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 REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION

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DATED: December 28, 2015

I. REPLY CONCERNING FACTUAL STATEMENTS CONTAINED IN COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF

Respondent Paragon Systems, Inc. ("Paragon") submits this Reply Brief in Support of Respondent's Exceptions to the Recommended Decision that was issued by Administrative Law Judge ("ALJ") Eric M. Fine on September 30, 2015. Before addressing the legal arguments raised in Counsel for the General Counsel's Answering Brief ("Answering Brief"), Respondent is compelled to clarify certain of the factual statements contained in the Answering Brief.

On page 4 of the Answering Brief, Counsel for the General Counsel broadly states that "the Service Contract Act generally requires successor employers to at least maintain specified working conditions set forth" in its predecessor's collective bargaining agreement. By failing to identify the "specified working conditions", the Answering Brief creates the impression that there are a wide range of terms and conditions of employment that a successor must keep in place in order to comply with the Service Contract Act ("SCA").

In actuality, the only aspects of the predecessor's collective bargaining agreement ("CBA") that a successor must match are the amounts that the predecessor pays as wages and fringe benefits, and this is because the CBA rates are statutorily a substitute for the wage and fringe benefit rates that would otherwise be in effect under the applicable Department of Labor Wage Determination for that geographic area. The SCA does <u>not</u> require a successor to adopt any predecessor CBA language or CBA provisions, and the successor has complete freedom to determine when and how to pay wages and fringe benefits, as well as complete freedom to set the successor's own terms and conditions of employment on all other matters such as work schedules, work assignments, rotation procedures, break schedules, performance standards, discipline practices, overtime rules, vacation scheduling and the like – regardless of what the predecessor bargained to do in the predecessor's CBA. As such, the SCA is consistent with the

Board's determination in Spruce Up, 209 NLRB 194 (1974) ("Spruce Up") and the Supreme Court's decision in NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972) ("Burns") that a successor is not bound by the substantive provisions of its predecessor's CBA and the successor is free to set its own initial terms and conditions of employment when it commences operations.

In footnote 5 on page 4 of the Answering Brief, Counsel for the General Counsel notes that Paragon's in the present case did not notify the predecessor's union (NASPSO) that Paragon would not be adopting its predecessor's CBA, and the Answering Brief asserts that Paragon's procedure in that case was different from Paragon's procedure in an earlier situation involving a different federal contract in Florida (RX-1). The record evidence does not support this assertion.

Respondent Exhibit 1 is a letter from Region 12 dismissing unfair labor practice allegations against Paragon that stemmed from Paragon's take-over of a federal contract to provide guard services in the Tampa Bay area. The letter states that Paragon was awarded the contract on August 9, 2012 and that in mid-August Paragon began notifying security officers that they needed to complete applications, submit appropriate paperwork and meet certain testing requirements to be eligible for employment. This is the same procedure that Paragon lawfully used in the present case at the FEMA jobsite. The Region 12 letter then states that, like the present case, Paragon held job fairs for prospective employees and notified prospective employees that, if they accepted employment, their health and welfare benefits would be deposited in individualized 401(k) accounts instead of being paid out in cash each payroll period.

The letter than states that "Paragon's Labor Relations Manager notified International Union Representatives that the Employer intended to negotiate new collective bargaining agreements for bargaining units in Florida" and that the International then informed the Local

Union that "Paragon would negotiate new contract once it took operational control of the FPS contract." Id. The letter **does not identify** whether the conversation between Paragon's manager and the International's representative was initiated by the International or by Paragon. It simply says that, when the conversation took place, Paragon notified the Union that Paragon would be negotiating its own CBAs rather than adopting the predecessor's agreements. Of course, it was of no consequence to Region 12 whether the International initiated the contact to Paragon or whether Paragon proactively reached out to the International, so this point is not covered in the letter and there is no evidentiary basis for speculating that it was Paragon that reached out to the International. Indeed such a conclusion would be inconsistent with the only record evidence in this regard, which was testified to by Grady Baker regarding Paragon's standard procedure for handling federal contract transitions (Tr. 114-116). The record in the present case contains no evidence that NASPSO reached out to Paragon regarding whether Paragon intended to adopt Knight's contract at the FEMA location, so it is quite possible that the reason Paragon "notified" the Florida union and not the FEMA union about Paragon's bargaining plans is simply that the Florida union asked whereas the FEMA union did not ask. As such, it is wrong for the Answering Brief to assert otherwise, particularly where Board law does not place any obligation on a successor to proactively contact a union about such issues.

