

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

PARAGON SYSTEMS, INC.

and

Case 5-CA-127523

NATIONAL ASSOCIATION OF SPECIAL POLICE
AND SECURITY OFFICERS

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

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I. STATEMENT OF THE CASE

Counsel for the General Counsel files this single cross-exception to seek the Board's re-examination and reversal of its decision in *Spruce Up Corp.*,¹ and a return to the plain language of the U.S. Supreme Court's decision in *NLRB v. Burns Security Services*.² In so holding, the Board should hold here that Paragon Systems, Inc. ("Respondent") was a "perfectly clear" successor as initially defined by the Court in *Burns*, and violated Section 8(a)(5) and (1) by setting initial terms and conditions without first consulting with the employees' bargaining representative, in spite of Respondent's plan to retain its predecessor's workforce.

Respondent was awarded a security services contract at the Federal Emergency Management Agency ("FEMA") buildings in Washington, D.C., succeeding Knight Protective Services ("the predecessor" or "Knight"). National Association of Special Police and Security Officers ("NASPSO" or "the Union") was, at all material times, the employees' certified bargaining representative. NASPSO and Knight were parties to an effective collective-bargaining agreement at the time of Respondent's successful contract bid. Furthermore, because it successfully bid a government service contract, Respondent was required to adhere to Executive Order 13495 (Non-Displacement of Qualified Workers Under Service Contracts), which requires that successors on federal service contracts offer a right of first refusal to qualified employees for employment with the successor.

In June 2013, soon after being awarded the contract, Respondent posted a memorandum to Knight employees, notifying them that it was accepting applications from incumbent security officers and inviting those employees to apply for employment with Respondent. At this time

¹ *Spruce Up Corp.*, 209 NLRB 194 (1974).

² *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

Respondent made no indication of an intention to set initial terms and conditions of employment upon its assumption of operations at FEMA. Employees were directed to complete an online job application in advance of Respondent's June 29, 2013 job fair and were told to bring certain documents to the job fair, such that employees would reasonably believe that they would be hired by Respondent. Nor did Respondent's job application clearly express any intention to set initial terms and conditions of employment. Once at the job fair, employees who had previously submitted applications were provided with offer letters upon arrival and prior to discussing employment with any Respondent representative. These form offer letters, however, set forth a number of working conditions differing from those set forth in the Knight-NASPSO agreement. Additionally, upon assuming operations at FEMA on September 1, 2013, Respondent introduced several other changes not previously announced—one of which was not officially implemented until after Respondent realized an operational mistake following its first pay period at FEMA.

Following a hearing, Administrative Law Judge ("ALJ") Eric M. Fine correctly held that Respondent is a "perfectly clear" successor under the Board's still-applicable decision in *Spruce Up*.³ Specifically, the ALJ found that Respondent became a "perfectly clear" successor at the time it solicited applications in early-June 2013, and by failing to clearly announce that it intended to establish a new set of working conditions at the time it invited employees to apply. Thus, the ALJ concluded that Respondent was a "perfectly clear" successor and thereby violated Section 8(a)(5) and (1) of the Act by unilaterally altering employee working conditions without

³ Cites to the ALJ's decision will appear as "ALJD (page number)." Cites to the hearing transcript will appear as "Tr. (page number or range)." Cites to General Counsel exhibits will appear as "GC Ex. (number)." Cites to joint exhibits will appear as "Jt. Ex. (number)." Finally, cites to any Respondent exhibits will appear as "R Ex. (number)."

first providing notice and an opportunity to bargain to NASPSO, the employees' certified bargaining representative.⁴

Nonetheless, the ALJ declined counsel for the General Counsel's argument that the ALJ should issue an order recommending to the Board that it overturn *Spruce Up* and return to the plain language of the Supreme Court's decision in *Burns*. That sole issue is the subject of counsel for the General Counsel's cross-exceptions.

II. STATEMENT OF FACTS

A. Respondent's Successful Bid and Legal Obligations

In June 2013,⁵ the Federal Protective Service ("FPS") awarded Respondent a federal contract to provide security services at FEMA buildings in Washington, D.C.⁶ (Jt. Ex. 9, ¶ 1-2; ALJD 2.) Respondent was scheduled to assume operations at the FEMA buildings on September 1, replacing Knight. (Jt. Ex. 9, ¶ 3; ALJD 2.)

