

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PARAGON SYSTEMS, INC.

Respondent,

And

Case No. 5-CA-116070

FEDERAL CONTRACT GUARDS OF AMERICA
INTERNATIONAL,

Union.

RESPONDENT'S BRIEF OPPOSING THE GENERAL COUNSEL'S EXCEPTIONS

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I. INTRODUCTION

On May 8, 2014, Administrative Law Judge Arthur Amchan (the “ALJ”) issued a decision finding that Respondent Paragon Systems, Inc. (“Respondent” or “Paragon”) did not commit any unfair labor practice when it took over as a Burns successor employer and set initial terms and conditions of employment at the ICE headquarters building in Washington, D.C. The General Counsel has filed timely exceptions to the portion of the ALJ’s Decision in which the ALJ found that Paragon lawfully commenced operations with work shifts that included a schedule ten-minute pre-shift and post-shift “gear up/gear down” time as a part of each shift rather than the twenty minutes of guard mount time that Paragon’s predecessor had scheduled as a part of each shift. The General Counsel has not filed exceptions to the portion of the ALJ’s Decision finding that Respondent lawfully chose not to provide a uniform allowance to employees as part of the employees’ initial terms and conditions of employment. Accordingly, the “uniform allowance” portion of the ALJ’s Decision should be summarily adopted by the Board.

Respondent opposes the exceptions that the General Counsel has filed regarding the scheduling of “guard mount” time for shifts at the ICE Building. The ALJ was correct when he held that Paragon did not violate Section 8(a)(1) or (5) of the National Labor Relations Act (“Act”). The General Counsel acknowledged at the hearing that Paragon was not a “perfectly clear successor” to Paragon’s predecessor MVM, Inc. (“MVM”) (Tr. 126). Paragon avoided being a perfectly clear successor when Paragon announced to MVM’s employees that Paragon would not be adopting the collective bargaining agreement that MVM had signed with Federal Contract Guards of America International Union (“FCGOA” or “the Union”). Instead, Paragon made it clear from the outset that Paragon would be setting its own initial terms and conditions

of employment that were in many ways different from MVM's terms and conditions.

Paragon believes that, as a matter of law, its only obligation as a Burns successor was to advise incumbent employees that Paragon was not stepping into the shoes of MVM and that Paragon would be starting operations by implementing its own initial set of terms and conditions of employment. Paragon met that obligation here through its application process, its offer letter to employees and Paragon's follow-up communications with the former MVM employees about working conditions. Thus, Paragon **did not mislead any incumbent worker** into thinking that Paragon was making no changes from the terms and conditions set by MVM.

Paragon disagrees with the General Counsel's assertion in the exceptions that Paragon needed to additionally tell employees in minute detail how each of Paragon's new initial terms and conditions would differ from the predecessor's terms and conditions. As the ALJ correctly found, the Supreme Court's decision in NLRB v. Burns Security Services, 406 U.S. 272 (1972) and the Board's decision in Spruce Up Corporation, 209 NLRB 194 (1974) do not require a detailed listing of new terms and conditions, as is sought here by the General Counsel exceptions. Accordingly, the ALJ's Decision should be affirmed on that basis.

The General Counsel's exceptions are also unfounded, however, because the record evidence in this case demonstrates that Paragon's offer letter to incumbent employees of MVM advised them that if they accepted employment with Paragon, then "(s)hift schedules will be determined in accordance with the operational needs of the contract" (GCX-5). The record evidence contains testimony from the General Counsel's own witness that "guard mount" time is **part of the scheduled shift** that each guard worked each day (Tr. 25)¹. Thus, Paragon did in fact

¹ In this Brief, the following designations will be used: (Tr. __) for transcript citations; (ALJD __) for the ALJ's Decision; (GCX-__) for General Counsel Exhibits; (RX __) for Respondent's Exhibits.

specifically tell all incumbent employees in the offer letters that that shift schedules – which included some amount of guard mount gear-up and gear-down time – would not necessarily remain the same and would be determined based on the operational needs of the contract. Any incumbent employee who accepted Paragon’s contingent job offer did so with full knowledge that shift schedules – including the guard mount aspects of shift schedules – were not going to automatically be the same as whatever MVM had put in place when MVM had operational control of the ICE Building. Paragon made it clear that it was going to be setting its own schedules based on operational assessments that it would make as the new contractor. Thus, no incumbent employee could claim to have been misled as to whether changes in scheduling might occur.

