

United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL  
**Advice Memorandum**

DATE: February 6, 2017

TO: Leonard J. Perez, Regional Director  
Region 14

FROM: Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: DFW Security Protective Force, Cases 14-CA- **Successorship Chron**  
176861, -177024, -177071, -178815, -180205, and 530-4825-6700  
-184549 530-4850-6700  
530-6067-4000  
530-6067-6033-8800  
524-8387-2200  
512-5012-0125

The Region submitted these cases for advice as to whether a federal security contractor: (1) is a “perfectly clear” successor under *Spruce Up Corp.*<sup>1</sup> and whether this is a good vehicle to urge the Board to overrule *Spruce Up*; (2) violated Section 8(a)(5) by making unlawful unilateral changes in employee classifications, weapons qualifications, health and welfare benefits, and lunch and break schedules; failing to bargain with the Union prior to terminating employees; and unreasonably delaying in providing information to the Union; (3) violated Section 8(a)(3) by unlawfully terminating two employees for their Union leadership positions; and (4) violated Section 8(a)(1) by promulgating and maintaining overly broad work rules threatening an employee with termination, and denying an employee (b) (6), (b) (7) *Weingarten*<sup>2</sup> rights.

We conclude that the Employer is a “perfectly clear” successor who had an obligation to bargain with the Union prior to setting initial terms and conditions and, accordingly, violated Section 8(a)(5) by unilaterally changing employee classifications, health and welfare benefits, weapons qualifications (effects bargaining only), and lunch and break schedules.<sup>3</sup> We also conclude that the Employer lawfully terminated

---

<sup>1</sup> 209 NLRB 194 (1974), *enforced mem.*, 529 F.2d 516 (4th Cir. 1975).

<sup>2</sup> *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975).

<sup>3</sup> Because the Employer is a “perfectly clear” successor under current Board law, the Region should not use this case as a vehicle to urge the Board to overturn *Spruce Up*.

the two employees and did not unlawfully fail to bargain with the Union prior to terminating them; unlawfully delayed providing relevant information requested by the Union; unlawfully promulgated and maintained an overly broad work rule; did not unlawfully threaten an employee with termination; and did not deny an employee (b) (6), (b) (7)(C) Weingarten rights.<sup>4</sup>

## FACTS

### A. The Employer's Takeover of the Predecessor's Operations

DFW Security Protective Force (“the Employer”) provides contracted security services at the FAA’s Mike Monroney Aeronautical Center (“MMAC”), located in Oklahoma City, Oklahoma. In late 2015, the Employer was awarded the MMAC security contract with operations to commence on April 1, 2016.<sup>5</sup> Prior to April 1, security services at MMAC were provided by joint employers Safety and Security Services, Inc. and Superior Security and Investigations of Shawnee (collectively “the Predecessor”).

United Guards of America Local 100 (“the Union”) represents the approximately fifty-four security guards who provide security at MMAC. Bargaining unit guards were previously represented by United Security Specialists of America (“USSA”), which was party to a collective-bargaining agreement with the Predecessor. In 2015, the Union won a Board election to represent the unit guards. After the Union was certified in April 2015, the Union and the Predecessor executed a bridge agreement whereby they agreed to abide by the collective-bargaining agreement between USSA and the Predecessor, and extended it indefinitely until a new agreement could be negotiated. The collective-bargaining agreement included, inter alia, provisions on rest and meal breaks, compensation (which included employee classifications and health and welfare benefits), and employer discretion to implement a 401(k) plan.

In early 2016, the Predecessor notified the Union that it was not awarded the new MMAC security contract, and the Union learned by word of mouth that the Employer would be the new MMAC security contractor. In early March, the Employer’s owners visited MMAC and were introduced to (b) (6), (b) (7)(C), who was also an employee (“Employee A”). Employee A informed the Employer officials

---

<sup>4</sup> As to the allegations that the Employer made unlawful unilateral changes to the method for filling vacancies; unlawfully harassed, surveilled, and intimidated employees; and maintained a grievance procedure which inhibited employees’ Section 7 rights, we conclude that these allegations should be dismissed, absent withdrawal, because the Union failed to provide supporting evidence.