Prior to submitting its bid, Respondent received a copy of Knight's CBA with NASPSO. (Tr. 127-128; ALJD 11.) Respondent admits it reviewed the CBA's wage appendices, but, consistent with its usual practice, ignored the document's other provisions. (Tr. 111-112; ALJD 11.) While Grady Baker, Respondent's Director of Operations, testified that Respondent did not consider adopting the Knight-NASPSO CBA, there is no record evidence indicating that this

⁴ Respondent has filed exceptions to the ALJ's conclusion that it is a "perfectly clear" successor under extant Board law. Issues related to that finding and Respondent's exceptions to that finding will be addressed in counsel for the General Counsel's Answering Brief to Respondent's Exceptions.

⁵ All dates take place in 2013 unless otherwise specified.

⁶ The buildings at which Respondent assumed operational control on September 1 include FEMA Headquarters, located at 500 C St. SW, and the Portals Building, which is also located in southwest Washington, D.C. (Tr. 17-19.)

position was conveyed to the employees providing guard services at the FEMA buildings, or to NASPSO. (Tr. 128.)

As a federal contractor with a government service contract, Respondent does not dispute that it is subject to the requirements of Executive Order 13495 (Non-Displacement of Qualified Workers Under Service Contracts), as well as the Service Contract Act.⁷ (Jt. Ex. 9, ¶ 5; ALJD 2.) Executive Order 13495 requires a Service Contract Act successor to offer qualified predecessor employees a right of first refusal for employment with the successor. Additionally, the Service Contract Act generally requires successor employers to, at minimum, maintain specified working conditions set forth—if the predecessor is unionized—in a collective-bargaining agreement. (Tr. 109-111; ALJD 2 at fn. 4.)

B. The Predecessor CBA

Before Respondent assumed operations at the FEMA buildings, NASPSO was the bargaining representative for approximately 50-60 protective security officers (“PSO’s” or “unit employees”) employed by Knight at the FEMA buildings. (Jt. Ex. 9, ¶ 4; Tr. 18; ALJD 2.) Knight and NASPSO were parties to a collective-bargaining agreement (“the predecessor CBA”), the effective dates of which were October 1, 2012 through September 30, 2015. (Jt. Ex. 1; Jt. Ex. 9, ¶ 4; ALJD 2.) The predecessor CBA set forth the following relevant terms and conditions of employment for unit employees:

- Employees working at least eight (8) hours but less than twelve (12) hours received one 30-minute paid break and two 15-minute paid breaks. (Jt. Ex. 9, ¶ 10.)
- Full-time status was defined as any employee regularly scheduled to work at least 32 hours per week. (Id. at ¶ 11.)

⁷ McNamara-O’Hara Service Contract Act of 1965, 41 U.S.C. §§ 351-358

- Employees received a uniform allowance of \$0.65 per hour worked, which was paid to employees in their paycheck. (Id. at ¶ 12.)
- Employees had the option of receiving in their paycheck the cash equivalent of the hourly health and welfare (H&W) fringe benefit. (Id. at ¶ 13.)
- Similarly, employees had the option of receiving in their paycheck the cash equivalent of Knight’s hourly pension contribution. (Id. at ¶ 14.)

(See also Jt. Ex. 1; ALJD 5.)

The predecessor CBA set forth employees’ paid break intervals. Employees scheduled to work for eight hours were on duty for seven hours and received one hour of paid break time.⁸

(Tr. 28.) Regardless of how the employees utilized their one hour of paid break time, employees scheduled for an eight-hour shift were compensated for eight hours of work. (Tr. 29.)

Finally, the predecessor CBA defined employees regularly scheduled to work at least 32 hours per week as full-time employees. (Id. at ¶ 11.) An employee’s status as a full- or part-time employee factored into the amount of hours paid for holidays, vacation, and leave. (Tr. 41-42.) Under the predecessor CBA, full-time employees were compensated for the full amount of usually-scheduled hours on those occasions, whereas part-time employees received pro-rated compensation. (Id.)

C. The Invitation to Apply and Employees Submit Applications

Soon after winning the FEMA contract, Respondent posted an onsite memo inviting incumbent Knight employees—and making no reference to outside applicants—to apply for employment and attend a June 29 job fair. (Jt. Ex. 2; Tr. 20-21; ALJD 2-3.) Respondent noted that offers of employment would be contingent on passing certain pre-employment requirements, including attending training and obtaining all contract-required performance standards (e.g., a medical exam and a drug screening). (Jt. Ex. 2; Tr. 20-21; ALJD 3.) Nowhere in its job fair

⁸ Officer Myron Birdsong testified that employees had the option of taking the entire paid hour at one time, or separating break intervals into a 30-minute lunch break and two 15-minute rest breaks. (Tr. 28-29.)

memo did Respondent indicate, much less clearly announce, any intention to implement initial terms and conditions of employment differing from those in the predecessor CBA. (Jt. Ex. 2.) Rather, Respondent simply directed incumbent employees to visit its website to complete an online application. (Jt. Ex. 2; ALJD 2-3) Respondent further advised incumbent employees to bring documents required for their continued employment to a June 29 job fair at the Greenbelt, Maryland Marriott. The required documents are those typically needed for an employee personnel file, including a Social Security card, birth certificate, driver's license, and high school diploma (or equivalent). (Jt. Ex. 2; ALJD 3.)