II. STATEMENT OF FACTS

Paragon provides armed guard services to the Federal Government through a variety of federal contracts with federal agencies (Tr. 81). Paragon obtains work by bidding on federal contracts and being awarded contracts based on those bids. In the past five years, Paragon has outbid the existing security company contractor on at least 50 occasions, and Paragon knows when it wins such a bid that it will need to take over operational control from the predecessor on a specific future date (Tr. 82-83). In about 90% of these situations, the predecessor’s employees are represented by a union, and Paragon’s guard workforce similarly is composed of roughly 90% union-represented guards (Tr.83). Neither the General Counsel nor the Union claimed in any way that Paragon was opposed to union representation or that Paragon displayed any union animus.

If Paragon takes over a work location where no union is in place, then Paragon’s obligation under the Service Contract Act is to pay its employees at least the wage amount and

fringe benefit levels set by the Department of Labor in the applicable “wage determination”, which is a publication generated by the Department of Labor to identify fair wage and benefit levels for various classifications of employees in a geographic area. 41 U.S.C. Section 351(a) and 29 C.F.R. Part 4, Subpart A, Section 4.1 et. seq..

If the work location instead has a collective bargaining agreement in place when Paragon wins the bid, then the wage rates and health and welfare benefits of the collective bargaining agreement become the “wage determination” for that particular contract, and Paragon’s starting wage rates and health and welfare benefit levels for workers must be at least at the union contract rates. This discourages bidding contractors from trying to use wages and benefits as a basis for underbidding one another at the expense of the existing workers.

In 2012, the Federal Protective Service, which is a division of the Department of Homeland Security, put out a solicitation seeking bids from contractors who were willing to provide guard services at three federal buildings located in downtown Washington, D.C. (Tr. 6). MVM was the contractor who held the contract at the time of the bid solicitation, and MVM had collective bargaining agreements with various unions at the three federal buildings, including an agreement with the FCGOA at the Immigration and Customs Enforcement (“ICE”) Building at 500 12th Street, SW (Tr.33). Paragon submitted a bid to provide guard services, and it was awarded the contract to replace MVM (Tr. 6). Under the federal contract, Paragon was scheduled to take over operational control of the three buildings on the following staggered dates:

- The Old Post Office Building commencing January 1, 2013
- The Environmental Protection Agency Headquarters Building on June 1, 2013

- The ICE Building commencing October 1, 2013

As in all other situations in the past where Paragon had won bids from competitors, Paragon exercised its right not to adopt the collective bargaining agreements of the unions who represented workers at the three government buildings (Tr. 84). Instead, Paragon decided to set its own initial terms and conditions of employment for the buildings and then see whether more than 50% of the workforce would agree to work under those Paragon-imposed working conditions (Tr. 119-121). If more than 50% of the incumbents passed all qualification tests and training requirements and also actually showed up for work when Paragon assumed operational control, then Paragon would recognize the bargaining unit's prior bargaining representative and commence negotiations for a new collective bargaining agreement (Id.).²

Paragon won the bid in October 2012, and since the first building that Paragon needed to staff was the Old Post Office Building commencing January 1, 2013, Paragon made arrangements to hold a job fair for that building location on November 11 and 12, 2012 (Tr. 7). In preparation for the job fair, Paragon placed ads in Monster.com for non-incumbents and sent job fair flyers to incumbent employees letting them know about the opportunity to apply for

² Paragon's actions in this regard were the same as the actions that it had taken when it became a successor on a federal contract in Florida during this same time frame and had set its own initial terms and conditions of employment when it assumed operational control of the worksite. The Regional Director for Region 12 had provided Paragon with a determination dated March 23, 2013 finding that Paragon had lawfully set its own terms and conditions because Paragon:

“plainly informed employees that alternative provisions would be implemented if they accepted employment, specifically in regard to health and welfare benefits cash payments **and shift scheduling**. Moreover, the Employer informed the Union on multiple occasions **prior to taking operational control** of the FPS contract that it intended to enter into negotiations for a new collective bargaining agreement rather than adopt the existing agreement.”

(RX-9) (Emphasis added).

work at the Old Post Office location (Tr. 84-85). As Grady Baker testified, Paragon needed to seek non-incumbents as well as incumbents because there was no guarantee as to how many incumbents would elect to accept Paragon's employment offer (Tr. 85). There were many employment opportunities for armed guards in the D.C. market, and there was a heavy amount of testing and other procedures that guards would have to successfully complete in order to be able to work for Paragon on the contract, including new physical fitness standards that were part of the new federal contract and which had not been in place during MVM's tenure (Tr. 85, 98).

