

**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

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ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

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I. STATEMENT OF THE CASE

In June 2013, Paragon Systems, Inc. (“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”) 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.

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 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 one-day hearing, Administrative Law Judge (“ALJ”) Eric M. Fine correctly held that Respondent was a “perfectly clear” successor as defined by the Board’s decision in *Spruce Up Corp.*¹ Agreeing with counsel for the General Counsel that Respondent’s memorandum and solicitation of incumbent employee applications was, or is tantamount to, an “invit[ation]...to accept employment,” Respondent was required to clearly announce its intention to establish a new set of working conditions prior to or contemporaneously with its invitation. The ALJ concluded, however, that Respondent failed to clearly announce its intention to establish a new set of working conditions at that time. Consequently, Respondent incurred an obligation to bargain with NASPSO prior to implementing different working conditions.

By finding that Respondent violated Section 8(a)(5) and (1) by failing to notify and bargain with NASPSO, upon request, before altering employees’ terms of employment, the ALJ correctly rejected Respondent’s argument that the complaint in this case is time-barred by Section 10(b) of the Act. Respondent failed to meet its burden that NASPSO had actual or constructive knowledge of Respondent’s unfair labor practices more than six months prior to filing the charge in this case. Respondent presented insufficient evidence to support a conclusion that employee knowledge of Respondent’s unfair labor practice more than six months prior to NASPSO’s charge should be imputed to NASPSO. Further, the ALJ made the reasoned, well-supported finding that NASPSO exercised reasonable diligence and, thus, should not be charged

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

with constructive knowledge of Respondent's actions more than six months prior to the charge. Absent sufficient evidence of knowledge—actual or constructive—or a lack of reasonable diligence by NASPSO, the ALJ correctly rejected Respondent's affirmative defense.

Respondent excepts to the ALJ's above findings. Respondent's exceptions are without factual and legal merit. Based on the facts of this case and the arguments set forth below, counsel for the General Counsel respectfully urges the Board to deny Respondent's exceptions, in full, and affirm the ALJ's evidentiary rulings, factual findings, and legal conclusions to extent modified by counsel for the General Counsel's cross-exceptions.²

II. STATEMENT OF FACTS

A. Respondent's Successful Bid and Legal Obligations

In June 2013,³ the Federal Protective Service ("FPS") awarded Respondent a federal contract to provide security services at FEMA buildings in Washington, D.C.⁴ (Jt. Ex. 9, ¶ 1-2; ALJD 2.) Respondent was to assume operations at the FEMA buildings on September 1, replacing Knight as the site's security services contractor. (Jt. Ex. 9, ¶ 3; ALJD 2.)

Prior to submitting its bid, Respondent received a copy of Knight's CBA with NASPSO and, thus, was indisputably aware of Knight's unionized workforce. (Tr. 127-128; ALJD 11.) Though Respondent's Director of Operations Grady Baker testified that Respondent never considered adopting the Knight-NASPSO CBA, there is no record evidence indicating that this

² In Respondent's Brief in Support of Exceptions to the Administrative Law Judge's Recommended Decision, Respondent addresses the issue of whether the Board should overturn its decision *Spruce Up Corp.*, 209 NLRB 174. See R. Br. at 40-49. This issue is the subject of counsel for the General Counsel's Cross-Exceptions and Brief in Support of Cross-Exceptions, and, thus, will not be addressed here.

³ All dates take place in 2013 unless otherwise specified.

⁴ 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 Knight employees at the FEMA buildings, or to NASPSO. (Tr. 128.) Nor does Respondent contend it ever informed NASPSO of its intention not to adopt the Knight-NASPSO CBA.⁵

As a federal contractor with a government service contract, Respondent was subject to the requirements of Executive Order 13495 (Non-Displacement of Qualified Workers Under Service Contracts), as well as the Service Contract Act.⁶ (Jt. Ex. 9, ¶ 5; ALJD 2.) In relevant part, Executive Order 13495 requires federal government contractor successors to offer qualified predecessor employees a right of first refusal for employment with the successor, absent certain exceptions not applicable in this case. Additionally, the Service Contract Act generally requires successor employers to at least 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 exclusive bargaining representative for approximately 50-60 protective security officers (“PSOs”) 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:

⁵ Respondent’s failure to inform NASPSO of its intention not to honor the existing CBA departs from its procedure in at least one other case. In a case before Region 12 of the National Labor Relations Board, the Regional Director premised the Region’s dismissal, at least in part, on Respondent’s notification to the union that it did not intend to honor the pre-existing CBA and would negotiate a new contract upon assuming operations. *See* R. Ex. 1.

⁶ McNamara-O’Hara Service Contract Act of 1965, 41 U.S.C. §§ 351-358

- 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.)
- 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.)

An employee's status as a full- or part-time employee factored into the amount of hours paid to employees 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. Respondent's Invitation to Predecessor Employees

Soon after winning the FEMA contract, Respondent disseminated a memorandum 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 were 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 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. (Id.) 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.)⁷ 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 to Incumbent 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.⁸ (Tr. 23-24, 55-58; ALJD 6.) 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.)

⁷ 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.

⁸ Employees from other predecessors, and in separate bargaining units, were also present at this job fair. (Tr. 44, 61, 77-78.)