Similar to its job fair memo, Respondent's application omitted any clear intention to implement its own initial terms and conditions of employment, or specifically change any existing term or condition of employment for the incumbent employees. (Jt. Ex. 5; Tr. 22.)⁹ After reviewing the job fair memo, Officer Myron Birdsong completed the online employment application and subsequently received an e-mail confirming Respondent's receipt of his application. (Tr. 21-23; ALJD 6.) Respondent's confirmation e-mail, too, was bereft of any notification that Respondent would be implementing its own initial terms and conditions of employment differing from those contained in the predecessor CBA. (Tr. 21-23; ALJD 6.)

D. Respondent Issues Offer Letters and Misleads Employees at Job Fair

On June 29, incumbent unit employees attended Respondent's job fair at the Greenbelt Marriott, and were provided with a hiring packet upon arrival.¹⁰ (Tr. 23-24, 55-58; ALJD 6.)

⁹ The application does indicate, in the final section titled "Customer Disclaimer," that "Paragon retains the right to establish compensation, benefits, and working conditions for all of its employees," as well as the "sole right to modify [the applicant's] compensation and benefits, position, duties, and other terms and conditions of employment...." (Jt. Ex. 5 at p. 7). The application does not indicate any specific term or condition of employment, or that Respondent would, in fact, be instituting any changes.

¹⁰ Employees from other predecessors, and in separate bargaining units, were also present at this job fair. (Tr. 44, 61, 77-78.)

The hiring packet included state and federal tax withholding forms, direct deposit authorization, and various policy acknowledgments. Also included in this packet was a job offer letter. (Tr. 24-25; GC Ex. 2; Jt. Ex. 3; see New Hire Paperwork at Jt. Ex. 4; ALJD 6-7.)

Despite never meeting with or interviewing a single predecessor employee before the job fair, Respondent issued job offer letters to all incumbent employees who had applied for employment in advance of the job fair.¹¹ (Tr. 122; GC Ex. 2; Jt. Ex. 3; ALJD 9.) As described by Officer Birdsong, Respondent never interviewed him at any time prior to presenting him with an employment offer or assuming operations at the FEMA buildings (Tr. 33-34, 42).¹² Furthermore, there is no record evidence indicating that Respondent interviewed any incumbent employee prior to taking over the security guard services at the FEMA buildings. Within the offer letter, Respondent expressly stated that incumbent unit employees were receiving a right of first refusal for employment with Respondent, in compliance with Executive Order 13495 (Non-Displacement of Qualified Workers Under Service Contracts). (GC Ex. 2, p. 2; ALJD 4). Birdsong signed and submitted his acceptance of the offer letter at the June 29 job fair, and was informed that an announcement scheduling mandatory job orientation would be coming soon. (Tr. 31-35; ALJD 6-7.)

Respondent's template offer letter omits mention of several changes ultimately implemented. In the case of paid employee breaks, the offer letter provided unspecific and vague generalizations. Specifically, buried in the middle of its offer letter, Respondent provided a general statement that employee breaks would be "provided in accordance with Company

¹¹ Grady Baker, Respondent's vice president of operations, testified that non-incumbent applicants usually do not receive a contingent offer at the job fair "because [Respondent would not] have as much data on them." (Tr. 122.) Executive Order 13495 does not require new applicants, unlike incumbent employees, to receive a right of first refusal to employment with a successor employer.

¹² The ALJ correctly credited Birdsong's testimony that Respondent officials did conduct interviews. Rather, Respondent officials at the June 29 job fair merely determined that employment-related documents were in order. (ALJD 29:4-7.)

policy and in compliance with any applicable State and Federal law requirements and subject to the operational needs of the contract.” (GC Ex. 2; Jt. Ex. 3; ALJD 3.) No further details were provided in the offer letter concerning employee breaks. Additionally, the offer letter is silent concerning hourly uniform allowance and the definition of full-time status. (See GC Ex. 2; Jt. Ex. 3.) The letter did note, however, that employer-funded hourly health and welfare (H&W) and pension contributions would be redirected to a company-sponsored 401(k) plan in each employee’s name. (Id.; ALJD 3.)