While the November 2012 job fair was primarily designed to fill the Old Post Office job openings, Paragon let it be known that incumbents from the EPA Headquarters Building and the ICE Headquarters Building could also come to the November 2012 job fair to complete applications and obtain job offer letters for their locations (Tr. 7). Similar job fairs were later scheduled and held specifically for the EPA Headquarters Building on April 6, 2013 and for the ICE Headquarters Building on September 12, 2013 (Tr. 7; RX-4), and incumbents for those buildings could attend those job fairs instead of the November 2012 job fair if they wished.

Applicants at the job fairs were handled in the same manner regardless of which particular job fair they attended. Applicants were told that they needed to read and fill out a Paragon job application (GCX-4 and RX-3). The application asked applicants to fill out information about their background and work availability, and the last page of the application contained six paragraphs notifying applicants about certain important information regarding the terms and conditions that were being offered by Paragon. This is important because the information in the application clearly advises the employees that they will be starting work under terms and conditions that are different from what they worked under for MVM. For purposes of this proceeding, the critical language in the application is in the paragraph (RX-3, p.8) that

advises applicants that:

- The applicant would need to conform to the policies, practices and procedures of Paragon
- The applicant would be employed at-will at the commencement of their employment and could be terminated with or without cause
- “Paragon retains the sole right to establish compensation, benefits and working conditions for all of its employees”
- “Paragon retains the sole right to modify my compensation and benefits, position, duties and other terms and conditions of employment, including the right to impose disciplinary action that Paragon, at its sole discretion, determines to be appropriate.”
- Only an agreement signed by Paragon’s President could modify the at-will nature of the applicant’s employment.
- The applicant had been advised that the applicant had an opportunity to ask any questions that the applicant may have had about Paragon’s policies, procedures and employment status and that no Paragon representative had made any representations different from what was contained in the application.

Incumbent employees at the job fair were additionally given a “contingent offer of employment” document with an “effective date” of October 1, 2013 for incumbents who accepted the employment offer (GCX-5). These offer letters re-confirmed to incumbents that they would begin their employment as at-will employees with no restriction on Paragon’s ability to terminate their employment for any reason not prohibited by law. The offer letter described the health plan and 401(k) plan that Paragon was implementing at the start of employment, and the letter contained an Appendix setting forth the various wage rates and benefits that Paragon would be providing to the three federal buildings since the Service Contract Act benefit levels were different for each building.

The second page of the offer letter also contained a series of notifications to incumbents. Incumbents were told that the Government’s had the right to reject an applicant and that

applicants needed to successfully complete a series of pre-employment tests and training, including a physical exam with a physical abilities test. The letter stated that Paragon would be setting its own break schedule in accordance with applicable law and that: “Shift schedules will be determined in accordance with the operational needs of the contract....”

As Grady Baker testified, there was no possible way for Paragon to know in November 2012 how precisely Paragon would schedule shifts at each of the three buildings that were covered by the contract (Tr. 88). Paragon knew the number of posts that needed to be staffed and the total number of hours that needed to be covered because that information was provided by the Federal Protective Service in connection with the bid (Tr. 95). However, Paragon did not know whether it was going to need 8-hour shifts or 12-hour shifts in November 2012, and it had no way to really assess shift scheduling for the ICE Building (the last building where Paragon would assume operational control) until it completed the preparation work for the Old Post Office Building and EPA Headquarters Building. The best Paragon could do at these job fairs was to let incumbents know that there was no guarantee that shift schedules would remain the same since shift scheduling “will be determined in accordance with the operational needs of the contract.” (RX-2, p. 2). Thus employees who accepted the contingent offers of employment did so with full knowledge that their actual work schedules might be different from their work schedules under MVM.

MVM’s scheduled shifts had included a twenty minute “guard mount” period of pre-shift and post-shift activities that were paid as part of the scheduled shift (ALJD-3). UFGOA International President Guy James testified that “guard mount is part of the shift that each person works” (Tr. 25). Thus each shift consisted of: (1) the guard’s initial gear-up time in preparation for standing post (part of guard mount time); (2) the time actually standing post; and (3) the

guard's gear-down time after returning from standing post (again part of guard mount time).

Article 9, Section 1 of the union's contract with MVM further confirms that guard mount is a part of the scheduled shift. This Section discussed the setting of hours and shifts (Tr. 24), and the section specifically characterized guard mount as being included in the definition of the regular workday (RX-1, p. 9). The point was reinforced in Article 9, Section 8 of the MVM contract, which characterizes gear-up and gear-down time as time worked as part of the normal shift (RX-1, p. 10).

There was no language in MVM's contract identifying how long guard mount or gear-up/gear-down time would last, and the Memorandum of Understanding that Guy James said was the basis for MVM's guard mount agreement with the Union does not even reference the topic of guard mount, much less how long guard mount lasts under MVM's operations (Tr. 76). Thus, the most that Paragon could tell incumbents in offer letters for November 2012 or April 2013 or September 2013 was that shift schedules had not yet been determined and would be determined in accordance with operational needs at a later date (Tr. 88).

