

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PARAGON SYSTEMS, INC.

Respondent,

and

Case No. 5-CA-127523

NATIONAL ASSOCIATION OF
SPECIAL POLICE AND SECURITY
OFFICERS,

Union.

**RESPONDENT'S ANSWERING BRIEF TO
COUNSEL FOR THE GENERAL COUNSEL'S CROSS-EXCEPTIONS**

Thomas P. Dowd
Littler Mendelson, PC
1150 17th St. NW, Suite 900
Washington, D.C. 20036
tdowd@littler.com
(202) 789-3428

Attorneys for Respondent
Paragon Systems, Inc.

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I. INTRODUCTION

Respondent Paragon Systems, Inc. (“Paragon”) submits this Answering Brief in response to Counsel for the General Counsel’s Cross-Exceptions in which Counsel for the General Counsel requests that the Board overturn Spruce Up Corp., 209 NLRB 194, 195 (1974) enforced 529 F. 2d 516 (4th Cir. 1975) (“Spruce Up”). Spruce Up is one of the Board’s truly seminal decisions. It has been cited and/or relied upon by the Board and various federal circuit courts and the Supreme Court in a combined 250 cases over the past 41 years, according to a search of LexisNexis. It is one of the cornerstones of Board doctrine regarding the treatment of successorship situations under federal labor law, and it stems from the Board’s interpretation and application of the Supreme Court’s pronouncement of fundamental successorship bargaining principles in NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972).

Yet, Counsel for the General Counsel is not asserting that Spruce Up needs to be abandoned because of some change in the way successorship situations arise in the U.S. economy or because of any intervening Supreme Court, Circuit Court or Board administrative decisions that have created any conflict with Spruce Up or undermined the continued viability of the long-settled analysis and legal principles set forth in Spruce Up. Instead, Counsel for the General Counsel cites and recycles the losing arguments that were championed by former Members Fanning and Penello in their dissents from the majority decision in Spruce Up (GC’s Brief in Support of Exceptions pp. 11 and 15), as well as the dissents and concurring opinions of former Chairman Gould. (Id at p. 13).

From both a legal perspective and a policy perspective, there is no good reason for the Board to overturn Spruce Up. While no one questions that one of the aims of the National Labor Relations Act (“the Act”) is to promote collective bargaining, the Supreme Court in Burns expressly held that such a concern needed to yield to “the rightful prerogative of owners

independently to rearrange their businesses” in successor situations, and the Court emphasized that a successor’s **right** in this regard was one of the “established principles of federal labor law.” Id., 406 U.S. at 301. Spruce Up achieves the required balance by allowing a successor to inform incumbent employees that the successor plans to set its own initial terms and conditions of employment. If a majority of the incumbent employees agree to come to work despite knowing that the initial terms and conditions will be different, then the successor inherits a bargaining obligation when it commences operational control of the predecessor’s business, and this bargaining obligation properly protects the interests of the incumbent employees.

Spruce Up recognizes that, while an employer may hope or desire that incumbents will find the successor’s terms and conditions acceptable, the successor cannot “know” that this is the case until a majority of incumbents accept employment under the new terms. And if the successor cannot “know” that a majority will agree to work under such new terms, then the successor cannot plan in a “perfectly clear” manner that the successor will be able to retain the predecessor’s employees. The Supreme Court’s use in Burns of the phrase “perfectly clear” sets a higher standard than the amorphous standard proposed here by Counsel for the General Counsel, in which the certainty of the successor’s plans for staffing the jobsite must necessarily depend on what incumbents will “probably”, “likely” or “hopefully” decide when offered employment under terms and conditions that are different from the prior employer. For these reasons, the Board should not overturn Spruce Up.

II. ARGUMENT

In Respondent’s Brief in Support of Exceptions (pp. 40-49), Paragon set forth a series of arguments in support of its exceptions to the portion of the ALJ’s Decision in which the ALJ explored rationales for why the Board should, in the ALJ’s opinion, overrule Spruce Up. All of those arguments are equally applicable in answering Counsel for the General Counsel’s cross-

exceptions, and Paragon hereby incorporates those pages of its Brief in Support of Exceptions as if fully set forth herein.¹ Instead, Paragon will focus in this Brief on certain points raised in the cross-exceptions.