E. Respondent Assumes Operations and Makes Further Changes

Respondent eventually assumed operations at FEMA on September 1 with a workforce comprised of a majority of its predecessor’s employees. (Jt. Ex. 9, ¶ 16.) Accordingly, Respondent concedes that it was a legal successor to Knight no later than September 1, and thereafter formally recognized NASPSO as the collective-bargaining representative of unit employees at the FEMA buildings.¹³ (Tr. 12; Jt. Ex. 9, ¶ 17.)

Soon after assuming operations, employees noticed unanticipated and previously-mentioned changes to their terms and conditions of employment. First, employees noticed they were no longer receiving an hourly uniform allowance. (Tr. 41.) While Knight paychecks set forth line items for each wage and fringe benefit paid, Respondent’s paychecks provided no such organization. (Id.) Consequently, employees had difficulty discerning for what they had, and had not, been paid. (Tr. 73, 75.) In addition, employees experienced pay discrepancies, which, according to Baker, was not unusual during a transition period. (Id.; Tr. 156-157.)

Second, long after Respondent assumed control at the FEMA buildings, employees learned that the threshold for full-time status had, in fact, been increased from 32 to 40 hours. (Tr. 41.)

¹³ While the parties have stipulated that Respondent and NASPSO thereafter commenced bargaining, the record does not specify when NASPSO was formally recognized or when the parties began contract negotiations.

Moreover, to the surprise of Birdsong and other employees, Respondent eliminated 30 minutes of paid employee break time. At hearing, Baker admitted that Respondent failed to initially implement changes to employee breaks, conceding that Respondent provided employees with a paid 30-minute break during the first pay period after assuming control at the FEMA buildings. (Tr. 151-152.) Baker claims this mistake was corrected in the second pay period, and employees never again received a paid 30-minute break. (Tr. 153-156.)

It is undisputed that Respondent did not provide NASPSO with notice or an opportunity to bargain over any of the alleged unlawful changes to employee working conditions. (Jt. Ex. 9, ¶ 15.) Indeed, Respondent admits that all of the alleged changes were announced and implemented without bargaining with NASPSO. (Id.)

III. ARGUMENT

A. *Spruce Up* should be overturned and the Board should return to the “perfectly clear” successor standard set forth in *Burns*.

The Board should overturn *Spruce Up* and return to the standard first articulated by the U.S. Supreme Court in *Burns* regarding the appropriate bargaining obligation for a successor that is predominantly relying upon its predecessor’s unionized workforce to meet its own staffing needs. In *Burns*, the Supreme Court acknowledged that while a successor employer is ordinarily free to set initial terms on which it will hire a predecessor’s employees,

there 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 initially consult with the employees bargaining representative before [the employer] fixes terms.¹⁴

¹⁴ 406 U.S. at 294-295 (1972).

Two years after *Burns*, the Board significantly narrowed the Court’s “perfectly clear” caveat. In *Spruce Up*, the Board held that an employer is a “perfectly clear” successor, with an obligation to bargain over initial employment terms, only where it has either: (1) actively or tacitly misled employees into believing they will all be retained without a change in terms and conditions of employment; or (2) has failed to *clearly announce* its intent to establish new terms and conditions prior to inviting a predecessor’s employees to accept employment.¹⁵

1. *Spruce Up* is inconsistent with the Supreme Court’s clear language in *Burns* and has created confusing and often inconsistent Board law.

The Board’s limitation on “perfectly clear” successors first announced in *Spruce Up* is contrary to the clear language set forth by the Supreme Court, and has produced confusing and often inconsistent Board law. In addition to the ALJ in this matter, at least one other ALJ has suggested the Board might wish to revisit its holding in *Spruce Up*.¹⁶ Furthermore, because the number and scale of corporate mergers and acquisitions has increased dramatically over the last thirty-nine years, “much more is at stake in the Board’s approach to successorship issues—and in getting it right.”¹⁷ By overturning *Spruce Up* and returning to the clear language set forth by the Supreme Court in *Burns*, Respondent should be found to be a “perfectly clear” successor as contemplated by the *Burns* Court, because Respondent unquestionably planned to retain Knight’s workforce. Indeed, Executive Order 13495 required Respondent to offer employment to all

¹⁵ 209 NLRB at 195.

¹⁶ See *Nexeo Solutions, LLC*, JD(SF)-42-12, 2012 WL 3776858 (NLRB Div. of Judges Aug. 30, 2012).