Once incumbents had completed applications and had signed the contingent offers of employment, such incumbents were added to Paragon's payroll records and listed as "hired" so that they could be eligible to participate in the extensive pre-operational testing and training that needed to be completed prior to their first day of employment on October 1 (GCX-10; Tr. 83, 84, 98, 106). However, this administrative step of placing them on the payroll list did not reflect an actual starting date of work on the contract at the ICE Building since it is undisputed that MVM was the employer of the guards at the ICE building until October 1 and that Paragon neither had the authority nor exercised any power to affect terms and conditions of employment at the ICE

Building until it acquired operational control on October 1.

FCGOA represented guards at the ICE Building but not at the EPA Building or the Old Post Office Building, and the record evidence is somewhat confusing as to when FCGOA learned that Paragon would be assuming operational control of the ICE Building. Guy James said in his affidavit that he learned in June 2013 that Paragon had been awarded the contract (Tr. 19). On the witness stand, however, he claimed that he learned about it informally in Fall 2012 and formally in Winter 2012 (Tr. 13). Eventually, he settled on Spring 2013 as his “formal” notification date (Tr. 28). The ALJ’s Decision did not address the point.

In any event, Roman Gumul testified that he received an undated letter from Mr. James (GCX-2) several months before October 1, 2013 congratulating Paragon on being awarded the contract at the ICE Building (Tr. 121). In the letter, Mr. James asked Paragon to recognize the FCGOA as the representative of the guards at the ICE Building, and the letter also asked Paragon to adopt the MVM contract. Mr. Gumul testified that he responded verbally to the letter through a series of conversations in which he explained to Mr. James that Paragon was not adopting the MVM contract and would, instead, set its own initial terms and conditions of employment (Tr. 119-121). Mr. Gumul advised Mr. James that Paragon would wait and see if more than 50% of the incumbent guards came to work for Paragon when Paragon assumed operational control on October 1, and that if that happened, then Paragon could recognize the Union and commence bargaining for a first collective bargaining agreement (Id.).

Meanwhile, Paragon continued to take the necessary steps to take operational control of the Old Post Office Building on January 1, 2013 and the EPA Building in June 2013. When these transitions were complete, Paragon’s personnel turned their attention to the things that

Paragon needed to do in order to be prepared to assume operational control of the ICE Building on October 1. One of those steps was to figure out how many shifts to have at the building and how long each shift would extend. On September 18, 2013, Payroll Manager Jill Patterson asked Program Manager Rick Waddell whether the shifts would include a guard mount (RX-8). Mr. Waddell replied that the MVM shifts included a 20-minute period before post time for guard mount and a 10-minute period after post time for gear-down time, but that he needed to discuss this with Grady Baker because “I expect changes” (RX-8).

When Mr. Baker and Mr. Waddell examined the buildings posts and coverage requirements, they concluded that a formal guard mount was not needed at the ICE Building (Tr. 88-90). A formal guard mount would have included a group meeting at the beginning of the shift with guards standing in formation, lined up for inspection, and followed by formal briefings on what would be expected that day or concerning other company business (Tr. 88-89). Paragon was familiar with that process because it had scheduled a guard mount each day for its guards at the Department of Homeland Security’s National Headquarters on Nebraska Avenue, where Paragon provided guard services (Tr. 89).

Mr. Baker and Mr. Waddell determined, however, that there was no need at the ICE Building for a formal guard mount. They viewed the ICE Building as “simple donning and doffing” (Tr. 90) where guards just needed to pick up or drop off their weapon each day before and after their scheduled post time and travel to and from their respective posts. Since there were only 12 posts that needed to be manned on any particular shift, Mr. Baker and Mr. Waddell were confident that guards could adequately get their weapons and travel to and from their posts if Paragon added five minutes to the beginning and end of each shift as “gear-up” and “gear-down” time (Tr. 89). They finished their discussions about this issue approximately one week

before Paragon assumed operational control of the building, and they included a 5-minute gear-up and 5-minute gear-down time as part of the regularly scheduled shift for each guard other than the weekend guards, since all the weekend posts were “roving” posts (walking around with no assigned post location), meaning guards were immediately on their post as soon as they received their weapon and did not have to walk to their post (Tr. 97-98). Paragon also arranged for this information to be conveyed to the guards in advance of October 1 after the decision was made about gear-up and gear-down time and the lack of any formal guard mount (Tr. 62; ALJD 3-4, n.5).