A. Executive Order 13495

On pages 10-11 of Counsel for the General Counsel’s Brief in Support of Exceptions (“the G.C.’s Brief”), the Brief states that Executive Order 13495 required Paragon to offer employment to all qualified incumbents. While technically true, this broad statement glosses over the undisputed fact that Executive Order 13495 did not obligate Paragon to offer employment on terms that were identical to the terms of its predecessor. Paragon could set its own initial terms and conditions of employment and offer employment on those terms. So, Paragon’s obligation to offer employment to the incumbent workforce did not mean that Paragon would “know” or could “plan” with perfectly clear knowledge that the incumbents would accept employment on Paragon’s new terms. As such, Executive Order 13495 does not change the legal analysis necessary under Burns and Spruce Up.

B. Favorable Comments by Successors About Employment Opportunities for Incumbents

Page 12 of the G.C.’s Brief characterizes Spruce Up as being concerned that, if the Board did not allow successors to unilaterally set the successor’s initial terms and conditions for employment on a jobsite, successors would be “encouraged to violate the Act” by intentionally declining to hire a majority of the predecessor’s employees. In actuality, the Board did not express a concern in Spruce Up that successors would act unlawfully in the absence of a different

¹ Incorporating the text by reference is not an effort to circumvent the page limitations set forth in Section 102.46(j) of the Board’s Rules and Regulations since this Answering Brief is well short of the applicable page limitation even if the prior arguments were duplicated and repeated here. Paragon is simply making an effort to avoid restating arguments to the Board that are now already part of the record in this proceeding.

standard. Instead, the Board expressed concern that employers would have an incentive to exercise the employer's legal right to "refrain from commenting favorably at all upon employment prospects of old employees", which would leave incumbent employees unclear on their potential employment opportunities with the successor and thereby "discourage continuity in employment relationships." *Id.*, 209 NLRB at 195. The Board noted that a cautious employer in such circumstances might be well advised to "not offer employment to at least some of the old work force under such a decisional precedent", but the context of this observation shows that the Board was expressing concern about the successor declining to make an advance announcement of a desire to give the incumbent employees a preference concerning any offer of employment. The Board did not use the phrase "refuse to hire" when noting what an employer might otherwise choose to do, and it would be a "refusal to hire" that would constitute an employer unfair labor practice. The Board's point was that it is in both the successor's interests and the incumbent employee's interests to establish an environment in which the successor can alleviate incumbent job concerns by candidly expressing a desire to offer employment to incumbents on terms set by the successor, instead of setting up a decisional precedent that encourages successors to be silent on something incumbents obviously want to know.

C. Changes in the U.S. Economy Since Spruce Up was Issued in 1974

Counsel for the General Counsel notes in footnote 17 on page 10 of the G.C.'s Brief that a 2011 study shows that mergers happened more frequently between 1997 and 2009 than they happened in 1974. This may be true, but economic growth of this type is to be expected given the ongoing and desired expansion of the U.S. economy during the intervening period. Indeed, one of the underlying principles of Burns was to allow greater freedom to successors regarding the setting of initial terms of employment (rather than forcing successors to begin operations using their predecessor's terms of employment) so that successors could be more willing to engage in

mergers and acquisitions that benefit the U.S. economy. This point regarding Burns was highlighted by the Supreme Court in Howard Johnson Co. v. Detroit Local Joint Executive Board, 417 U.S. 249, 255 (1973) just a year after Burns was issued, when the Supreme Court explained: “Burns also stressed that holding a new employer bound by the substantive terms of the pre-existing collective-bargaining agreement might inhibit the free transfer of capital, and that new employers must be free to make substantial changes in the operation of the enterprise.” Thus, from a policy perspective, the growth of mergers since 1974 strengthens rather than weakens the argument for leaving Spruce Up in place and not creating an environment that discourages such growth.

D. Spruce Up Has Created Stability Rather Than Confusion Concerning What a Successor Can or Cannot Do.

On page 14 of the G.C.’s Brief, the Brief asserts that “(c)onfusion reigns” as a result of the Board’s decision in Spruce Up, but the cited examples do not support this hyperbole. For example, the G.C.’s Brief notes that the Sixth Circuit followed Spruce Up’s formulation of the “perfectly clear successor” standard in Elastomeers, LLC v NLRB, 296 F. 3d 495 (6th Cir. 2002) but the Court permitted an employer in an earlier case to announce new terms “immediately after commencing operations”. Peters v. NLRB, 153 F. 3d 289 (6th Cir. 1998). However, as the Court pointed out in Elastomeers, the result in Peters was not the result of any confusion on the Court’s part about the applicable legal standard. The result in Peters was different because of the “unique circumstances” in Peters where the person who had to talk to employees about initial terms and conditions of employment was a court-appointed receiver rather than a new owner, and the Court explained that the receiver would have put the business at risk by making any announcement about working conditions before the date that the receiver had any operational control and could talk to employees about terms of employment. Elastomeers, 296 F. 3d at 504-

505. There was no “confusion” concerning the law. There was simply a unique set of circumstances in the earlier case that was addressed and explained by the Court in its subsequent decision.