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.⁹ (Tr. 122; GC Ex. 2; Jt. Ex. 3; ALJD 9.) As described by Officer Birdsong, Respondent never interviewed him prior to offering him employment or assuming operations at the FEMA buildings (Tr. 33-34, 42).¹⁰ 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 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.) The letter did not state Respondent's break policy or explain how, if at all, that policy differed from Knight's break policy. Additionally, Respondent's offer letter is silent concerning payment of an hourly

⁹ 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.

¹⁰ 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.)

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 H&W and pension contributions would be redirected to a company-sponsored 401(k) plan in each employee's name and employees would no longer have the option to receive those fringe benefits as wages. (Id.; ALJD 3.)

E. New Hire Orientation

On August 24, just eight days before assuming operations at FEMA, Respondent held a mandatory New Hire Orientation for unit employees. (Jt. Ex. 5; Tr. 35.) There, employees were provided for the first time with an employee handbook. (Tr. 36; Jt. Ex. 7.)

The handbook touches on a number of the terms and conditions at issue in this case. First, under "Uniforms and Appearance," the handbook states that wash-and-wear uniforms require "minimal maintenance" and "do not require dry cleaning." (Jt. Ex. 7, p. 24.) The handbook does not, however, state or even suggest that employees receiving wash-and-wear uniforms will be disqualified from receiving a uniform allowance. Indeed, there is not a single reference to uniform allowance in Respondent's employee handbook. Next, the handbook defines a full-time employee as one who "regularly works a minimum of 40 or more hours per week." (Id. at p. 39.) Finally, in the section titled "On-Duty Meal Period," the handbook states that security officers "sometimes take paid on-duty meal breaks." (Id. at p. 41.) Just sentences later, the handbook states, "at some assignments, officers take off-duty, unpaid meal periods." (Id.) The handbook provides no further clarity on this issue.

Though Baker was not present for New Hire Orientation, Waddell and Lori Raines, Respondent's Human Resources Generalist, represented Respondent at this session.¹¹ (Tr. 35-

¹¹ Neither Waddell nor Raines was called by Respondent to testify about what transpired at the New Hire Orientation, despite what Baker testified to be Waddell's and Raines' voluntary and amicable separations from the company. (Tr. 144; see generally Tr. 161-166.)

36, 146.) At hearing, Birdsong was the only witness to testify who was present for, and has personal knowledge of, the orientation. Indeed, Baker conceded that he has no personal knowledge of any questions posed or answers provided at the orientation. (Tr. 166-167.) Birdsong testified unequivocally that neither Waddell nor Raines stated that Respondent was terminating the hourly uniform allowance, reducing employee breaks, or altering the then-existing definition of a full-time employee in any manner. (Tr. 37-40.)¹² Further, Waddell reiterated that employee wages would stay the same and nothing would change from the predecessor CBA. (Tr. 53-55, 64, 68, 71.)

F. Respondent Assumes Operations and Makes Further Changes

Respondent ultimately 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, though the exact date of Respondent's formal recognition is not clear in the record.¹³ (Tr. 12; Jt. Ex. 9, ¶ 17.)

Soon after assuming operations, employees noticed unanticipated and previously-unmentioned changes to their terms and conditions of employment. First, employees noticed they were no longer receiving an hourly uniform allowance. (Tr. 41.) Whereas Knight paychecks set forth line items for each wage and fringe benefit paid, Respondent's paychecks provided no such organization or clarity. (Id.) Consequently, employees had difficulty

¹² Birdsong acknowledged that both Raines and/or Waddell indicated that employees who opted out of receiving health insurance would have the health and welfare portion of their wage deposited into a 401(k) plan, in addition to pension contributions that would also go into a 401(k) plan. (Tr. 36-39.)

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.

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.)

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 an unspecified amount of its 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.) Birdsong, however, testified that he received paid breaks for approximately two months after Respondent assumed operations. (Tr. 76, 81-82.) The ALJ considered the witnesses' contrasting testimony and concluded that the record was insufficient to conclude when exactly Respondent began consistently applying its policy of not paying for a 30-minute lunch break to all employees. (ALJD 19:42-34: "No hard evidence was placed on the record by either Paragon or the General Counsel as to when Paragon employees stopped being paid for their 30-minute lunch break...")

It is undisputed that Respondent did not notify NASPSO or provide NASPSO with 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 prior bargaining with NASPSO. (Id.)

G. NASPSO Learns of Respondent's Actions and Files Charge

In March 2014, Gaby Fraser, NASPSO's Director of Operations, first learned of the changes at issue from FEMA unit employees. (Tr. 91-92.) Fraser is NASPSO's only representative and represents 1,200 to 1,500 unit members spanning 19 separate bargaining units. (Tr. 90-92.) Around March 2014, an employee informed Fraser that Respondent had diverted fringe benefit contributions previously offered as wages in employee paychecks to a Respondent-sponsored 401(k) plan, and had eliminated 30 minutes of paid break time for unit employees. (Id.) NASPSO's two shop stewards for this bargaining unit were no longer employed at the FEMA buildings after Respondent assumed operations.¹⁴ (Tr. 93.) In March 2014, after hearing of the changes involving the terms and conditions of employment for employees at the FEMA buildings, Fraser contacted additional Respondent employees—in separate bargaining units not at issue in this case—who confirmed similar changes to Fraser. (Tr. 93-94, 97.)