¹⁷ *UGL-UNICCO Serv. Co.*, 357 NLRB No. 76, slip op. at 5 (Aug. 26, 2011). See Patrick A. Gaughan, Mergers, Acquisitions, and Corporate Restructurings 58 fig. 2.7 (5th ed. 2011) (showing how the number of merger and acquisition transactions in the U.S. grew from about four thousand the year *Spruce Up* was decided (1974) to cycling between six thousand and ten thousand per year from 1997 through 2009); Inst. of Mergers, Acquisitions & Alliances, *Statistics on Mergers & Acquisitions*, http://www.imaa-institute.org/statistics-mergers-acquisitions.html#MergersAcquisitions_United States of America (last updated June 24, 2014) (indicating that the number of announced mergers and acquisitions in the U.S. rose from about three thousand in 1985 to about eleven thousand for the past three years).

qualified applicants previously employed by Knight, its predecessor. Thus, not only does the record establish that Respondent planned to retain the existing unionized workforce, Respondent had a legal obligation to do so—if incumbent employees so chose—as part of its enterprise as a federal contractor.

As noted by Members Fanning and Penello in their dissents from the majority decision in *Spruce Up*, the Board’s holding there is inconsistent with the clear language of *Burns*.¹⁸ The Supreme Court recognized that an incumbent union will continue to enjoy majority status when no wholesale changes to the workforce are planned, and thus there would be situations where the successor’s retention plans were so clear that the successor would be obligated to confer with the employees’ bargaining representative prior to setting initial terms of employment.¹⁹ This rule underscores what the Court described as “the significant interest of employees in being represented as soon as possible.”²⁰

In *Spruce Up*, the Board majority ignored the Court’s plain meaning, and instead chose to limit a successor’s obligation to initially consult with the union to instances where the successor either: (1) misled the predecessor’s employees into believing that their terms of employment would remain unchanged; or (2) failed to announce its intention to establish new terms.²¹ The Board majority reasoned that because the successor cannot “realistically anticipate” whether the predecessor’s employees will agree to work under changed terms, it cannot be “perfectly clear”

¹⁸ *Spruce Up*, 209 NLRB at 206.

¹⁹ *Burns*, 406 U.S. at 294-295.

²⁰ *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 49 (1987).

²¹ 209 NLRB at 195.

to the successor that it can, in fact, “plan to retain all of the employees in the unit.”²² The Board majority based this limitation not on any legal precedent, but on policy grounds: in the Board majority’s view, adherence to the plain language of the *Burns* “perfectly clear” caveat would encourage a successor to “refrain from commenting favorably at all upon employment prospects of old employees for fear he would thereby forfeit his right to unilaterally set initial terms.”²³ Moreover, the Board majority determined that successor employers would be discouraged from hiring their predecessor’s employees if mere intent to hire caused a bargaining obligation to attach.²⁴ To hold otherwise, the Board majority reasoned, would discourage continuity in employment relationships for “legalistic and artificial considerations.”²⁵

Essentially, the Board majority determined that without *Spruce Up*’s limitations, a successor employer would be encouraged to violate the Act by not hiring its predecessor’s employees so it could unilaterally set initial terms free from any bargaining obligation. It is longstanding Board policy, however, that pre-start-up bargaining in the “perfectly clear” successor context promotes both job retention and labor peace.²⁶ Furthermore, there is no empirical evidence that *Spruce Up* has done anything to curtail employer discrimination in the successor context. But even if *Spruce Up* did reduce the incentives to violate the Act, weakening

²² *Id.*; *Road & Rail Services*, 348 NLRB 1160, 1162 (2006) (“The *Spruce Up* test focuses on gauging the probability that employees of the predecessor will accept employment with the successor.”).

²³ *Spruce Up*, 209 NLRB at 195.

²⁴ *Id.*

²⁵ *Id.*

²⁶ See *Road & Rail Services*, 348 NLRB at 1162 (“[T]here is a much greater likelihood that employees will choose to remain with the successor because they have a voice, through their representative, in establishing the terms and conditions under which they will work.”). See also *Planned Bldg. Services*, 330 NLRB 791, 797 (2000) (noting that only a fraction of employees applied for work with successor when initial wages were unilaterally cut in half).

the Act's protections simply to reduce a successor's temptation to violate the Act it is both counterproductive and unprecedented.

Even assuming the Board majority's concerns in *Spruce Up* were well-founded, though, they are based on a misreading of *Burns*. As Chairman Gould observed in his concurrence to *Canteen Co.*, the "Supreme Court in no way even suggested, much less stated, that the 'desire' of the employees or their 'willingness' to accept the new employer's offer was to be considered in determining whether the employer planned to retain all of the employees in the unit."²⁷ Indeed, as Member Fanning observed in his dissent to *Spruce Up*, the key factor according to the *Burns* Court is the intent of the employer.²⁸ If the successor "plans to retain" the predecessor's employees, the Court deemed that those employees' bargaining representative should be consulted before fixing initial terms.²⁹ By creating an exception that allows an employer to ignore those employees' representative while, at the same time, planning on using those employees as its own, the Board has acted contrary to the *Burns* Court's plain meaning.