Paragon scheduled a mandatory New Hire Orientation meeting for September 25, 2013 (RX-5). At this meeting, guards were given their wash-and-wear uniforms and a copy of Paragon’s Security Officer Handbook (RX-6) containing the policies and procedures that guards were expected to understand and follow when they commenced their employment for Paragon on October 1 (Tr. 91). Like Paragon’s application, this Handbook explained to guards that they were employed at-will and that they were responsible for adhering to the policies and procedures established by Paragon when it assumed operational control. All guards signed Acknowledgement pages showing that they received this Handbook prior to the date that Paragon acquired operational control of the contract (RX-7).

On October 1, 56 of the 60 incumbent guards showed up for work at the ICE Building and were employed by Paragon (Tr. 128). In response, Roman Gumul notified Guy James that Paragon was recognizing FCGOA as the bargaining representative of the guards and that Paragon was prepared to bargain with the Union for a collective bargaining agreement. The parties coordinated their schedules and commenced bargaining in November 2013 (Tr. 15).

III. LEGAL ARGUMENT

A. PARAGON MET ITS LEGAL OBLIGATION AS A BURNS SUCCESSOR, BECAUSE IT DID NOT MISLEAD THE INCUMBENT EMPLOYEES INTO BELIEVING THAT PARAGON WOULD RETAIN THEM WITHOUT CHANGES IN THEIR WAGES, HOURS OR CONDITIONS OF EMPLOYMENT.

In NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972), Wackenhut Corp. had been providing guard services to Lockheed Aircraft Service Co. at one of Lockheed's factories, and Wackenhut had a union contract with the United Plant Guard Workers. Burns won a bid to replace Wackenhut as the contractor for guard services. The Board initially held that, because Burns hired a majority of Wackenhut's guards, Burns was required to adopt and abide by Wackenhut's collective bargaining agreement. The Supreme Court rejected this approach, noting that it was inconsistent with previous Board decisions "which until now have consistently held that, although successor employers may be bound to recognize and bargain with the union, they are not bound by the substantive provisions of a collective-bargaining contract negotiated by their predecessors but not agreed to or assumed by them." Id. at 284.

The Supreme Court then discussed the importance of Section 8(d) of the Act as a limitation on the Board's authority to compel an employer to accept terms of conditions that it had not agreed to through the bargaining process, and the Court concluded that Burns could not be held to any of the terms or conditions negotiated by Wackenhut because Burns "made it perfectly clear that it had no intention of assuming that contract." Id. at 286. The Court noted that a successor cannot be accused of "changing" a term or condition of employment that had not been negotiated or put in place by the successor, and the Court observed that a successor is free to set the initial terms on which it will hire a predecessor's employees. Id. at 294-295.

Soon after Burns, the Board issued its decision in Spruce Up Corporation, 209 NLRB 194

(1974) acknowledging the principles set forth in Burns and holding in relevant part as follows:

When an employer who has not yet commenced operations announces new terms prior to or simultaneously with an invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer “plans to retain all of the employees in the unit”, as that phrase was intended by the Supreme Court. The possibility that the old employees may not enter into an employment relationship with the new employer is a real one, as illustrated by the present facts.

Id. at 195. The Board then expressed concern that it did not want to set up a situation where

an employer desirous of availing himself of the Burns right to set initial terms ... would have to refrain from commenting favorably on employment prospects of old employees for fear he would thereby forfeit his right to unilaterally set initial terms.... * ** We do not wish ... to discourage continuity of employment relationships for such **legalistic and artificial considerations**. We believe the caveat in Burns, therefore, should be restricted to circumstances in which the new employer has either **actively or by tacit inference, misled employees** into believing they would all be retained without change in their wages, hours or conditions or employment, or at least to circumstances where the new employer, unlike the Respondent here, has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.”

Id. (Emphasis added).

The General Counsel in the present case admits that Paragon was not a “perfectly clear successor” and that Paragon did in fact announce to the incumbent employees that Paragon intended to implement initial terms and conditions of employment that differed from the terms the incumbent employees had worked under with MVM. The General Counsel could not in good faith contend otherwise since the record evidence conclusively shows that Paragon’s offer letter, application and Handbook gave incumbents clear notice that they were being offered employment at-will and that they would be responsible for knowing and adhering to all of Paragon’s policies and procedures. While incumbents Andrew Durand and George Shaw claimed that they lacked notice because they chose not to actually read through the notices that

Paragon provided in the offer letter, application and Handbook, such self-denial plainly cannot be twisted into an argument that Paragon failed to provide effective notice to the employees that things were going to be different from whatever conditions they worked under for MVM.