Similarly, there was no confusion about the law in Ridgewell’s, Inc., 334 NLRB 37 (2001) enf’d mem., 38 F App’x 29 (D.C. Cir. 2002) and Windsor Convalescent Center of North Long Beach, 351 NLRB 975 (2007) enforcement denied 570 F. 3d 354 (D.C. Cir. 2009). The D.C. Circuit in both case found that the successor’s advance announcement that work was being offered on a conditional basis was sufficient to put employees on notice that the successor was setting its own initial terms and conditions of employment. The only “confusion” in the two cases was at the Board level where the two-member majority in Windsor suggested changing existing law and deviating from past Board precedent – an effort that was soundly rejected by the Court. This case is discussed in greater detail in Respondent’s Brief in Support of Exceptions, pages 46-49.

Lastly, in Saks & Co. v. NLRB, 247 NLRB 1047 (1980), enforcement denied 634 F.2d 681 (2d Circ. 1980), there was no confusion about existing law. The Second Circuit simply concluded that the Board’s General Counsel had not met his burden of proof in showing that employees were misled about what the successor was setting as initial terms and conditions of employment. Saks did not involve any misunderstanding of the law or any problem created by the Spruce Up legal standard.

E. Fall River Does Not Provide a Policy Reason Favoring Speedy Representation Over a Successor’s Freedom to Set Initial Terms and Conditions of Employment.

At pages 14-15 of the G.C.’s Brief, Counsel for the General Counsel asserts that the Supreme Court’s decision in Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987) identified early representation of incumbent employees as being an important objective in

successorship situations. The G.C.'s Brief, however, inadvertently takes the Supreme Court's statement in this regard out of context. When the Supreme Court in Fall River addressed the idea of early representation, it did so in the context of identifying the point in time when an employer is employing a "substantial and representative complement" of its employees, and it was in this context that the Court said that the proper test must balance "the objective of insuring maximum employee participation in the selection of a bargaining agent against the goal of permitting employees to be represented as quickly as possible." Fall River, 482 U.S. at 48. The Court was not saying that speed in providing representation outweighs or needs to be balanced against a successor's right to set initial terms and conditions of employment. To the contrary, the Court went to great lengths to stress the fundamental importance of a successor's legal right to start fresh without being burdened by what its predecessor may have agreed to as part of prior collective bargaining negotiations. The Supreme Court emphasized that:

Burns was careful to safeguard "the rightful prerogative of owners independently to rearrange their businesses." Golden State Bottling Co. v. NLRB, 414 U.S. 168, 182 (1973), quoting John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 549 (1964). We observed in Burns that, although the successor has an obligation to bargain with the union, it "is ordinarily free to set initial terms on which it will hire the employees of a predecessor," 406 U.S., at 294, and it is not bound by the substantive provisions of the predecessor's collective-bargaining agreement. Id., at 284.

Fall River, 482 U.S. at 40.

Thus, while speed of representation may be a significant factor that needs to be considered in the context of assessing the point at which a successor has hired a substantial and representative complement of employees, it is not a factor that trumps the more fundamental right of a successor to start its operations under those terms and conditions that the successor determines will best allow it to operate its business. The central principle in Burns is that the successor did not bargain a contract with the predecessor's union, so the successor cannot be

forced to put in place the terms and conditions of the predecessor's collective bargaining agreement. The Court relied on Section 8(d) of the Act when it held that the Board lacks the statutory authority to compel a successor to put in place terms and conditions that the successor did not agree to put in place through the collective bargaining process. Burns, 406 U.S. at 281-282. Spruce Up correctly recognizes this fundamental policy consideration and protects the successor's ability to set its own initial terms and conditions of employment so long as the successor does not mislead incumbent employees into thinking that their employment terms will continue unchanged.

F. Spruce Up Does Not Promote Direct Dealing.

At page 15 of the G.C.'s Brief, Counsel for the General Counsel asserts that Spruce Up is wrongly decided because it "sanctions a period of direct dealing" in place of negotiation about terms and conditions of employment. This is the argument that Member Fanning made without success 41 years ago, and the argument has not gained any traction over the course of time since the reality is that new employers act unilaterally when setting initial terms and conditions of employment and do not engage in any give-and-take discussion with individual employees from the predecessor's workforce about what initial terms will be put in place by the successor. Quite to the contrary, successors generally avoid contact with the individual employees of the predecessor so that the successors can minimize or eliminate the risk of employees creating factual questions as to what if anything the successors "promised" as initial terms and conditions of employment.