Finally, *Spruce Up* has produced inconsistent and confusing Board and court decisions. Because *Spruce Up* changed the focus of the "perfectly clear" test from whether the employer plans to retain the incumbent employees to whether the employees are likely to accept employment, the Board has spent considerable energy analyzing whether the potential successor has actively or tacitly misled employees, whether it failed to clearly announce new terms, and the legal effect of when "the successor employer announces its offer of different terms of

²⁷ *Canteen Co.*, 317 NLRB 1052, 1054–55 (1995) (Chairman Gould, concurring), *enforced*, 317 NLRB 1052 (7th Cir. 1997). See also *Planned Building Services*, 318 NLRB 1049, 1050 (1995) (Chairman Gould, dissenting); *Spruce Up*, 209 NLRB at 208 (Member Penello, dissenting); at 205–206 (Member Fanning, dissenting).

²⁸ 209 NLRB at 205–206.

²⁹ *Burns*, 406 U.S. at 294–295.

employment in relation to its expression of intent to retain the predecessor’s employees.”³⁰

Confusion reigns as to when an employer must announce new terms to preserve its right to set initial terms,³¹ how explicit its announcement of new terms must be,³² and whether an employer forfeits its right to set initial terms by merely failing to announce new terms or by misleading employees into thinking their terms will remain unchanged.³³ Indeed, when a majority of a Board panel criticized *Spruce Up in Canteen Co.*, the Seventh Circuit welcomed the Board’s willingness to re-examine the case, and pointedly based its enforcement of the Board’s order on only *Burns*, not *Spruce Up*.³⁴

2. Compelling policy reasons exist to return to the Supreme Court’s definition of a “perfectly clear” successor in *Burns*.

In addition to relying on dubious policy considerations and ignoring the plain language of *Burns*, the majority opinion in *Spruce Up* disregarded the compelling policy reasons supporting a plain reading of the Supreme Court’s description of a “perfectly clear” successor. The Act aims to allow employees to be represented by the chosen collective-bargaining agent as quickly as

³⁰ *Fremont Ford*, 289 NLRB 1290, 1296 (1988).

³¹ Compare *Peters v. NLRB*, 153 F.3d 289, 298 (6th Cir. 1998) (holding that so long as an employer announces new terms “before or immediately after commencing operations,” it is not a perfectly clear successor) with *DuPont Dow Elastomers, LLC v. NLRB*, 296 F.3d 495, 502–03 (6th Cir. 2002) (distinguishing *Peters* and holding that employer must announce new terms by the time it expresses its intent to retain employees).

³² Compare *Ridgewell’s, Inc.*, 334 NLRB 37, 37 (2001) (holding that successor’s erroneous announcement that employees would be retained as “independent contractors” was enough notice for employees that terms would be changed), *enforced mem.*, 38 F. App’x 29 (D.C. Cir. 2002) with *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 980–982 (2007) (holding that announcement that employees would serve a ninety-day probationary period without company benefits was not enough notice that terms would be changed), enforcement denied 570 F.3d 354 (D.C. Cir. 2009).

³³ See *Saks & Co.*, 247 NLRB 1047, 1051–52 (1980) (finding “perfectly clear” successor where employer failed to announce new terms before commencing operations), *enforcement denied*, 634 F.2d 681, 687–88 (2d Cir. 1980) (reversing Board since employer did not mislead employees that terms would be different)

³⁴ *Canteen Corp. v. NLRB*, 103 F.3d 1355, 1362 (7th Cir. 1997).

possible.³⁵ The Supreme Court recognized that this significant interest is “especially heightened” in successor situations, since delay in recognition “disrupts the employees’ morale, deters their organizational activities, and discourages their membership in unions.”³⁶ Permitting an employer to delay recognition where the employer plans to retain its predecessor’s workforce frustrates this important objective.

Moreover, a plain reading of *Burns* would result in greater stability in labor relations. Both Congress and the Supreme Court have recognized that collective bargaining promotes stable and harmonious labor relations, which is the goal of the Act.³⁷ But as Member Fanning noted in his dissent to *Spruce Up*, the majority opinion sanctions a period of direct dealing where the successor may ignore the employees’ representative, thereby creating unnecessary conflict.³⁸ While a plain reading of *Burns* would bring the “mediatory influence of negotiation” when an employer wishes to alter employment terms, the Board’s decision in *Spruce Up* produces the “anomalous, if not absurd” result that collective bargaining is only required where there is no controversy.³⁹

Furthermore, the Board in *Spruce Up*, without explanation, shifted the balance struck by the Court in *Burns* between collective bargaining and labor peace on the one hand, and entrepreneurial freedom on the other. In *Burns*, the Supreme Court recognized that national

³⁵ *Fall River Dyeing*, 482 U.S. at 48-50.