<sup>5</sup> All dates hereinafter are in 2016, unless otherwise noted.

about the Union and gave them a copy of the predecessor collective-bargaining agreement, the Union's constitution and bylaws, and the Union's bridge agreement with the Predecessor.

Later in March, the Employer asked Employee A to assist it in distributing employment packets and have all employees complete the employment application. Included in the application was an offer letter, dated March 4, to "All Security Officer Incumbents/Applicants-FAA/MMAC Contract." The offer letter stated that the Employer was "pleased to extend to you a contingent offer of employment as a Contract Security Officer FAA/MMAC," and that employees' "work duties, work location, shift and post assignment and supervisor are . . . subject to change at the company's discretion." The letter also stated that employees would "receive an hourly wage and a package of health and welfare benefits in accordance with the prevailing rates as required by the [collective-bargaining agreement]/Service Contract Act . . . ."<sup>6</sup> The employment offers were contingent on employees passing a background investigation, medical testing, and maintenance of certain licenses. Finally, the letter instructed employees to accept by signing and returning the offer letter no later than March 13. The vast majority of letters were signed and dated between March 8 and March 10. No interviews were conducted.

In late March, the Employer again visited the facility to meet with guards and answer any questions they had. During the visit, the Employer met with Employee A and (b) (6), (b) (7)(C) the Union proposed another bridge agreement that would apply the predecessor contract to the Employer. Although the Employer refused to sign the bridge agreement, the meeting became a negotiating session with the Union for a new collective-bargaining agreement. At the meeting, the Employer informed the Union that, among other things, the dispatcher position was being reclassified from armed to unarmed and that the Employer had bid the contract with this change in mind. The Union protested, explaining that the dispatcher position under the Predecessor was classified as armed and that, based on the wage rates in the predecessor agreement, the reclassified guards would receive lower pay.<sup>7</sup> After taking a break, the Union and the Employer ended negotiations for the day without making any progress.

---

<sup>6</sup> The Service Contract Act, 47 U.S.C. § 6701 *et seq.*, requires federal government contract employers to pay employees, among other criteria, the wage rate and benefits as provided in a predecessor collective-bargaining agreement for the first year of contract performance.

<sup>7</sup> The predecessor collective-bargaining agreement set out wage rates for "armed" and "unarmed" employees; "armed" employees received a higher hourly wage rate.

On April 1, the Employer began operations at MMAC. Of the fifty-four unit guards, seven were not retained for employment after failing physical examinations. The remaining forty-seven guards began working for the Employer. After commencing operations, employees learned of various changes to working conditions in addition to the reclassification. First, despite the offer letter's promise that employees would receive benefits in accordance with the predecessor collective-bargaining agreement, employees learned in their first paycheck that they were no longer receiving direct payments of their health and welfare benefits. The "Compensation" article in the predecessor agreement required that employees be paid \$3.59 per hour for health and welfare for all hours worked and that health and welfare pay be included in employees' paychecks, in addition to their hourly wage earnings. The Employer, rather than provide health and welfare pay directly to employees, placed the money in an escrow account for employees to use towards benefits elections. Further, the Employer established its own 401(k) plan, in which employees could, at their election, opt to contribute their health and welfare funds. Although the predecessor agreement contained a provision giving the Predecessor the right to provide a 401(k) plan, the Predecessor had not established one.

The Employer also changed how employees took their lunch and other breaks. The collective-bargaining agreement between the Predecessor and the Union stated that employees were entitled to paid breaks and a lunch period during a regular shift and required the Predecessor to take "reasonable steps" to ensure that employees were able to take their breaks throughout the day. Accordingly, the Predecessor had scheduled employees' lunches and breaks according to a set relief break schedule. After the Employer took over the MMAC contract, it stopped using the set relief break schedule and, instead, instructed employees to call in and request relief to take a break or lunch period.