Weeks later, in April 2014, unit employees working at the FEMA buildings informed Fraser that Respondent had also increased the threshold for determining full-time status from the collectively-bargained predecessor CBA amount of 32 hours to 40 hours. (Tr. 95-96.) On April 24, 2014, NASPSO filed the instant charge alleging, in relevant part, that Respondent unlawfully reduced employee breaks and changed the definition of full-time status from 32 to 40 hours. (GC Ex. 1(a)-(b).) Finally, in May 2014, the investigating Board agent notified Fraser that unit employees were no longer receiving a uniform allowance. (Tr. 95-96.) At that time, NASPSO filed a first amended charge incorporating the elimination of the uniform allowance, and Respondent's diversion of the H&W and pension contributions to a company-sponsored 401(k) plan. (Tr. 96; GC Ex. 1-C.)

¹⁴ The record is unclear as to the reasons why the former shop stewards did not continue their employment with Respondent.

The record is devoid of evidence or testimony establishing that Fraser knew of the alleged violations prior to October 24. Respondent did not proffer any evidence that it directly informed NASPSO, orally or in writing, of its intention to set initial terms and conditions of employment prior to assuming operations at the FEMA buildings. The record is equally devoid of evidence demonstrating that Respondent directly notified NASPSO that it had implemented initial terms and conditions of employment for the unit employees working at the FEMA buildings after assuming operations, let alone before October 24, 2013—six months prior to the filing of this charge and the effective Section 10(b) date in this case.

III. ARGUMENT

Respondent advances two general categories of exceptions, both of which are without merit. Respondent first excepts to the ALJ's rejection of its argument that the complaint should be dismissed because it was filed outside the Section 10(b) period. Specifically, though the ALJ credited Fraser's testimony that she did not obtain actual knowledge of Respondent's unfair labor practices until spring 2014, Respondent contends that constructive knowledge should be imputed to NASPSO. Respondent, however, failed to meet its burden of establishing that employee knowledge of some of its unlawful actions more than six months preceding the charge should be imputed to NASPSO. Similarly, Respondent presented insufficient evidence warranting a conclusion that reasonable diligence would have alerted NASPSO to Respondent's unfair labor practices more than six months prior to NASPSO filing its charge in this matter. Second, Respondent excepts to the ALJ's reasoned holding that Respondent is a "perfectly clear" successor and, thus, was obligated to bargain with NASPSO prior to implementing new working conditions. The ALJ exhaustively analyzed this issue, and correctly determined that Respondent failed to clearly announce its intention to implement new terms when it invited employees to

accept employment with Respondent. For the reasons explained below, the Board should affirm the ALJ's holding that Respondent violated Section 8(a)(5) and (1) by failing to notify and provide NASPSO with an opportunity to bargain prior to Respondent changing employee working conditions.

A. Respondent Failed to Establish that Complaint is Barred by Section 10(b)

Section 10(b) of the Act requires that “[n]o complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board.” The party asserting this defense bears the burden of proving that the aggrieved party had actual or constructive knowledge of the alleged violation more than six months prior to filing the charge.¹⁵ The 10(b) period begins only when the aggrieved party has “clear and unequivocal” notice of the violation.¹⁶ Constructive knowledge may be imputed where the conduct in question was sufficiently “open and obvious” to provide *clear notice*, or where the filing party would have discovered the conduct had it exercised reasonable diligence.¹⁷ Here, Respondent bears the burden of demonstrating that NASPSO had actual or constructive knowledge prior to October 24, the date six months preceding NASPSO's April 24, 2014 charge. Respondent failed to meet its burden, and the ALJ correctly concluded that NASPSO's charge was not barred by Section 10(b).

In its exceptions, Respondent largely restates many of the same arguments that were considered, analyzed, and correctly rejected by the ALJ. Respondent cannot and does not

¹⁵ *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004), *enfd. sub nom. East Bay Automotive Council v. NLRB*, 483 F.3d 628 (9th Cir. 2007).

¹⁶ *Id.*

¹⁷ *Duke University*, 315 NLRB 1291, 1291 fn. 1 (1995) (clear notice where changes were made openly); *Oregon Steel Mills*, 291 NLRB 185, 192 (1988), *enfd. mem. sub nom.* See also *Gilmore Steel Corp. v. NLRB*, 134 LRRM 2432 (9th Cir. 1989), *cert denied* 496 U.S. 925 (1990).

contend that NASPSO had actual knowledge of Respondent's unfair labor practices more than six months prior to filing the instant charge. Indeed, the ALJ concluded that Respondent presented no such evidence.¹⁸ Rather, Respondent excepts to the ALJ's refusal to impute employee knowledge of changes to their working conditions to NASPSO. Respondent further excepts to the ALJ's conclusion that NASPSO, under the circumstances of this case, did not fail to exercise reasonable diligence that would have revealed Respondent's unlawful conduct prior to October 24. Both categories of exceptions are meritless and should be rejected by the Board. Accordingly, the Board should conclude, consistent with the ALJ's finding, that Section 10(b) does not serve as a bar to the allegations in this case.

1. The ALJ Correctly Refused to Impute Employee Knowledge of Respondent's Unfair Labor Practices to NASPSO.

Respondent seeks to sidestep the uncontroverted fact that it never provided notice of its intention to alter employees' initial terms to NASPSO by arguing that employee knowledge of the changes prior to October 24 should be imputed to NASPSO. This argument has no merit.