³⁶ *Id.* at 49-50 (quoting *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704 (1944)).

³⁷ See *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 211 (1964) (“One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation.”). See also *Auciello Iron Works v. NLRB*, 517 U.S. 781, 785 (1996) (finding the object of the Act is industrial peace and stability, fostered by collective bargaining); *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 95 (1957) (noting that national labor policy is the promotion of industrial peace through collective bargaining).

³⁸ *Spruce Up*, 209 NLRB at 206 (Member Fanning, dissenting).

³⁹ See *id.*

labor policy requires that “the rightful prerogative of owners independently to rearrange their businesses” must be balanced against the interest of employees in continued representation by their union.⁴⁰ Because a transition between employers places unions and employees in a “peculiarly vulnerable position” particularly amenable to the labor peace and stability promoted by collective bargaining, the Court determined that a successor employer must bargain with the union.⁴¹ The Court also determined, however, that a successor is not required to adopt the predecessor’s collective-bargaining agreement.⁴² As to setting initial terms, a successor may do so unilaterally unless its intention is to adopt the predecessor’s workforce as its own. By limiting the Court’s “perfectly clear” caveat, the Board altered this balance, significantly undermining industrial peace in favor of entrepreneurial prerogatives.

The original “perfectly clear” caveat laid out by the Court in *Burns* amply accommodates the successor employer’s need for flexibility in restructuring and organizing its enterprise. Consistent with *Burns*, an employer can, for non-discriminatory reasons, hire new employees or a combination of new and predecessor employees. In those circumstances, an employer may unilaterally set initial terms. Alternatively, an employer can choose to adopt the predecessor’s trained, experienced workforce, in which case it must notify and bargain with the employees’ representative before fixing new initial terms. If the employer does choose to adopt the predecessor’s workforce, the successor is not barred from having new terms upon commencing

⁴⁰ 406 U.S. at 301 (quoting *John Wiley & Sons, Inc. v. Livingstone*, 376 U.S. 543, 549 (1964)). See also *Fall River Dyeing*, 482 U.S. at 41.

⁴¹ *Fall River Dyeing*, 482 U.S. at 39.

⁴² *Burns*, 406 U.S. at 294.

operations; it is merely required to notify and bargain with the incumbent union, upon request, before setting those terms.⁴³

For the reasons described above, the Board should overturn *Spruce Up* and establish a standard for “perfectly clear” successorship consistent with the Supreme Court’s direction in *Burns*. Here, as explained further below, Respondent made it perfectly clear to its predecessor’s organized employees that it planned to meet its staffing needs at the FEMA buildings from the ranks of the qualified incumbent employees who applied for employment with Respondent. Accordingly, the Board should conclude that Respondent is a “perfectly clear” successor within the meaning of *Burns*.

3. Consistent with its well-established policy, the Board should adopt a return to the *Burns* standard retroactively.

The Board customarily applies new policies and standards retroactively “to all pending cases in whatever stage.”⁴⁴ To determine whether retroactive application is appropriate, the Board balances any ill effects of retroactivity against “the mischief of producing a result which is contrary to statutory design or to legal and equitable principles.”⁴⁵ The Board will retroactively apply a new rule or standard to a case in which a new rule is announced, and all other pending cases, unless doing so would produce a “manifest injustice.”⁴⁶ To determine whether retroactive application will cause manifest injustice, the Board balances three factors: (1) the reliance of the

⁴³ *Id.* at 295; *Spruce Up*, 209 NLRB at 208 (Member Penello, dissenting).

⁴⁴ See *SNE Enterprises, Inc.*, 344 NLRB 673, 673 (2005) (quoting *Aramark School Services*, 337 NLRB 1063, 1063 fn. 1 (2002); *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006-07 (1958)).