Finally, the Employer changed how employees obtained the necessary weapons qualifications. The Employer's contract with the FAA requires the Employer's guards to be appropriately licensed and qualified on the pistols they carry and lists a set of minimum qualifications that each employee must meet. The Predecessor had required employees to shoot at stationary targets with revolvers to obtain the necessary annual weapons qualifications, which would not have satisfied FAA's contract with the Employer. In June, the Employer required employees to meet their annual qualifications recertification on a tactical range and shoot at moving targets with a semi-automatic pistol at a customized firearms training course.

In mid-December, the Union and Employer executed a new collective-bargaining agreement, effective until March 31, 2019. The collective-bargaining agreement addressed some of the bargaining subjects relevant to the instant case but only as to future application; the parties have not reached a settlement on the alleged unlawful unilateral changes at issue here.

## **B. Employee Discipline and Terminations**

The Employer's security services at MMAC are governed by a Performance Work Statement ("PWS"), which describes the requirements, including performance standards, applicable to the Employer under its contract with the FAA. The PWS details the work to be done and penalties for failure to abide by certain conditions. Section 3.2, in the "Requirements" section, states that "[n]o post shall ever be left unattended . . . ." Section 3.6 states that "[i]f the [Employer's] employees fail to . . . perform the required duties, deductions [of 1% of the total monthly contract cost] shall be taken[.]" Specifically, the PWS states in Section 7.20.3, under the heading of "Critical Performance," that any employee who "[f]ail[s] to control access [at the vehicle entry gates to MMAC]" or "[l]eav[es] a duty post without being properly relieved[.]" "shall be terminated under this contract."

### **i. Terminations Over Facility Access**

In early (b) (6), (b) (7)(C) Employee A stepped away from (b) (6), (b) (7)(C) post at the (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) While (b) (6), (b) (7)(C) was away from (b) (6), (b) (7)(C) post, a vehicle entered the facility unimpeded and without being properly inspected or credentialed. Employee A was unaware that the vehicle had entered during the short time (b) (6), (b) (7)(C) stepped away from (b) (6), (b) (7)(C) post. The Employer and FAA learned about the incident when the vehicle's driver, after entering the facility, stopped to ask for directions; the officer who assisted the driver noticed that the individual did not have a visitor badge and then radioed to dispatch for a patrol unit to escort the driver back to the facility's entrance to be processed. The radio exchange was overheard by the Employer and FAA personnel. Employee A was placed on suspension, pending investigation, and then terminated when the Employer's investigation determined that Employee A left (b) (6), (b) (7)(C) post without permission and failed to control access to the facility. The Union filed a grievance over the termination on Employee A's behalf and submitted an information request to the Employer. The Employer did not respond to the initial request, the Union sent a follow-up request, and the Employer eventually provided the information approximately one month after the initial request.

During the investigation of Employee A's conduct and while reviewing security camera footage of the incident, representatives of the Employer and the FAA observed another employee ("Employee B") wave through vehicles at (b) (6), (b) (7)(C) gate without first inspecting them; the Employer's representatives and FAA officials observed the conduct on a closed circuit live video feed. Employee B, who is also (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) was then placed on suspension pending investigation of the incident. During the Region's investigation, (b) (6), (b) (7)(C) and other employees who typically work the (b) (6), (b) (7)(C) stated that they routinely wave through contractors whom the employees know to frequent the facility and have a valid pass from earlier in the day. Employee B was terminated after the Employer's investigation determined that (b) (6), (b) (7)(C) failed to control access to the facility.

In (b) (6), (b) (7)(C), two other employees (“Employee C” and “Employee D”) were suspended, pending investigation, for failing to control access when a visitor was allowed into the facility without proper identification or processing; Employees C and D are members of the Union but do not hold leadership positions. Allegedly, the visitor showed his driver’s license to Employee D, who mistook it for an official FAA badge. Employee C observed Employee D check the visitor’s identification, assumed the visitor was properly credentialed following Employee D’s inspection, and allowed the visitor to enter the facility. The Employer’s investigation determined that Employee D was at fault and recommended termination; however, Employee D resigned before the Employer had an opportunity to terminate (b) (6), (b) (7)(C). Employee C was not found at fault for the overall incident, receiving only a three-day suspension.