The Board examines the factual context of each case when determining whether unit employees' knowledge of changes to their working conditions should be imputed to their bargaining representative for purposes of determining the start of the Section 10(b) limitations period.¹⁹ Here, the ALJ thoroughly analyzed extant Board law addressing this issue, and correctly concluded that the facts of this case do not warrant imputing employee knowledge of changes prior to October 24.²⁰

¹⁸ ALJD 17:50-18:1.

¹⁹ *Michael Konig T/A Nursing Center at Vineland*, 318 NLRB 337, 339 (1995).

²⁰ See ALJD 16:50-21:7.

In cases where the Board has imputed employee knowledge of unfair labor practices to the employees' bargaining representative, thereby starting the Section 10(b) period, it has often done so on the basis that a high-ranking shop steward—often with a role on the union's negotiating committee—knew of the alleged unlawful practice more than six months prior to the filing date. Thus, there is a basis of agency, as the employee-shop steward might be considered a union agent, thereby justifying imputing knowledge to that shop steward's union.

In *The Courier-Journal*,²¹ the Board affirmed an ALJ's finding that an employee-shop steward's knowledge of unilateral changes more than six months prior to the charge should be imputed to the union. There, the ALJ felt it appropriate to impute knowledge to the union in that case's factual context because the shop steward had also served on the union's bargaining committee for one year at the time the changes at issue were made, and had participated in all bargaining sessions on behalf of the union.²² Similarly, in *Baytown Sun*,²³ an employee-union steward's knowledge was imputed to the union where the steward was closely tied to the union, was a member of the union's negotiating committee, and had attended all negotiation sessions between the employer and union prior to the alleged unlawful changes.

Respondent, however, has produced insufficient evidence in this case to support a finding that employee knowledge of Respondent's unlawful acts should be imputed to NASPSO more than six months prior NASPSO's April 24, 2014 charge. Respondent—who bears the burden of establishing its Section 10(b) defense—failed to elicit evidence contradicting Fraser's testimony that NASPSO's shop stewards during Knight's operational control at FEMA were not employed

²¹ 342 NLRB 1093, 1103 (2004).

²² *Id.*

²³ 255 NLRB 154, 160 (1981).

by Respondent after it assumed operations on September 1. At hearing, Respondent did not ask Fraser the names of NASPSO's stewards with the predecessor, NASPSO's then-current shop stewards, or when its current shop stewards assumed their respective position as a steward. Nor did Respondent establish that NASPSO bargaining committee members served as shop stewards during the period between September 1 and October 24. Accordingly, Respondent produced no evidence to support the conclusion that any high-ranking NASPSO employee-shop steward had knowledge of any of Respondent's unlawful actions prior to the start of the limitations period.²⁴ In sum, the ALJ correctly determined that Respondent did not establish that there were NASPSO stewards at FEMA between September 1 and October 24, nor did it establish that any employee had a significant role in negotiations or was otherwise connected to NASPSO.²⁵

Next, Respondent advances the unusual argument that NASPSO—the employees' certified collective-bargaining representative, a fact admitted to by Respondent²⁶—is not the “affected party,” and, instead, the Board should calculate the limitations period from when employees first learned of some of Respondent's unlawful changes. This argument amounts to little more than a long-shot effort to avoid the inescapable conclusion that NASPSO had neither actual nor constructive knowledge of Respondent's unfair labor practices prior to October 24, and should be rejected. Respondent is unable to cite any legal authority standing for the proposition that the limitations period for an allegation alleging a refusal to bargain commences

²⁴ In any event, the Board does not automatically impute an employee's knowledge to a union for the purpose of starting the limitations period simply because the employee is a shop steward. See *Catalina Pacific Concrete Co.*, 330 NLRB 144, 149 (1999) (knowledge not imputed where employee was “nominal” shop steward); *Brimar Corp.*, 334 NLRB 1035, 1037 fn. 1 (2001) (employee steward's knowledge not imputed to union for purpose of triggering the 10(b) period where steward had no role in matters relating to bargaining).

²⁵ ALJD 20:38-41.

²⁶ See GC Ex. 1(e) & (g), ¶6(a)-(e).

upon an individual employee's or group of employee's knowledge of the unilateral change rather than the knowledge of the employees' exclusive collective-bargaining representative.

The complaint specifically alleges that Respondent's unlawful changes to mandatory subjects of collective bargaining, without providing NASPSO with prior notice and an opportunity to bargain, amounts to a failure to bargain collectively and in good faith with the exclusive collective-bargaining representative of Respondent's employees, in violation of Section 8(a)(5) and (1).²⁷ NASPSO is the party affected by Respondent's failure to bargain, for it is NASPSO that, the parties agree, has been the exclusive collective-bargaining representative of the unit employees at all relevant times. Respondent's failure to consult with NASPSO prior to implementing initial terms and conditions of employment undermined NASPSO's status as the employees' exclusive bargaining representative. Nor does Respondent explain how employees would have knowledge of whether, or to what extent, Respondent met its bargaining obligation by notifying and bargaining with NASPSO over the changes at issue.