Under Burns and Spruce Up, Paragon fully satisfied its notice obligation when it notified the incumbents that Paragon would be setting its own initial terms and conditions of employment commencing October 1 when it took operational control of the ICE Building. Paragon did not “actively or by tacit inference” (Spruce Up, 194 NLRB at 195) mislead employees into thinking that if they accepted employment with Paragon that everything would be the same as it had been under MVM.

Once Paragon notified incumbents that things would be different, Paragon was free to set initial terms without first bargaining with the Union, and neither Burns nor Spruce Up contain any requirement that the successor employer’s employment offer specify in every detail the precise terms and conditions that will be put in place at the time operations commence. On the contrary, both Burns and Spruce Up are inconsistent with such an assertion.

Burns emphasized that the reason a successor (who implements its own initial terms and conditions) cannot be deemed to have “changed” terms and conditions is that the successor never **had** any legal obligation to keep in place terms and conditions that the predecessor negotiated. Section 8(d) proscribes efforts by the Board to force an employer to accept a particular contract provision – like the ones negotiated by MVM – that the successor employer has not itself negotiated with the applicable union. Yet, the General Counsel in this case is clearly trying to argue that Paragon is bound by MVM’s negotiated terms and conditions unless Paragon expressly states the particular way in which Paragon is changing what MVM negotiated with

FCGOA.

Spruce Up similarly expressed a desire to “discourage ... legalistic and artificial considerations” that might be invoked in an effort to force a predecessor’s terms and conditions of employment onto a successor employer and thereby encourage that successor employer to avoid offering employment to a group of incumbent employees. Spruce Up, 194 NLRB at 195. The Board’s decision in Spruce Up simply wanted to ensure that incumbents were not **mised** into thinking nothing was changing. Spruce Up did not require notice to incumbents of every single way in which terms and conditions would be changing.

Indeed, such a requirement would be impossible for a successor to meet in any practical way. In this case, Paragon was able to obtain a copy of MVM’s contract because it was included in the materials that were provided to Paragon as part of the bidding process, but many successors take over a predecessor’s operations through asset sales, bankruptcy proceedings or other transactions where the predecessor’s union contract is not available to them. Thus, such successors would never be able to identify for incumbent employees each and every way that the successor’s terms and conditions differ from the predecessor’s terms and conditions. And whatever rule the Board puts in place on this issue must be one that applies equally to all successors without special rules for employers who happen to be able to obtain copies of a predecessor’s contract.

Providing notice of all changes in terms and working conditions is particularly impossible for the myriad of terms and working conditions that are not covered in a predecessor’s union contract but are instead covered by the handbooks, manuals, written and unwritten policies and procedures that a predecessor has put in place and that a successor will change by implementing

its own handbooks, manuals, policies and procedures. Like most successors, Paragon did not receive MVM's handbook or other documents setting forth standards of conduct, discipline procedures, timekeeping practices or the hundreds of other rules and benefits that were the basis for MVM's operations, yet each and every one of those MVM rules and procedures are terms and conditions of employment.

Even if Paragon had knowledge of such differences in how MVM operated versus how Paragon planned to operate, it is not realistic to put the obligation on Paragon to detail all those differences in policy and procedure to incumbent employees in advance of offering employment to those incumbents. It is sufficient under Burns and Spruce Up for Paragon to let employees know that Paragon is putting its own terms and conditions of employment into place when it commences operations. As long as Paragon puts those terms and conditions into place at the start of operations, it is free to abide by those terms and conditions while it negotiates with the incumbent Union for a first collective bargaining agreement.

B. EVEN IF PARAGON NEEDED TO MEET A HEIGHTENED STANDARD OF NOTICE REGARDING WHETHER CHANGES WOULD BE MADE IN GUARD MOUNT TIME, PARAGON'S ACTIONS HERE WERE SUFFICIENT TO MEET SUCH A HEIGHTENED STANDARD.

While Paragon is certain that it had no legal obligation to specify all of the many ways in which its working conditions would be different from MVM's working conditions, it is important to recognize that, in this case, Paragon did in fact take adequate steps to provide notice to incumbent workers before they accepted employment that Paragon would be making changes to the shift schedules in accordance with the operational needs of the contract. As such, incumbents knew at the time that they accepted contingent offers of employment that the shift schedules that MVM had put in place – including MVM's assessment of the necessary time for

the guard mount portion of the shift – might not be the same under Paragon’s operations, and these incumbent employees accepted employment without being misled on this point.