Following the Employer’s investigation, the Employer’s (b) (6), (b) (7)(C) informed Employee C that another employee had filed charges with the NLRB about the incident and how it may be different from the earlier incidents that resulted in the discharges of Employees A and B. The (b) (6), (b) (7)(C) claimed that if the Employer could not come up with a credible response differentiating Employee C’s access-control incident and discipline from those of Employees A and B, the Employer would have to either reinstate Employees A and B or terminate Employee C.

ii. Discipline for Rules Violations

Shortly after the Employer began operations in April, Employee A, who is also (b) (6), (b) (7)(C), was instructed by the Employer’s (b) (6), (b) (7)(C) not to conduct union business “while on the clock.” Another of the Employer’s (b) (6), (b) (7)(C) acknowledged (b) (6), (b) (7)(C) gave Employee A the same instruction. A few days later, Employee A made a request to a supervisor on behalf of unit employees and was again told not to conduct union business while on the clock. Employee A was then issued written warnings for conducting union business while working. Although the discipline was soon after rescinded, the prohibition on conducting union business “while on the clock” remained.

iii. Investigatory Interview

In (b) (6), (b) (7)(C) the Employer asked to speak with an employee (“Employee E”). Employee E requested a Union representative to accompany (b) (6), (b) (7)(C) to the meeting. At the meeting, the Employer explained that Employee E was not being issued any disciplinary action, that the meeting was investigatory in nature, and that there was no need for the Union representative. Despite the Employer’s assurances, the Union representative present insisted that (b) (6), (b) (7)(C) remain and, when asked, Employee E reiterated that (b) (6), (b) (7)(C) wanted the Union representative present. After continued insinuations by the Union representative and protestations by the Employer, the Employer ended the meeting and no future meeting took place with Employee E.

## ACTION

We conclude that the Employer is a “perfectly clear” successor who had an obligation to bargain with the Union prior to setting initial terms and conditions and, accordingly, violated Section 8(a)(5) by unilaterally changing employee classifications, health and welfare benefits, weapons qualifications (effects bargaining only), and lunch and break schedules. We also conclude that the Employer lawfully terminated the two employees and did not unlawfully fail to bargain with the Union prior to terminating them; unlawfully delayed providing relevant information requested by the Union; unlawfully promulgated and maintained an overly broad work rule; did not unlawfully threaten an employee with termination; and did not deny an employee (b) (6), (b) (7) *Weingarten* rights.

### A. Successorship and Unilateral Changes

Upon acquiring a business, a new employer has an obligation to bargain with the union that represented its predecessor’s employees if the new employer continues its predecessor’s business in substantially the same form and if a majority of its workforce was formerly employed by the predecessor.<sup>8</sup> The successor employer’s obligation to bargain with the union ordinarily attaches after the occurrence of two events: (1) a demand for bargaining by the union; and (2) the employment by the successor employer of a “substantial and representative complement” of employees, a majority of whom were employed by the predecessor.<sup>9</sup> Although an employer is not required to adopt a predecessor’s collective-bargaining agreement and ordinarily is permitted to unilaterally fix initial terms and conditions of employment, once the bargaining obligation attaches, an employer may not make unilateral changes to employees’ terms and conditions without first bargaining to impasse with the union.<sup>10</sup>

While a *Burns* successor employer is normally free to set initial terms and conditions of employment for its newly hired work force, it must “initially consult with the employees’ bargaining representative before [it] fixes terms” if it is “perfectly clear

---

<sup>8</sup> *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 (1987); *NLRB v. Burns Int’l Sec. Servs., Inc.*, 406 U.S. 272, 279–81 (1972).

