “not held to the terms of its predecessor’s contract, but to the terms on which it hired its employees,” and new terms announced or implemented after it hires the employees are unlawful. *Banknote Corp. of America v. NLRB*, 84 F.3d 637, 647 n.5 (2d Cir. 1996).

b. Respondent changed its initial terms and conditions of employment⁴

Respondent outlined its terms and conditions of employment when it distributed its employment offer letter. This offer letter outlines very specific terms and conditions of employment which were different than the predecessor's terms. (GC-5). In fact, Respondent was permitted to continue to set its initial terms and conditions up to the point at which it hired a majority of the predecessor's employees.

The ALJ properly found that there was no mention of a change in paid guard mount time in the offer letters, and that Respondent did not give specific notice to the Union or the unit employees prior to reducing the amount of paid guard mount time. (ALJD 2:27-28). The record evidence demonstrates that the Union and employees did not learn about the change until the employees were paid. (Tr.38; ALJD 3:1-3). Accordingly, the reduction in paid guard mount time was not part of Respondent's initial terms and conditions. Therefore, this reduction constitutes a change in Respondent's initial terms and conditions of employment and the ALJ erred when he found that Respondent did not change its initial terms and conditions of employment. In the instant case, the ALJ found that telling the employees that some changes would occur implied that other changes were also likely and did not have to be specified. This is contrary to the Board's holding in *301 Holdings, LLC*, 340 NLRB 366 at 368 (2003): "[I]n setting the initial terms and conditions, the Respondent told the employees that scheduling would change, thereby implicitly telling them that all other terms and conditions would remain the same." Thus, the Board has found that specificity is required, because a lack of it implies no further changes will be made.

⁴ This section concerns Exception 1 and 2

c. Respondent unlawfully reduces paid guard mount time in violation of Section 8(a)(5) of the Act⁵

The ALJ not only improperly framed the issue, he also misapplied and ignored the case law. Under *Banknote*, any changes not specifically enumerated prior to the bargaining obligation attaching, are unlawful. The ALJ used *Burns* and *Spruce Up* to reach his conclusion, but those foundational cases do not address the issue presented herein.⁶ The ALJ did not cite any additional case law that supported his conclusions, and more importantly, ignored the case law in *Banknote*; *301 Holdings LLC*; *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 990 (2007) (A general statement that new terms will subsequently be set is not sufficient to fulfill the Respondent's *Spruce Up* obligation to announce new terms prior to or simultaneous with the takeover), and *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB No. 57 (2011) (After the bargaining obligation attached on May 16, the Respondent was foreclosed from making unilateral changes to the unit employees' terms and conditions of employment. Accordingly, by unilaterally eliminating the lube technician job ... on October 15, 2007, without bargaining with the Union about the decision and its effects, the Respondent violated Section 8(a)(5) and (1) as alleged). Those cases clearly say that any changes not specifically enumerated prior to the bargaining obligation attaching are considered unlawful. In *Banknote*, the employer specified a number of changes prior to taking over. However, once they took over, they made some additional changes only 5 days later. The Board held that those changes were unlawful because they were not specifically communicated to the employees and the union prior to the bargaining obligation attaching. 315 NLRB at 1042.

⁵ This section concerns Exceptions 3-5

⁶ Counsel for the General Counsel asserted that Respondent was a *Burns* successor; at no point was it alleged that Respondent was a perfectly clear successor. (Tr. 126).

Here, the situation is the same. The ALJ noted that the offer letters made it clear that some changes were going to occur. However, he improperly concluded that because some changes were listed, any and all changes could thereafter be made. Under *Banknote*, this is not lawful. Here, the Respondent, as the ALJ noted, specified a number of changes that were going to occur; none of those changes specified that the amount of paid guard mount time would be reduced.

The ALJ mischaracterized the evidence, specifically the offer letters. He observed that the letters did not say the paid guard mount time would be reduced, and in making this observation, concluded that omission of such language did not mislead employees into believing they would receive the same paid guard mount time. *Banknote*, however, states that failure to specify changes violates Section 8(a)(5) of the Act as an unlawful unilateral change; so it would follow that here, too, a violation occurred. *Supra* at 1042.

In this case, Respondent was free to set initial terms and conditions of employment, and through its offer letters to the employees, put the employees and the Union on notice that it was not adopting certain terms of the predecessor's collective-bargaining agreement, and that its initial terms would differ from those offered by the predecessor. However, once it hired a majority of the predecessor's employees, and took over the operations on October 1, its obligation to bargain attached and it was required to bargain with the Union over any subsequent changes it wished to make in those initial terms and conditions of employment. Significantly, at no point prior to October 1 did Respondent notify the Union or the employees that the paid guard mount time would be reduced. Therefore, the ALJ erred when he found that Respondent did not forfeit its right to set initial terms and conditions of employment by failing to specify all the changes that would be implemented upon taking over the contract. On

the contrary, Respondent was required to specify each and every change it would be making up to the time it hired a majority of the predecessor's employees and took over operations on October 1. It is precisely because this change was not specified before that time that makes it an unlawful unilateral change and the ALJ's finding should be reversed.

V. CONCLUSION

In conclusion, the record evidence demonstrates conclusively that Respondent reduced paid guard mount time, after they hired a majority of the predecessor's employees and after the bargaining obligation attached, without notice to or bargaining with the Union. As a result, Respondent's conduct violates Section 8(a)(5) of the Act and an appropriate remedy is warranted.

Dated in Washington, D.C., this 5th day of June 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the EXCEPTIONS OF COUNSEL FOR THE GENERAL COUNSEL in case 05-CA-116070 was electronically filed on June 5, 2014, and, on that same day, copies were electronically served on the following individuals by email:

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