Paragon's situation is an example of this. Grady Baker testified at length about the steps Paragon takes to avoid any direct interaction with incumbent employees (Tr. 114-116). Paragon only communicates in writing with incumbents until such time as incumbents are given Paragon's offer letter, which contains the new and different terms under which Paragon will

operate. Paragon does not deal directly with employees when determining the starting terms and conditions of employment. It acts unilaterally, as it is entitled to do under Burns.

G. Spruce Up Does Not Shift the Balance Struck By the Supreme Court in Burns.

At pages 15-16 of the G.C.'s Brief, Counsel for the General Counsel asserts that "Spruce Up, without explanation, shifts the balance struck by the Court in Burns between collective bargaining and labor peace in the one hand, and entrepreneurial freedom on the other."² This assertion is wrong on its face since the Board's decision in Spruce Up contains a detailed and clear explanation as to why the Board will allow an employer (who does not mislead employees into thinking that their employment conditions will remain unchanged) to set initial terms and conditions of employment. Burns expressly held that "a successor employer is ordinarily free to set initial terms on which it will fire the employees of its predecessor" Burns, 406 U.S. at 294. Thus, the "balance" between the values of collective bargaining versus the values of unilateral setting of initial terms and conditions of employment was struck in favor of entrepreneurialism in Burns, except in the narrow circumstance where the successor plans to retain all of the predecessor's employees without change.

Spruce Up simply provides a framework for addressing this narrow exception, and it correctly concludes that, where an employer has announced its intent to commence operations

² In part, Counsel for the General Counsel reaches the wrong conclusion in this portion of the G.C.'s Brief's because the G.C.'s Brief conflates two separate Supreme Court holdings in separate cases and then mistakenly attributes the principles in those other cases to the Supreme Court's rationale in Burns. Page 15-16 of the G.C.'s Brief contains a citation from the dissenting opinion in Burns in which the dissenter discusses the balance struck by the Court in John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964). Wiley concerned whether a successor must arbitrate disputes under a predecessor's arbitration agreement, and even the dissenter recognized that Wiley involved only "a form of the 'successor' doctrine." Burns, 406 U.S. 299. The "balance that Wiley struck is not the one that the Supreme Court was addressing in Burns. The next sentence in the G.C.'s Brief (top of page 16) is a quote from Fall River rather than from Burns, and that quote arises is in the context of deciding the point at which a successor assumes a basic bargaining obligation with the predecessor's union, as compared to Burns' focus on whether a successor can set its own terms and conditions of employment.

under its own unilaterally established terms and conditions of employment, the successor cannot be said to “plan” employment of the prior workforce since the successor cannot “know” that its offer will be accepted. The predecessor’s employees have **not** previously agreed to work under the conditions being imposed by the successor, so while the successor may hope and desire that the predecessor’s employees will find the successor’s offer acceptable, the only way the successor could ensure that the employees will agree to its terms would be to offer the terms that were in place under the predecessor’s collective bargaining agreement.

H. The G.C.’s Brief Improperly Ignores the Board’s Recent Decision in GVS Properties, LLC

On August 27, 2015, the Board issued a decision in a case entitled GVS Properties, LLC, 362 NLRB No. 194, p. 4 (2015). Paragon’s Brief in Support of Exceptions discussed the case at length (pp. 41-42), but the G.C.’s Brief ignores the decision completely. In GVS Properties, the Board held that a New York City worker retention statute triggered a bargaining obligation with the predecessor’s union. This is the same type of bargaining obligation that successors like Paragon, who are covered by the Service Contract Act (“SCA”), inherit when a majority of the predecessor’s employees accept offers of employment from the SCA successor. Like Paragon did here, the successor is GVS Properties set its own initial terms and conditions of employment, and the Board in GVS Properties found that it was lawful for the successor to do so.

Most significantly, the two-person majority in GVS Properties expressly rejected the dissent’s concern that the Board’s decision could be misconstrued to mean that an employer who was subject to a worker retention statute would automatically be deemed a “perfectly clear successor”, thereby preventing the successor from setting its own initial terms and conditions of employment. Instead, the two-person majority explained that “employers subject to worker retention statutes can avoid ‘perfectly clear’ successor status by announcing new terms and

conditions of employment prior to or simultaneously with the expression of intent to retain the predecessors' employees." Id. at 5-6.