<sup>9</sup> *Hampton Lumber Mills-Washington*, 334 NLRB 195, 195 (2001) (quoting *Royal Midtown Chrysler Plymouth*, 296 NLRB 1039, 1040 (1989)).

<sup>10</sup> See *Monterey Newspapers*, 334 NLRB 1019, 1020 (2001) (successor employer not bound by predecessor agreement but is obligated to recognize and bargain with union that represented predecessor employees and may lawfully unilaterally fix initial terms and conditions of employment).

that the new employer plans to retain all of the employees in the unit.”<sup>11</sup> The Board has limited the “perfectly clear” exception to situations where the new employer actively or tacitly misleads employees or their union into believing that the employees will be retained by the successor under the same terms and conditions, or at least fails to “clearly announce” its intent to establish new terms and conditions prior to or simultaneous with its invitation to accept employment.<sup>12</sup> Thus, an employer becomes a “perfectly clear” successor only if it is silent as to changing or continuing the existing working conditions at the time it indicates to employees or their union that it will be hiring the predecessor’s employees,<sup>13</sup> or if its announcement of new terms and conditions is too “generalized” or “speculative.”<sup>14</sup>

---

<sup>11</sup> *NLRB v. Burns Int’l Sec. Servs., Inc.*, 406 U.S. at 294–95.

<sup>12</sup> *Spruce Up*, 209 NLRB at 195 (employer that indicated intent to retain predecessor’s employees while simultaneously announcing new wage rate was not a “perfectly clear” successor); *Canteen Co.*, 317 NLRB 1052, 1052–54 (1995) (employer became “perfectly clear” successor when it informed union of its plan to retain predecessor employees without announcing changes in working conditions), *enforced*, 103 F.3d 1335 (7th Cir. 1997).

<sup>13</sup> *See, e.g., Canteen*, 317 NLRB at 1052–54; *Roman Catholic Diocese of Brooklyn*, 222 NLRB 1052, 1055 (1976) (successor forfeited right to set initial terms under “perfectly clear” exception where new employer made unequivocal statement to union of intent to hire all predecessor’s lay teachers, but did not mention any changes in terms and conditions of employment, which only became known later when it submitted an employment contract), *enforcement denied in relevant part sub. nom. Nazareth Regional High School v. NLRB*, 549 F.2d 873 (2d Cir. 1977); *Fremont Ford*, 289 NLRB 1290, 1296–97 (1988) (successor forfeited right to set initial terms under “perfectly clear” exception where new employer manifested intent to retain predecessor’s employees prior to beginning of the hiring process by informing union it had doubts about retaining only a few employees and did not announce significant changes in initial terms until it later conducted hiring interviews).

<sup>14</sup> *See, e.g., Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 982 (2007) (“A general statement that new terms will subsequently be set is not sufficient to fulfill the [employer’s] *Spruce Up* obligation to announce new terms prior to or simultaneous with the takeover”), *enforcement denied in relevant part*, 570 F.3d 354 (D.C. Cir. 2009); *East Belden Corp.*, 239 NLRB 776, 793 (1978) (finding employer to be “perfectly clear” successor where it announced “in generalized and speculative terms” only that unspecified changes would occur in the future), *enforced mem.*, 634 F.2d 635 (9th Cir. 1980).

Here, it is undisputed that the Employer hired nearly all of the Predecessor's employees through its employment offer included in the March 4 letter to employees; further, the Employer does not dispute that it continued the Predecessor's business and that the Union made a demand for bargaining. The Employer's offer letter also stated that employees' wages and benefits would be in line with the Predecessor's collective-bargaining agreement as required by the Service Contract Act. Where the Employer announced that it would not change employees' wages and benefits but in fact planned to reduce some employees' wages (by reclassifying them from armed to unarmed) and change benefits, the evidence demonstrates that the Employer misled employees into thinking they would be hired without changes to their terms and conditions.<sup>15</sup> Although the offer letter contained a general statement that employees' work duties, locations, shifts, and post assignments were subject to change, this was not sufficiently specific to pass as a clear announcement.<sup>16</sup> Accordingly, the Employer is a "perfectly clear" successor and was required to bargain to agreement or impasse before fixing initial terms and conditions of employment.<sup>17</sup>