The Board case cited by Respondent in support of its specious proposition is not persuasive, and the ALJ was correct to reject their applicability in this case. In *R.J.E. Leasing Corp.*,²⁸ the charging party was an individual, not a union. There, the employee alleged that the employer violated Section 8(a)(2) for entering a pre-hire agreement with a union. The Board affirmed the ALJ's rejection of the employer's Section 10(b) defense, stating that the limitations period began only when the employees knew of the pre-hire agreement. Whether employee knowledge could be imputed to a union was not at issue in that case, and was not even addressed because the charging party was not a union.

²⁷ GC Ex. 1(e), ¶ 7-10.

²⁸ 262 NLRB 373, 381-382 (1982).

Here, Respondent has failed to meet its burden of establishing that constructive knowledge should be imputed to NASPSO based on employee knowledge of some—but not all—of Respondent’s unlawful changes. Respondent failed to elicit evidence that any employee served as a high-ranking shop steward or negotiating committee member for NASPSO, or who otherwise was closely connected to NASPSO. Additionally, Respondent’s contention that NASPSO is not the party affected by Respondent’s alleged failure to bargain, in violation of Section 8(a)(5) or (1), is entirely without legal support. Thus, the Board should reject Respondent’s exceptions calling for the Board to reverse the ALJ’s conclusion that employee knowledge of unfair labor practices prior to October 24 should be imputed to NASPSO.

2. The ALJ Properly Concluded that NASPSO Exercised Reasonable Diligence

Respondent next advances the equally meritless argument that the ALJ improperly concluded that NASPSO acted with reasonable diligence and, thus, should not be charged with constructive knowledge prior to October 24. The Board has long held that constructive knowledge may be found, even in the absence of actual knowledge, if a charging party has failed to exercise reasonable diligence.²⁹ Specifically, the Section 10(b) limitations period commences when the charging party knew or should have known of the unfair labor practice, or would have discovered it in the exercise of reasonable diligence.³⁰ The Board, however, does not require that unions “aggressively police” their contracts in order to meet the reasonable diligence standard.³¹ Once again, determining whether a charging party engaged in reasonable diligence requires a

²⁹ *Oregon Steel Mills*, 291 NLRB 185, 192 (1988), enfd. mem. sub nom. *Gilmore Steel Corp. v. NLRB*, 134 LRRM 2432 (9th Cir. 1989), cert. denied 496 U.S. 925 (1990).

³⁰ *Id.*

³¹ *Mathews-Carlson Body Works, Inc.*, 325 NLRB 661, 662 (1998).

case-specific factual determination.³² Despite Respondent’s efforts frame the issue as whether Fraser and NASPSO should have first learned of Respondent’s actions prior to March 2014, that is not the issue to be decided; rather, the issue is whether reasonable diligence would have revealed Respondent’s unlawful actions prior to October 24. The ALJ thoroughly examined the facts of this case and correctly concluded that NASPSO did act with reasonable diligence, and, thus, constructive knowledge should not be imputed to NASPSO prior to October 24.

Respondent’s reliance on the Board’s holdings in *Moeller Bros. Body Shop*³³ and *Mathews-Carlsen Body Works*³⁴ is misplaced for numerous reasons. In *Moeller Bros.*, the Board found that the union could be charged with constructive knowledge because it failed to exercise reasonable diligence that would have much earlier confirmed the respondent’s contractual noncompliance, which spanned several *years*.³⁵ The Board concluded that minimal effort and mere observation would have put the union on notice that the number of unit employees was at least double that being reported on respondent’s fringe benefit reports.³⁶ There, despite a long and well-established bargaining relationship, the union never assigned a steward to the facility and rarely visited the shop—indeed, the union made only four visits in six years preceding its discovery of the employer’s violations.³⁷ The Board reasoned that had the union “made even minimal effort to monitor the employer’s facility,” it would have observed the employer’s unfair labor practices; indeed, mere observation would have revealed the employer’s deeds long before

³² See, e.g., *Michael Konig*, 318 NLRB at 339 (evidence insufficient to establish that exercise of reasonable diligence by labor organization would have led to earlier discovery of unfair labor practice).

³³ 306 NLRB 191 (1992).

³⁴ 325 NLRB 661 (1998).

³⁵ *Id.* at 192-193.

³⁶ *Id.* at 192.

³⁷ *Id.* at 191-192.

the date six months prior to the charge.³⁸ Put simply, had the union quite simply counted the respondent's employees, the respondent's violations would have been revealed.

Similarly, in *Mathews-Carlson*, the Board affirmed an ALJ's holding that the union had constructive knowledge of unfair labor practices more than six months prior to the charge, because the union failed to exercise reasonable diligence.³⁹ There, the employer was remitting contractually-mandated fringe benefits on behalf of only five employees. The union's representative infrequently visited the shop. When the representative did make a rare visit, he should have readily observed that the respondent employed approximately 12 employees, more than double the amount for which it was remitting fringe benefit contributions.⁴⁰ Indeed, for more than six years the respondent openly employed more employees than for which it was remitting required fringe benefit payments. In the present case, the ALJ correctly distinguished *Moeller Bros.* and *Mathews-Carlson* from the facts of Respondent's unfair labor practices.

First, there are significant differences in the duration of the bargaining relationships. In those cases, the parties had long, established bargaining relationships preceding the unions' charges. Here, however, NASPSO and Respondent had a nascent bargaining relationship. Moreover, as discussed above, the record is unclear as to when Respondent formally notified NASPSO that it was recognizing it as the unit employees' collective-bargaining representative.