As noted earlier, Paragon’s offer letter specifically advised incumbents that “(s)hift schedules will be determined in accordance with the operational needs of the contract”, and all witnesses agreed that guard mount and gear-up/gear-down time are part of the scheduled shifts.³ MVM’s contract did not state what amount of time MVM had set aside for guard mount or gear-up/gear-down time, and Paragon did not have MVM’s Handbook or any MVM written policies identifying how much time, if any, MVM had set aside for its guard mount. Thus, at the time that Paragon was extending contingent offers of employment, Paragon could not know whether the amount of time that Paragon would later determine was necessary as gear-up/gear-down time was different from whatever time had been set aside by MVM for such activities. At the time that Paragon was extending offer letters, Paragon had not been on-site to examine the operational needs of the ICE Building, so Paragon could do nothing other than advise the incumbents that

³ Several of the General Counsel’s witnesses testified at length in an effort to establish that Paragon should have allotted more than five minutes at the beginning and end of each shift to deal with gear-up and gear-down time. The ALJ correctly noted that the “parties agree that Respondent’s compliance with the Fair Labor Standards Act and/or the Service Contract Act is not before me.” (ALJD-4, n.6). Nonetheless, the ALJ for some reason made factual findings to the effect that guard mount time takes 20 minutes to perform under Paragon’s operations. Respondent did not litigate this issue at the hearing since it is **immaterial** whether Paragon was right or wrong in its initial time estimates as to how much time would be needed for gear up/gear down activities. If required to litigate the issue, Paragon is certain that it could bring in witnesses and supporting documents that would prove that gear up/gear down time currently takes only ten minutes, but since FLSA compliance was not an issue in the hearing, Paragon respectfully submits that the Board should disavow the ALJ’s findings regarding the length of time spent on gear up and gear down activities. The only material question is whether Paragon implemented and paid a specific amount of gear-up/gear-down time (10 minutes) when it commenced operations and whether it ever changed that gear-up/gear-down time subsequent to commencing operations. The ALJ correctly found that Paragon maintained the same approach to gear up/gear down time throughout its employment of guards at the ICE Building, so the ALJ erred by digressing into findings on how much time Paragon should have allotted to this pre-shift and post-shift work.

the shift schedules would be determined at a later date and would not necessarily be the same as whatever MVM had established when MVM had operational control of the building. Paragon cannot be found guilty of an “unfair” labor practice since Paragon did the most that it could under the circumstances to make sure incumbents did not assume that shift schedules (which included guard mount time) would remain the same.

The General Counsel relies on Banknote Corp. of America, 315 NLRB 1041 (1994) enforced 84 F. 3d 637 (2d Cir. 1996) as support for the proposition that an employer is a perfectly clear successor if it makes changes **after it commences operations** that were not announced at the time operations commenced. That was a correct holding in Banknote, where the employer commenced operations on April 19, 1990 and then announced changes on April 23 that were inconsistent with the way the employer had started operations on April 19. Banknote did **not** stand, however, for some overarching proposition that an employer has not preserved its right to implement its own initial terms and conditions if it simply tells incumbents at the time of the job offer that they will be starting employment under new terms and conditions that will be determined at a later date. And there is no language in Banknote suggesting that there is an employee right to make an “informed choice” that trumps a successor’s right to set initial terms and conditions after notifying employees that such terms and conditions may be different from those of the predecessor.

Unlike Banknote, where the employer operated for a period of time under one set of conditions and then later changed those conditions, Paragon did not commence employment on October 1, 2013 with a paid guard mount of one length and then change the length of guard mount at a later date. Paragon started on October 1, 2013 with a ten-minute gear up/gear down time period as part of the regular work schedule, and it has retained that same ten-minute gear

up/gear down paid period throughout the time that it has operated at the ICE building.⁴

The ALJ and the General Counsel correctly do not cite to S&F Market Street Healthcare LLC d/b/a Windsor Convalescent Center of North Long Beach, 351 NLRB 975 (2007) enforcement denied 570 F. 3d 354 (D.C. Cir. 2009) in connection with Paragon's actions here, but since there is dicta in that case suggesting that a successor needs to do more than merely announce that it is setting its own initial terms and conditions of employment, Respondent feels compelled to make certain that the Board recognizes that the dicta in S&F Market does not apply here.