---

<sup>15</sup> See *Creative Vision Resources, LLC*, 364 NLRB No. 91, slip op. at 3 (Aug. 26, 2016) (predecessor employees submitting applications in response to successor employer's offer shows their agreement to work for employer under same terms and conditions as predecessor; by failing to announce new terms, employer obligated to bargain before altering predecessor terms and conditions); *Nexeo Solutions, LLC*, 364 NLRB No. 44, slip op. at 5, 6–7, 9 (Jul. 18, 2016) (employer was perfectly clear successor and failure to announce new initial terms and conditions at time employment offer made "lulled" employees into believing conditions would be comparable to predecessor and deprived employees of opportunity to seek alternate employment).

<sup>16</sup> See *East Belden Corp.*, 239 NLRB at 793 (successor's indication of future unspecified changes to terms and conditions did not privilege the employer's subsequent unilateral changes); *Windsor Convalescent Center of North Long Beach*, 351 NLRB at 982 (general statement that new terms and conditions will subsequently be set up is not sufficient to fulfill successor employer's obligation to announce new terms prior to or simultaneous with takeover).

<sup>17</sup> There is conflicting evidence about whether the Employer decided to make certain changes part of its initial terms and conditions or whether it intended to implement the changes at a later date. In any event, the Employer is, at a minimum, an ordinary *Burns* successor with an obligation to bargain to agreement or impasse over the changes that it clearly did not set as initial terms: break periods, weapons classifications (effects only), and the 401(k) plan. See *Blitz Maintenance*, 297 NLRB 1005, 1009 (1990) (ordinary *Burns* successor that did not tell prospective employees its initial terms and conditions obligated to continue predecessor terms and conditions of employment absent bargaining to agreement or impasse), *enforced mem.*, 919 F.2d 141 (6th Cir. 1990).

## **B. The Unilateral Changes**

Because the Employer is a “perfectly clear” successor with an obligation to bargain with the Union, it was not privileged to make unilateral changes to employees’ terms and conditions of employment that existed under the predecessor employer. Therefore, the Employer violated Section 8(a)(5) by: (1) reclassifying certain employees from armed to unarmed; (2) changing the method to obtain weapon qualifications (effects only); (3) changing the method of paying employee benefits and creating a new 401(k) benefit; and (4) establishing new methods for scheduling employee breaks.

### **i. Reclassifying Employees**

The Employer unlawfully reclassified dispatchers and monitors from armed to unarmed employees, which reduced their pay rate. As a “perfectly clear” successor, the Employer was required to meet and bargain with the Union before setting initial terms and conditions. Although the Employer did meet and bargain with the Union over reclassifying dispatchers from armed to unarmed, the parties did not reach agreement or impasse.<sup>18</sup>

The Predecessor’s collective-bargaining agreement with the Union provided that armed employees receive a higher hourly wage rate than unarmed employees; under the Predecessor, dispatchers and monitors were classified as armed and paid accordingly. Thus, when the Employer reclassified the positions, the affected employees saw a significant decrease in pay; indeed the Employer bid the FAA contract with this reduction in mind. In addition to terms spelled out in a predecessor contract, past practices also become a term and condition of employment that may not be unilaterally set as an initial term by a “perfectly clear” successor.<sup>19</sup> Although the predecessor agreement did not specify that dispatchers and monitors should be classified as “armed,” it was the Predecessor’s past practice to classify them as such. Accordingly, the Employer violated 8(a)(5) by unilaterally reclassifying them.<sup>20</sup>

---

<sup>18</sup> See *Nexeo Solutions, LLC*, 364 NLRB No. 44, slip op. at 12 (“perfectly clear” successors required to bargain with incumbent union to agreement or impasse before establishing initial terms).