Second, unlike the cases cited by Respondent, far more than "mere observation" and "minimal effort" would have been required of NASPSO to ascertain many of Respondent's unfair labor practices. In those cases, had the unions made the simple observation that the number of employees at the employers' shops exceeded the amount of employees for whom the

³⁸ *Id.* at 192-193.

³⁹ 325 NLRB at 662-663.

⁴⁰ *Id.*

respective employers were remitting fringe benefit contributions, the employers' unfair labor practices would have been revealed. Here, discovery of Respondent's unfair labor practices required more than two eyes and the ability to count. Due to Respondent's failure to make even the most minimal of efforts and provide NASPSO with a copy of its job offer letter or employee handbook—or inform NASPSO that the predecessor CBA would not be honored—prior to or soon after assuming operations, NASPSO was entirely reliant on Respondent employees for information. Further, Respondent's changes to the H&W and pension delivery, as well as the uniform allowance, could only be observed by reviewing employee paychecks. Thus, employees would have to be willing to share their paycheck information with Fraser in order for NASPSO to begin detecting that changes were afoot. Moreover, Respondent's change to the definition of full-time status could not be observed by reviewing an employee paycheck; rather, only when newly part-time employees received vacation or holiday pay would they be able to receive confirmation of this change.

Third, the unfair labor practices committed by the employers prior to the charges in *Moeller Bros.* and *Mathews-Carlsen* were ongoing for a period of years, rather than weeks. There, prior to the unions' charges, each employer had been *for several years* openly employing more employees than the number of employees for which it was remitting contractually-required fringe benefit contributions to the respective union. Here, approximately *five weeks* had elapsed between employees' receipt of their first paycheck—which, for a group of employees, the Respondent concedes contained errors in the form of paid lunch breaks—on September 19, and the start of the Section 10(b) period on October 24. This case is not one where NASPSO, like the unions in *Moeller Bros.* and *Mathews-Carlsen*, failed for several years to detect easily observable unfair labor practices.

Fourth, the record is devoid of evidence that NASPSO failed to visit or interact with the employees at the FEMA jobsite, or was without a shop steward for an extensive period of time.⁴¹ Indeed, the time period at issue—September 1 to October 24—amounts to less than eight weeks. Respondent has produced no support for the proposition that “reasonable diligence” requires union visitation to a jobsite at least once every eight weeks. Any such proposition runs counter to the Board’s rejection of the principle that unions must aggressively police their contracts and bargaining units. Further, the record is clear that NASPSO did, eventually, appoint at least one shop steward at the FEMA jobsite.⁴² That there was some delay in appointing a new shop steward during the transition period and after NASPSO’s former stewards left FEMA upon Respondent’s assumption of operations is both understandable and not inconsistent with the reasonable diligence standard.

Finally, the ALJ properly considered NASPSO’s limited resources in determining that NASPSO exercised reasonable diligence in this case. Fraser is NASPSO’s lone representative and does not work at FEMA or any other Respondent jobsite. She is solely responsible for the significant task of monitoring of the NASPSO’s 19 bargaining units encompassing 1,200-1,500 employees. NASPSO’s stewards with the predecessor did not continue their employment at FEMA with Respondent, thereby leaving Fraser and the NASPSO temporarily without a link to the FEMA jobsite for an undetermined amount of time following Respondent’s September 1 assumption of operations. When Fraser first learned from employees that Respondent had implemented several changes to employee working conditions, Fraser sought confirmation from

⁴¹ In its brief, Respondent misstates Fraser’s testimony concerning her interactions with Respondent’s employees at the FEMA jobsite. Respondent contends that Fraser testified she “failed to interact with any members of the bargaining unit during the six-month period after September 1, 2013.” See R. Br. at 19. Fraser merely testified that the first had heard from FEMA employees *about Respondent’s changes to employee working conditions* was in early-spring 2014. Tr. 91:14-92:20.

⁴² See Tr. 101:20-23.

other employees. Then, on April 24, 2014—no more than six *weeks* after first learning of Respondent’s unlawful actions—Fraser, on behalf of NASPSO, filed the instant charge.

In sum, the facts overwhelmingly demonstrate that the ALJ accurately rejected Respondent’s argument that NASPSO did not act with reasonable diligence. Distilled, Respondent’s arguments demand an aggressive policing standard that the Board has never adopted and expressly rejects. Accordingly, based on the foregoing and the ALJ’s case-specific analysis, the Board should reject Respondent’s exceptions arguing that NASPSO should be charged with constructive knowledge of Respondent’s unlawful acts prior to the start of the Section 10(b) limitations period on October 24.

B. The ALJ Correctly Determined that Respondent is a “Perfectly Clear” Successor Under the Board’s Decision in *Spruce Up*.

In *NLRB v. Burns Security Services*,⁴³ the U.S. 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.

Two years after *Burns*, the Board 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 terms of employment, 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

⁴³ 406 U.S. 272, 294-295 (1972).

conditions prior to inviting a predecessor's employees to accept employment.⁴⁴ Here, the ALJ correctly determined that Respondent is a "perfectly clear" successor and its obligation to bargain attached at the time it issued the June job fair memorandum and invitation to incumbent employees to apply for employment, and failed to clearly announce an intention to establish new terms and conditions of employment.⁴⁵

1. The ALJ Correctly Concluded that Respondent's Invitation to Apply Constitutes or is Tantamount to an Invitation to Accept Employment.