Thus, GVS Properties reaffirmed the viability and correctness of the Board's holding in Spruce Up, and the Board did so in the context where the successor had a legal obligation to offer employment to the predecessor's employees, just as Paragon was obligated to do under Executive Order 13495. The Board correctly recognized that the obligation to offer employment does not mean that the successor must offer employment on the same terms as the predecessor, and for this reason the successor cannot know with any degree of certainty that a majority of the predecessor's employees will accept employment on the terms offered by the successor. If a majority of incumbents ultimately accept the offered terms, then a bargaining obligation arises, just as it did here for Paragon. In such cases, such successors will do what Paragon did here and will acknowledge their bargaining obligation and reach an agreement with the applicable union.

Since the G.C.'s Brief omits any discussion of GVS Properties, Paragon does not know what arguments Counsel for the General Counsel may seek to make concerning the case, and since Paragon has no additional opportunity to brief this point once Counsel for the General Counsel files the Reply Brief, Paragon will not have an opportunity to rebut anything that Counsel for the General Counsel says in the Reply Brief concerning GVS Properties. With that in mind, Paragon requests that the Board recognize that GVS Properties is correctly decided with respect to the whether a successor's obligation to offer employment prevents a successor from setting the initial terms and conditions of that employment that are different from the predecessor's terms and conditions of employment.

I. Prospective Application of Any Adverse Decision in This Case.

At page 17 of the G.C.'s Brief, Counsel for the General Counsel seeks retroactive application of any change in the law regarding a successor's ability to set initial terms and

conditions of employment under Spruce Up. The G.C.'s Brief acknowledges that retroactive application is inappropriate where such an action will produce a manifest injustice, but the G.C.'s Brief does not explain why this particular case is not one in which it is unfair to change the rules on Paragon after Paragon has complied with the Board's long-standing position on what a successor should do when it takes over from a predecessor who has an existing collective bargaining agreement. Instead, the G.C.'s Brief talks in general terms about why the requested "new standard" (p. 18) will promote stable labor relations in the future and will not alter the recommended remedy in the pending case.

What Paragon did at the FEMA worksite was lawful under Spruce Up, and Paragon was entitled to rely on this 41-year old, actively-cited, seminal precedent decision when Paragon determined the course of action that it should take at FEMA. Paragon's "offer letter" approach had been determined by NLRB regional offices to be lawful (RX-1). The Board itself has similarly held in a past published decision involving Paragon that Paragon's offer letter approach was lawful. Paragon Systems, Inc., 362 NLRB No. 166 (2015). That published case involved not only the identical hiring and offer letter approach as the present case, it involved largely the same differences in initial terms and conditions of employment. For example, in Paragon the Board rejected the General Counsel's challenge to Paragon's implementation of different conditions concerning uniform allowance payments and payments for guard mount time (like paid vs. unpaid lunches in this case), and the General Counsel did not even challenge in that case the lawfulness of Paragon's changes in how fringe benefits were paid out, which like the present case involved the payment of excess fringe benefits amounts into each employee's individually established 401(k) account instead paying out the amount in cash.

It is hard to imagine a clearer example of "manifest injustice" than the present case where

Paragon did precisely what it had been told it could legally do and now finds that its **previously reviewed and approved** hiring processes do not fit within a new standard for employer conduct that the General Counsel wants the Board to announce for the first time in this legal proceeding. This is a case in which “retroactive application could, on balance, produce a result which is contrary to a statutory design or to legal and equitable principles.” Dana Corporation, 351 N.L.R.B. 434 (2007). See also, John Deklewa & Sons, 282 NLRB 1375, 1389 (1987) (citing Deluxe Metal Furniture Co., 121 NLRB 995, 1006-1007 (1958).

III. CONCLUSION

For each of the foregoing reasons, Respondent Paragon Systems, Inc. asks the Board to find no merit in Counsel for the General Counsel’s Cross-Exceptions, and Paragon requests that the Board dismiss the Complaint in its entirety.

Respectfully submitted,

/s/ Thomas P. Dowd

Thomas P. Dowd
Littler Mendelson, PC
1150 17th St. NW, Suite 900
Washington, D.C. 20036
tdowd@littler.com
(202) 789-3428

*Attorneys for Respondent
Paragon Systems, Inc.*

DATED: December 18, 2015

CERTIFICATE OF SERVICE

I do hereby certify that a copy of Respondent' Brief in Support of Exceptions was served electronically and by first-class mail, postage pre-paid, on December 18, 2015 upon Chuck Perry, Esq., Counsel for the Union, at Chalfrantz, Perry & Associates PLLC, 505 Capitol Court NE, Suite 100, Washington, DC 20002 and upon Chad Horton, Esq., Counsel for the General Counsel, National Labor Relations Board, Region 5, Bank of America Center, Tower II, Suite 600, 100 South Charles St., Baltimore, MD 21201

/s/ Thomas P. Dowd

Thomas P. Dowd

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