<sup>19</sup> See *Blitz Maintenance*, 297 NLRB at 1008–9 (terms and conditions of employment are those established by the predecessor’s collective bargaining agreement or by its past practices).

<sup>20</sup> There is some contradictory evidence about the Employer’s decision to reclassify dispatchers as unarmed. The Employer claims it came to an agreement with

## ii. Changes in How Employees Meet Annual Weapons Qualifications

Despite the requirement in the Employer's contract with the FAA that employees maintain the necessary weapons qualifications, the Employer violated Section 8(a)(5) by failing to bargain with the Union over the effects of implementing any changes in how employees meet those requirements. The PWS that governs the Employer's performance under its contract with the FAA includes a section spelling out the various qualification levels that the Employer's guards must achieve in order to continue providing services; however, the PWS states only that the weapons qualification course be at a "Federal Law Enforcement Training Center" and that the Employer may choose the actual facility for employees to meet the annual requirement. It is undisputed that, in June, the Employer changed the way its employees obtained their annual weapons qualification recertification by requiring employees to qualify at a new shooting range and by shooting at moving targets with semi-automatic weapons. Because the Employer had discretion in how employees completed the FAA-mandated qualifications, it was required to give the Union notice and an opportunity to bargain over the options available to satisfy the necessary weapons qualifications requirements.<sup>21</sup>

## iii. Health and Welfare Benefits and 401(k) Program

As a "perfectly clear" successor, the Employer unlawfully set initial terms by ceasing the Predecessor's practice of paying health and welfare payments directly to employees. Paying health and welfare benefits directly to employees via their paycheck was an express term of the collective-bargaining agreement between the Predecessor and Union and, as such, became a part of the status quo. Accordingly,

---

Employee A, (b) (6), (b) (7)(C) prior to commencing operations; in this case, the Employer would have satisfied its duty to bargain with the Union and could lawfully set the term. However, two Union officers claim that the matter was brought up in negotiations prior to April 1 but was not resolved. Because the Union is the charging party and there is a greater amount of record evidence that supports the Union's account, we resolve the discrepancy in the Union's favor.

<sup>21</sup> See *Trojan Yacht*, 319 NLRB 741, 743 (1995) (employer violated Act when it unilaterally implemented amendment to pension plan to maintain tax exempt status; even though amendment required by IRS regulations, employer had choice on how to amend plan and should have provided union with notice and opportunity to bargain over choices); *Long Island Day Care Services*, 303 NLRB 112, 116–17 (1991) (employer unlawfully unilaterally decided how to distribute 4.75% COLA from HHS; even though employer dependent on government for funding, it had discretion in how to distribute COLA).

the Employer was not privileged to unilaterally cease paying health and welfare benefits directly to employees and redirect the funds to an escrow account.

The Employer also violated Section 8(a)(5) by unilaterally creating a 401(k) benefit. Although the predecessor collective-bargaining agreement contained a provision stating that the Predecessor may create a 401(k) program for the benefit of employees, this was not a term or condition of employment that survived the transition from the Predecessor to the Employer. A Union may waive its right to bargain over a mandatory subject of bargaining,<sup>22</sup> such as a retirement benefit, but such waivers generally do not survive the expiration of a collective-bargaining agreement or the transition from a predecessor to a successor employer.<sup>23</sup> The provision in the predecessor agreement did not contain any language that would extend it to successor employers and, accordingly, the Employer was not privileged to unilaterally establish a 401(k) program for employees.<sup>24</sup>

#### iv. Lunches and Breaks

The Employer unlawfully changed the method for scheduling lunches and other breaks because it deviated from the Predecessor's past practice; although the Employer is arguably following the language of the previous collective-bargaining

---

<sup>22</sup> See *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007) (reaffirming Board's longstanding clear and unmistakable waiver standard that requires bargaining parties to unequivocally and specifically express their mutual intention to permit unilateral employer action on a particular employment term notwithstanding the statutory duty to bargain that would otherwise apply).