An employer may become a "perfectly clear" successor if it is silent as to changing existing working conditions at the time it indicates it plans to hire the predecessor's employees.⁴⁶ A successor has an obligation to bargain over initial terms of employment when it displays an intent to employ the predecessor's employees without making clear to those employees that their employment will be on different terms than those in place with the predecessor.⁴⁷ Here, Respondent failed to clearly announce an intention to set initial terms and conditions of employment when it invited employees to apply with Respondent for employment and attend its June 29 job fair. Further, viewed in context of Executive Order 13495, as well as Respondent's subsequent actions, Respondent effectively and clearly communicated to employees its plan to retain its predecessor's employees without clearly announcing an intention to set initial terms of employment.

Soon after being awarded the contract for guard services at the FEMA buildings, Respondent disseminated a memorandum inviting its predecessor's employees at the FEMA

⁴⁴ 209 NLRB at 195.

⁴⁵ ALJD 28:45-28; 29:9-13.

⁴⁶ See, e.g., *Canteen Co.*, 317 NLRB 1052, 1052-54 (1995).

⁴⁷ See *Hilton's Environmental*, 320 NLRB 437, 438 (1995).

buildings to apply for continued employment. This memorandum told the predecessor employees where and how to apply, and directed them to bring certain employment-related documents to the job fair, including a driver's license, birth certificate, Social Security card, and high school diploma, among other documents.

Nothing in the memo indicates that Respondent would be setting terms and conditions differing from those contained in the predecessor CBA. Moreover, the documents employees were required to bring are most often tendered *after* an employment decision has been made.⁴⁸ Any argument that these documents were required solely for the purpose of identifying the individual is disingenuous. Respondent required unit employees to bring an original and a copy of these documents and, at the job fair, collected the copies from the employees, presumably for their employment files. Further, while Respondent noted in the application that employment would be "at-will," Respondent's employment application otherwise fails to clearly announce Respondent's intention to set different initial terms and conditions of employment.

The ALJ's finding that the June job fair memorandum and invitation to incumbent employees to apply for employment constituted an "invitation to accept employment" is further bolstered when viewed against the backdrop of Respondent's obligations under Executive Order 13495. That well-publicized Executive Order required Respondent to offer to incumbent employees a right of first refusal for employment with Respondent, thereby effectively guaranteeing employment with Respondent to any incumbent employees who applied—or, at the very least, placing the prospect of continued employment with Respondent entirely within the unit employee's, not Respondent's, control. The mandate that Respondent offer the Knight

⁴⁸ The likelihood that employment decisions had already been made is suggested by the service which Respondent was going to provide: security guard services at a sensitive location involving a federal agency. It is self-evident that Respondent needed a full, or nearly-full, employee complement at the time it assumed control over the security guard services at the FEMA buildings.

PSOs a right of first refusal to employment with Respondent further created the impression among employees, at that time, that they were being invited to work for Respondent. Thus, Respondent both expressed an intention to retain Knight's employees, and, in fact, was legally obligated to offer employment to Knight employees by the requirements of Executive Order 13495.

Moreover, that Respondent had not yet extended formal job offers at the time it issued the job fair memo and made employment applications available to employees does not negate a finding of "perfectly clear" successorship. Contrary to Respondent's argument that the Board must focus on the job offer letter and its contents, the Board has previously imposed a bargaining obligation under the "perfectly clear" successor doctrine prior to the extension of formal employment offers. For instance, in *Roman Catholic Diocese of Brooklyn*,⁴⁹ the Board imposed a pre-offer letter obligation to bargain over initial terms where the employer voiced its intention to the union to hire the predecessor's employees, but did not mention any changes in terms and conditions of employment.⁵⁰ Additionally, the Board held that offering employees applications may be considered an invitation to accept employment.⁵¹

Respondent's actions following the issuance of the job fair memorandum and invitation to apply also conclusively establish its intention to retain the predecessor's workforce.

⁴⁹ 222 NLRB 1052 (1976), enforcement denied in relevant part sub. nom. *Nazareth Regional High School v. NLRB*, 549 F.2d 873 (2d Cir. 1977).

⁵⁰ See also *Fremont Ford*, 289 NLRB 1290, 1296-97 (1988) (imposing bargaining obligation under "perfectly clear" exception where successor informed union it would retain a majority of predecessor employees and did not announce significant changes to initial terms and conditions until it conducted hiring interviews); *Elf Atochem North America, Inc.*, 339 NLRB 796, 808 (2003) (finding "perfectly clear" successorship on the basis of an intent to employ the predecessor's employees without a simultaneous clear expression that employment would be on different terms than with the predecessor, and well before offers of employment were actually made); *DuPont Dow Elastomers, LLC*, 332 NLRB 1071, 1073-74 (2000) (finding "perfectly clear" successorship no later than November expression of intent to retain workforce with maintenance of existing wages and benefits, and prior to January offers of employment).

⁵¹ *Cadillac Asphalt Paving*, 349 NLRB 6, 10-11 (2007).