⁴⁵ *SNE Enterprises*, 344 NLRB at 673 (quoting *Security & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

⁴⁶ *Id.* (internal citations omitted)

parties on pre-existing law; (2) the effect of retroactivity on accomplishment of the purposes of the Act; and (3) any particular injustice arising from retroactive application.⁴⁷

Here, all three factors favor retroactive application and manifest injustice would not occur if the Board retroactively applied this new standard. First, as the ALJ correctly held, Respondent failed to meet its legal obligations even under the Board's narrower *Spruce Up* holding. Thus, even under pre-existing law, Respondent violated Section 8(a)(5) and (1) of the Act. Second, retroactive application aids in accomplishing the purposes of the Act. Here, as explained above, returning to the plain language of the Court's holding in *Burns* furthers the Act's goal of permitting employees to be represented by their chosen collective-bargaining representative as quickly as possible. Additionally, this new standard will serve to stabilize labor relations, another of the Act's foremost objectives. It is axiomatic that collective bargaining promotes stable and harmonious labor relations. Further, by retroactively applying this standard, the Board can effectively eliminate periods of direct dealing during which the successor ignores the employees' chosen bargain representative, which may further destabilize labor relations when the parties inevitably commence their bargaining relationship. Finally, there is no evidence that any particular injustice would arise from retroactive application. The ALJ correctly determined that Respondent violated Section 8(a)(5) and (1) pursuant to the extant *Spruce Up* standard—a decision that the Board should affirm. Retroactive application of the new “perfectly clear” standard in no way alters the recommended remedy, or otherwise converts lawful Respondent actions to unlawful actions. For these reasons, the Board should adhere to its well-established policy and retroactively apply its new standard to this matter, and all pending cases.

⁴⁷ *FedEx Home Delivery*, 362 NLRB No. 29, slip op. at 1 (March 16, 2015) (citing *Machinists Local 2777 (L-3 Communications)*, 355 NLRB 1062, 1069 fn. 37 (2010)).

B. Respondent is a “perfectly clear” successor within the meaning of *Burns* because it both intended to retain the predecessor’s employees, and was required to offer them employment.

Ample record evidence supports the conclusion that Respondent falls within the “perfectly clear” language articulated by the Supreme Court in *Burns*. The relevant inquiry concerns the successor employer’s intentions regarding the incumbent workforce. In this inquiry, certain facts in this case—that Respondent indicated at least some changed terms and conditions of employment in its June 29 offer letter—may be rendered irrelevant if *Spruce Up* is overturned. A preponderance of the record evidence establishes that Respondent unquestionably planned to retain Knight’s workforce as its own. Accordingly, the Board should hold that Respondent is a “perfectly clear” successor, as defined by the Court in *Burns*.

Respondent’s actions conclusively establish that it intended to retain the predecessor’s workforce. Soon after being awarded the contract for the guard services at the FEMA buildings, Respondent invited incumbent employees to apply for continued employment. Respondent concedes that it extended job offer letters at the June 29 job fair to all incumbent employees who had previously completed an online employment application. In addition to providing offers to Knight employees, sight unseen, Respondent failed to so much as interview Knight employees before extending job offers to these individuals. That Respondent offered employment to Knight employees simply because they submitted a job application, and, at the same time, did not bother to interview prospective employees further underscores Respondent’s unmistakable intention to retain its predecessor’s employees as its own.

Not only did Respondent’s actions evince an intention to retain predecessor employees, Respondent was obligated by Executive Order 13495 to offer employment to *all* qualified incumbents who applied. The Executive Order effectively requires Respondent, and other

Service Contract Act successors, to cede to an incumbent employee the decision of whether the employee will continue his employment with Respondent.

In sum, adhering to the plain language of *Burns*, Respondent's bargaining obligation attached upon determining it would enter the service contract and rely predominantly, if not exclusively, on its predecessor's workforce to meet its own staffing needs, due to its obligation to offer incumbent employees with a right of first refusal under Executive Order 13495. At that point, Respondent was obligated to notify NASPSO that it wished to alter employees' terms and conditions of employment, and thereafter give NASPSO an opportunity to bargain over these initial working conditions. Thus, the Board should hold that Respondent is a "perfectly clear" successor under *Burns* because the record establishes that it, at all times, intended to retain the predecessor's workforce in compliance with the Executive Order. The Board should further hold that Respondent violated Section 8(a)(5) and (1) by failing to notify and bargain with NASPSO before fixing initial terms and conditions of employment.

IV. CONCLUSION

Counsel for the General Counsel respectfully submits that the Board should find merit to counsel for the General Counsel's cross-exception in this matter. For the reasons stated above, the Board should reconsider and overturn its decision in *Spruce Up*, and return to the Supreme Court's plain language in *Burns*. This new standard should be applied retroactively because it would not create a manifest injustice to Respondent. Additionally, under that new standard, the Board should hold that Respondent violated Section 8(a)(5) and (1) of the Act because it unilaterally set initial terms without notifying or consulting with NASPSO despite Respondent's plan—and its coinciding obligations under Executive Order 13495—to retain predecessor Knight's experienced and unionized workforce.

Dated at Baltimore, Maryland this 4th day of December 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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