Page 5 of the Answering Brief contains an assertion that Respondent's memo announcing the Paragon job fair only solicited applications from FEMA incumbent employees and not from outside applicants. While technically true, this assertion is misleading to the extent that it suggests Paragon did not take steps to solicit applications from non-incumbents. It was stipulated that Paragon placed advertisements in various publications in July 2013 seeking applicants in the event that incumbents declined to accept the starting terms and conditions being

offered by Paragon at the FEMA worksite (JX-9, Stipulation 8). This is an important point because it demonstrates that Paragon did not simply assume, for planning purposes, that all incumbents would accept Paragon's unilaterally implemented terms of employment. Paragon "planned" for the contingency of needing additional workers, which shows that it was not "perfectly clear" that Paragon's starting workforce would consist of a majority of employees from the predecessor. Indeed, the record evidence is undisputed here that on more than one occasion less than 50% of an incumbent's workforce have chosen to apply or come to work for Paragon, and Grady Baker identified a number of reasons why that can happen (Tr. 128-129).

The Answering Brief (pp. 6, 25) places undue weight on the fact that Paragon's job fair announcement asked incumbents to bring to the job fair various forms of identification and other information that would be needed <u>if</u> incumbents reviewed and executed the offer letter that was provided to the applicants at the job fair. The record evidence is undisputed that the applicant's identification information only became needed <u>after</u> the applicant signed the requisite job offer letter, at which point the applicant would need to fill out various hiring-related paperwork would using the information brought by the applicants to the job fair (Tr. 122-123). Asking applicants to bring such information to the job fair does not convert the job fair announcement into an offer of employment, particularly when an actual offer letter is given to each applicant at the job fair.

The Answering Brief (p. 6) similarly places undue weight on the fact that, after completing and submitting an application on line, applicants received an automated reply confirming receipt of the application. The Answering Brief complains that the automated reply "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." However,

there is no reason for the automated reply to contain such a "notification" since the application was not an offer of employment and the automated reply was not confirmation of employment.

The Answering Brief unfairly suggests Paragon should have subpoenaed former employees Rick Waddell and Lori Raines to be at the hearing in this case, but the record is clear that Raines lived in Florida and Waddell lived in West Virginia (Tr. 119, 131). There were no allegations in the Complaint that they had done anything improper, so there was no reason to think they would be needed. Their absence from the hearing was inconsequential given the ALJ's finding of fact that Waddell did not say that Paragon would honor Knight's CBA or that "nothing would change" (ALJD-9, ll. 24-29). For this same reason, the Answering Brief is overbroad when it states on page 9, ll. 7-8, that Waddell said "nothing would change from the predecessor CBA." He only talked about an erroneous wage rate in the offer letter appendix.

II. REPLY CONCERNING LEGAL ARGUMENTS CONTAINED IN COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF

The ALJ's lengthy decision contained an opening section on which the ALJ summarized all evidence, whether credited or not, followed by an analysis section resolving credibility disputes. In response to Paragon's Section 10(b) arguments, the Answering Brief (p. 10) mistakenly points to the opening portion of the ALJ's decision in which the ALJ noted that Myron Birdsong testified that he received paid breaks for approximately "two months" after Respondent assumed operations and that there was a lack of "hard evidence" (meaning documentation) as to when Paragon corrected the first pay period's payment of break time to a portion of the incumbents. The Answering Brief conveniently ignores, however, that Birdsong also testified that, while he could tell in the first paycheck that he had been paid for his lunchtime, he saw in the subsequent checks that he was not being paid for the time (Tr. 74). It was this testimony that the ALJ credited at ALJD-37, n. 16, where the ALJ made a finding of

fact that Birdsong "testified the break structure changed around a month after Paragon took over, and he was paid for his 30 minute lunch break by Paragon until that time." The ALJ called this "credible testimony", so the reliable record evidence does not support the Answering Brief's assertion that Paragon did not fix the pay problem for a period of two months.[1]