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's employees, sight unseen, Respondent failed to so much as interview those employees before extending job offers to them—a fact credited by the ALJ. Put simply, Respondent intended to hire every incumbent employee who applied without having seen or spoken with any of the incumbent employees. This fact underscores Respondent's unmistakable intention to retain its predecessor's employees.

In sum, the ALJ correctly held that Respondent's early-June memorandum inviting employees to apply for continued employment at the FEMA buildings constituted, or was tantamount to, an "invit[ation]...to accept employment" under *Spruce Up*. The existence of Executive Order 13495, as well as Respondent's hiring process that represented little more than administrative formality,⁵² bolster the ALJ's conclusion that Respondent's solicitation of employment applications was effectively an invitation to accept employment with Respondent. Because Respondent failed to announce its intent to establish new terms and conditions prior to or contemporaneously with this memo and making applications available, Respondent was a "perfectly clear" successor. Accordingly, a bargaining obligation attached at that time and Respondent was required to at least notify and bargain, upon request, with NASPSO concerning any changes to employees' terms and conditions of employment. By failing to provide notice and an opportunity to bargain to NASPSO concerning employees' initial terms and conditions of employment, the ALJ correctly concluded that Respondent violated Section 8(a)(5) by subsequently making all of the alleged unilateral changes to employees' terms and conditions of employment.

⁵² As the ALJ noted, Respondent presented no evidence, and does not contend, that any predecessor employee had their application rejected. ALJD 33:5-6.

2. Language in Respondent’s Subsequent Employment Application Does Not Alter Its Status as a “Perfectly Clear” Successor.

The ALJ also correctly determined that Respondent’s application stating that employment with Respondent would be “at will,” and reserving the right to change benefits—but not stating it would do so, or listing any specific benefit changes—does not remove the bargaining obligation that attached when Respondent solicited incumbent employees to apply for employment.⁵³ Here, Respondent’s bargaining obligation attached when it solicited incumbent employee applications. Further, Board law confirms that an employer may still be considered a “perfectly clear” successor despite application language, or other statements, changing an employee’s status to “probationary,” or “at-will.”

The Board has deemed an employer to be a “perfectly clear” successor notwithstanding announced changes similar to Respondent’s pronouncement that employees would be “at-will” employees. In *Windsor Convalescent Center of North Long Beach*,⁵⁴ the Board held the respondent to be a “perfectly clear” successor despite statements in the respondent’s application that employees would be hired as at-will employees, and where the respondent reserved the right to change benefits but failing to specify how it would change benefits or whether it would do so at all. The Board determined that the respondent in that case was a “perfectly clear” successor because it failed to clearly announce its intent to establish a new set of working conditions prior to or simultaneous with inviting employees to accept employment.⁵⁵ In this case, as in *Windsor Convalescent*, even assuming that the “at-will” language in Respondent’s application would

⁵³ ALJD 30:13-18. See also ALJD 30, fn. 1.

⁵⁴ *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 980-981 (2007), enf. denied in relevant part in *S & F Market Street Healthcare LLC v. NLRB*, 570 F. 3d 354, 359-362 (D.C. Cir. 2009); see also *Canteen Co.*, 317 NLRB 1052 (finding a “perfectly clear” successor that employees would serve a probationary period if hired by the employer).

⁵⁵ *Id.*

otherwise negate a finding that it is a “perfectly clear” successor, Respondent’s bargaining obligation had attached prior to incumbent employees’ completion of job applications.

Because Respondent’s bargaining obligation attached when it solicited incumbent employee applications—which preceded employee review and completion of job applications—Respondent’s application language does not negate its status as a “perfectly clear” successor. A contrary finding would, as opined by the ALJ, “allow every ‘perfectly clear’ successor to eviscerate its bargaining obligation” simply by using the words “at will” in its application.⁵⁶ Thus, the Board should find, consistent with the ALJ, that language in Respondent’s application does not negate its previously-attached obligation to bargain with NASPSO before setting initial terms.

IV. CONCLUSION

In sum, Respondent failed to meet its burden of establishing that the complaint is barred by Section 10(b) of the Act. Additionally, Respondent is a “perfectly clear” successor as defined by the Board in *Spruce Up*, and violated Section 8(a)(5) and (1) of the Act by failing to notify and bargain with NASPSO prior to setting initial terms and conditions of employment. For the reasons set forth in this Answering Brief and the ALJD, counsel for the General Counsel respectfully urges the Board to affirm the ALJ’s rulings, findings, and conclusions to the extent modified by counsel for the General Counsel’s cross-exceptions.

⁵⁶ Respondent cites a recent Board decision in support of the proposition that Respondent’s same “at-will” application language has been found by the Board to be sufficient to put employees on notice that it would be setting its own terms and conditions of employment. See R. Br. at 39, citing *Paragon Systems, Inc.*, 362 NLRB No. 166, slip op. at 2, 6-7 (Aug. 18, 2015). In that case, unlike here, the General Counsel had not alleged Respondent to be a “perfectly clear” successor. Further, the Board did not rely on the “at-will” language in affirming the ALJ’s decision. Rather, the Board held that Respondent’s statement that “shift schedules [would] be determined in accordance with the operational needs of the contract...” sufficiently informed employees that guard mount time may change. *Id.* at 1.

Dated at Baltimore, Maryland this 11th day of December 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of December 2015, I served Counsel for the General Counsel's Answering Brief to Respondent's Exceptions on the following individuals by e-mail:

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