S&F Market is inapposite here since it is a "perfectly clear successor" case, whereas the General Counsel has conceded here that Paragon is a Burns successor and not a perfectly clear successor. In S&F Market, the judge dismissed allegations in the complaint alleging that a successor had made unilateral changes when it took over the operations of a nursing home and set its own initial terms and conditions of employment for employees. The ALJ found that the successor had informed incumbents that they would be employed only in a temporary capacity so their skills and abilities could be assessed, and that this put incumbents on notice that their terms

⁴ The remaining cases cited in the General Counsel's supporting brief are consistent with Respondent's position in this Brief and do not suggest that Paragon had any legal obligation to do more than it did in this case. The cases that discuss the "perfectly clear successor" doctrine are not applicable here since the General Counsel concedes that Paragon was not a perfectly clear successor. The cases that discuss employers who started operations with one set of working conditions and then changed those working conditions days or weeks after starting operations are inapplicable because Paragon commenced operations with a 10-minute gear up/gear down period and never changed that working condition. The Board's decision in 301 Holdings, LLC, 340 NLRB 366 (2003) is inapplicable because that employer in that case implicitly told the incumbents that no change would take place in wages and benefits, whereas Paragon told employees about large scale changes from what MVM had offered. Moreover, in 301 Holdings, LLC, the employer's statement that the incumbent employees needed to reconfigure work schedules to cover weekends was found by the Board to be sufficient notice that schedules would be changing, just as Paragon notified incumbents in their offer letter that shift schedules would be subject to change based on the operational needs of the contract.

and conditions of employment were changing. The ALJ relied in part on a written offer of temporary employment that was dated June 30, 2004 and was either mailed or handed out to employees in connection with the July 1, 2004 starting date. The letter did not announce any changes in wages or benefits, but it did include a sentence saying that other terms and conditions of employment would be contained in a later-distributed handbook.

A two-member majority (Liebman and Kirsanow with Schaumber dissenting) determined that the record evidence did not adequately show that the June 30 letter was actually given to any employee prior to the July 1 starting date, so no notice had been provided that there would be any change in terms and conditions of employment. The two-member majority also pointed to an earlier letter that the successor had sent to employees talking about changes in patient mix and upgrades in patient care plans without any reference to a change in any working conditions, which the majority found to be misleading in nature. Finally, the majority faulted the ALJ for not giving sufficient weight to some isolated employees' testimony that they were told in general terms that nothing was changing and that they should not worry. As such, the majority felt that the successor was a perfectly clear successor under Spruce Up, and that the employer's changes on July 1 were unlawful.

The majority apparently had some well-warranted concern that this ruling might not withstand judicial review, so the majority added some dicta language ("assuming arguendo" – id., at 982) designed to bolster the argument that S&F Markets was a perfectly clear successor even if it had announced that it was only employing the incumbents on a temporary basis. The majority suggested that, if a successor just makes a general statement that new terms and conditions of employment will subsequently be set by the successor, this deprives incumbent employees of the opportunity to make an informed choice about whether to accept employment

and makes every subsequent change in terms a violation of Section 8(a)(5).

In so holding, the majority cited Banknote Corp. of America, 315 NLRB 1041 (1994) enforced 84 F. 3d 637 (2d Cir. 1996) as support for the proposition that an employer is a perfectly clear successor if it makes changes **after it commences operations** that were not announced at the time operations commenced. As discussed earlier, that was a correct holding in Banknote, where the employer commenced operations on April 19, 1990 and then announced changes on April 23 that were inconsistent with the way the employer had started operations on April 19. Banknote did **not** stand, however, for some overarching proposition that an employer has not preserved its right to implement its own initial terms and conditions if it simply tells incumbents at the time of the job offer that they will be starting employment under new terms and conditions that will be determined at a later date. And there is no language in Banknote suggesting that there is an employee right to make an “informed choice” that trumps a successor’s right to set initial terms and conditions after notifying employees that such terms and conditions may be different from those of the processor.

It is worth noting that, when the successor in S&F Markets sought review of the Board’s adverse decision, the United States Court of Appeals for the D.C. Circuit (which is the Circuit where the present case will be reviewed if necessary) denied enforcement to the relevant part of the Board’s Order on the grounds that the two-person majority misapplied existing law and did not base its decision on substantial supporting evidence. The Court found that “no employee could have failed to understand that significant changes were afoot” based on the successor’s communications to employees. Id. at 360. The Court noted that the correct legal standard was whether “employees were misled into expecting the terms of employment to continue wholly without change”, and the Court emphatically rejected the notion that an employer must do more

that “simply convey its intention to set its own terms and conditions rather than adopt those of the previous employer.” (Id. at 360-361).

IV. CONCLUSION

For each of the foregoing reasons, Respondent Paragon Systems, Inc. asks the Board to adopt the Administrative Law Judge’s Decision in this case and to dismiss the Complaint in its entirety.

Respectfully submitted,

/s/ Thomas P. Dowd

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CERTIFICATE OF SERVICE

I do hereby certify that a copy of Respondent's Brief to the Administrative Law Judge was served electronically and by first-class mail, postage pre-paid, on June 19, 2014 upon each of the individuals listed below:

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