With respect to Paragon's Section 10(b) argument, the Answering Brief (p. 10) also errs when it asserts that Paragon is advancing an "unusual argument" when Paragon asserts that the six-month limitations period runs from the point in time when the aggrieved employees have actual or constructive knowledge of the employer's conduct that constitutes an unfair labor practice. The Answering Brief (p. 11) asserts that the union here ("NASPSO") is the "exclusive collective-bargaining representative of the unit employees" and thus is "the party affected by Respondent's refusal to bargain". Such a claim conflicts with long-established Supreme Court and Board authority to the contrary which holds that the Act confers rights only on employees and that union rights are derivative in nature.

> Section 7 of the NLRA provides in relevant part that "employees shall have the right to self-organization, to form, join, or assist labor organizations." 29 U. S. C. § 157. Section 8(a)(1) of the Act, in turn, makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7]." 29 U.S.C. § 158(a)(1). By its plain terms, thus, the NLRA confers rights only on employees, not on unions or their nonemployee organizers.

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[1] It is important for the Board to recognize Paragon's error in paying some employees for their lunch breaks in the first round of employee paychecks was not alleged in the Complaint to be an unlawful post-recognition unilateral change in terms and conditions of employment. This is partly because the change was actually implemented for many of the employees beginning on the first day of operations, and the failure of some supervisors to record break time properly for the other employees did not change the fact that Paragon's departure from its predecessor's practice was implemented on the date Paragon took over operational control of the contract. Indeed, the Parties stipulated that Paragon altered the pay practice for breaks effective September 1, 2013, and Paragon did not defend any allegation of a post-recognition unilateral change. That is why Counsel for the General Counsel did not pursue such a theory and the ALJ did not find any such unfair labor practice. For the same reason, the Board should not assert such a legal theory in its decision here.

Lechmere, Inc. v. NLRB, 502 U.S. 527, 531-532 (1992). The Board echoed this holding in Leslie Homes Inc., 316 NLRB 123, 127 (1995) (internal cites omitted) when it said "the NLRA confers rights only on employees, not on unions or their nonemployee organizers ... and [thus the Supreme Court has drawn a distinction] between the organizing activities of employees to whom Section 7 guarantees the right of self-organization and nonemployees to whom Section 7 applies only derivatively." If this is true for derivative rights under Section 8(a)(1), it is equally true for derivative rights under Section 8(a)(5). As a result, the Complaint is barred under Section 10(b) since employees knew about the changes in their terms and conditions of employment more than six months prior to the date the charge was filed in this case.

With respect to the Spruce Up argument, the Answering Brief (pp. 23-24) truncates the Spruce Up legal standard in a very important respect. The Answering Brief asserts that the perfectly clear successor doctrine applies under Spruce Up if the employer fails to clearly announce its intent to establish new terms and conditions "prior to" inviting a predecessor's employees to accept employment. In actuality, the Spruce Up standard permits the successor to announce its own terms and conditions "prior to or simultaneously with his invitation to the previous workforce to accept employment under those terms". Spruce Up, 209 NLRB at 195, third full paragraph on page 195 (emphasis added). Paragon met this standard by announcing in its offer letter that it was putting in place initial terms and conditions of employment that were different from its predecessor. Counsel for the General Counsel essentially concedes this point on page 2 of Counsel for the General Counsel's Brief in Support of Cross-Exceptions, where the Brief admits that Paragon's "form offer letters, however, set forth a number of working conditions differing from those set forth in the Knight-NASPSO agreement."

Also, the Answering Brief (p. 15) asserts that the Board "often" imputes employee knowledge to their union representative based on stewards being part of the bargaining unit, which is not the case at FEMA. This does not mean, however, that a union can shield itself from Section 10(b)'s six-month restriction by failing to designate a steward or by taking no significant steps to represent the bargaining unit during the six-month period. The Answering Brief (p. 20-21) is similarly wrong when it suggests that NASPSO's lack of diligence is excusable because it was involved in a "nascent bargaining relationship" and because NASPSO needed to be aware of changes that required "more than two eyes and the ability to count." The most basic union representation obligations are to know if the employer is changing at a worksite and know if this change results in new employment terms and conditions. There is nothing complex about this obligation, yet NASPSO failed in that regard for more than six months.

The Answering Brief's (pp. 25-26) most fundamental flaw, however, is arguing that Executive Order 13495's right of first refusal is something "effectively guaranteeing employment" with Paragon, thereby creating "the impression among employees" that the mere act of inviting incumbents to apply for employment was somehow a guarantee that any <u>subsequently offered</u> employment would be on the same terms as the predecessor's employment. It is crucial to remember that Executive Order 13495 permits the successor to offer employment on whatever terms the successor chooses to implement, so the Answering Brief (p. 25) goes too far when it asserts that the Executive Order places "the prospect of continued employment with Respondent entirely within the unit employee's, not Respondent's, control." Paragon has <u>complete</u> control over setting the terms and conditions of employment. The only thing the employee controls is whether the employee wants to accept employment under those conditions.

The Answering Brief's reliance (p. 26) on Roman Catholic Diocese of Brooklyn, 222 NLRB 1052 (1976) denied enf. 549 F. 2d 873 (2d Cir. 1977) is misplaced. In that case, the employer interacted with the predecessor's union in advance of taking over and unequivocally told the union it would rehire and retain all of the employees without restriction. Id. at 1053. Paragon made no such statement to NASPSO or the incumbent employees.[2] Moreover, the Board's ruling in Roman Catholic was denied enforcement because incumbents had not "been promised re-employment on the existing terms." Id., 549 F. 2d at 881.

Finally, the Answering Brief utterly fails in its effort to distinguish this case from the Board's holding and rationale in Paragon Systems, Inc., 362 NLRB No. 166 (2015). The Answering Brief waits until its final footnote on page 29 to assert that the case is different because, "unlike here, the General Counsel had not alleged Respondent to be a "perfectly clear" successor." However, that simply begs the question of why the General Counsel did not pursue a "perfectly clear successor" theory in the first case. The General Counsel did not change legal theories because of any difference in the two cases as to how Paragon went about the process of soliciting applications, announcing job fairs, holding job fairs, distributing offer letters or informing employees about Paragon's planned initial terms and conditions of employment.

The simple truth is that the General Counsel recognized in the first case that Paragon could not be deemed a perfectly clear successor since Paragon's offer of employment contained a simultaneous announcement of initial terms and conditions of employment that were facially different from its predecessor's terms and conditions, which is all that is required under Spruce Up. It is readily apparent that the General Counsel only changed theories here because, even if the ALJ here had adhered to the precedent set in Paragon Systems, the General Counsel could

[2] The cases cited in footnote 50 on page 26 of the Answering Brief are distinguishable for the same reason. Moreover, Fremont Ford involved false and misleading statements to employees.

still use this case as a vehicle to seek the overturning of Spruce Up. Fortunately for the General Counsel, the assigned ALJ here fully supported the notion of overturning Spruce Up, and the ALJ was even willing to stretch Spruce Up by characterizing Paragon's job fair announcement as being the equivalent of an offer of employment on unannounced terms.

In this regard, the Answering Brief is also wrong in stating that the Board in Paragon Systems did not rely on the at-will language in Paragon's application in affirming the ALJ's decision in that case. The Board cited the application language in the "Facts" section of its decision (Slip. Op. at 1), and relied in the "Discussion" section on the fact that Paragon's "job application forms disclosed that employees would need to conform to its policies, practices, and procedures." The identical language appears in the application in the present case (JX-5, p. 7), and the dissent in Paragon Systems expressly observed that the majority's view "rests" on two grounds, one of which is the application's language.

III. CONCLUSION

For each of the foregoing reasons, Respondent seeks dismissal of the Complaint.

Respectfully submitted,

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DATED: December 28, 2015

CERTIFICATE OF SERVICE

I do hereby certify that a copy of Respondent' Reply Brief in Support of Exceptions was served electronically and by first-class mail, postage pre-paid, on December 28, 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

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