<sup>23</sup> See *Holiday Inn of Victorville*, 284 NLRB 916, 916 (1987) (successor employer cannot rely on union waiver of statutory right to bargain over mandatory subject granted by predecessor contract unless parties had intended waiver to survive contract). See also *Blue Circle Cement Co.*, 319 NLRB 954, 954 (1995) (contractual reservation of managerial discretion such as waiver does not extend beyond expiration of contract unless contract specifically states provision intended to outlive contract), *enforced in relevant part on other grounds*, 106 F.3d 413 (10th Cir. 1997) (unpublished).

<sup>24</sup> Even assuming the Employer was privileged to set up a 401(k) benefit, the Employer had discretion over the details of the program and was, at minimum, required to bargain with the Union over the benefit's details and implementation. See *Long Island Day Care Services*, 303 NLRB at 116–17 (employer unlawfully unilaterally decided how to distribute 4.75% COLA from HHS because it had discretion in how to distribute COLA and should have bargained with union over distribution of funds).

agreement, the Predecessor's actual past practice is the status quo to be followed.<sup>25</sup> The terms of the predecessor contract required the Predecessor to take "reasonable steps" to ensure that employees were able to take their breaks throughout the day, and the Predecessor established a set break schedule. Thus, the Predecessor's break schedule was a term and condition that was part of the status quo, which the Employer, as a "perfectly clear" successor, was not privileged to unilaterally change.

For the foregoing reasons, the Region should, absent settlement, issue complaint on the Employer's unlawful unilateral changes.

### **C. The Terminations**

In determining whether a termination was unlawfully motivated by an employee's protected concerted activity, as opposed to a reason unrelated to protected concerted activity, the Board applies the test set forth in *Wright Line*.<sup>26</sup> Under *Wright Line*, the General Counsel bears the initial burden of establishing, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's decision.<sup>27</sup> If the General Counsel makes a showing of discriminatory motivation by proving the existence of protected activity, the employer's knowledge of the activity, and animus toward the protected activity, the burden of persuasion shifts to the employer to show that it would have taken the same action even in the absence of the employee's protected activity.<sup>28</sup>

Here, the General Counsel would likely be unable to establish a prima facie case that the Employer discharged Employees A and B because of their union activity. Although the Employer is aware of Employee A and B's (b) (6), (b) (7)(C), there is no evidence of discriminatory motivation or animus toward Employees A or B

---

<sup>25</sup> See *Rosdev Hospitality, Secaucus, LP*, 349 NLRB 202, 203 (2007) (despite following predecessor's collective-bargaining agreement, successor unlawfully unilaterally changed leave accrual method by failing to follow predecessor's past practice that differed from terms of collective-bargaining agreement); *Blitz Maintenance*, 297 NLRB at 1008–9 (terms and conditions of employment are those established by predecessor's collective-bargaining agreement or by its past practices); *Peerless Food Products*, 236 NLRB 161, 161 (1978) (policies based in past practice are still terms and conditions that may not be unilaterally changed).

<sup>26</sup> 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). See also *Arc Bridges, Inc.*, 362 NLRB No. 56, slip op. at 3 (Mar. 31, 2015).

<sup>27</sup> *Arc Bridges*, 362 NLRB No. 56, slip op. at 3.

<sup>28</sup> *Id.*

for (b) (6), (b) (7)(C) At most, in April, Employer officials had told Employee A not to conduct Union business while “on the clock.” When (b) (6), (b) (7) subsequently conducted Union business while working, the Employer issued (b) (6), (b) (7) a written warning but eventually rescinded the discipline.<sup>29</sup>

But even if the General Counsel were able to make out a case of unlawful discrimination, the Employer would be able to rebut that case by demonstrating that it would have discharged Employees A and B because of the Employer’s obligations under the PWS. The PWS states, in Section 7.20.3, under the heading of “Critical Performance,” that employees “*shall be terminated under this contract*” (emphasis added) for any “[f]ailure to control access [at the vehicle gates to MMAC]” or “[l]eaving a duty post without being properly relieved.” Further, for each infraction, the PWS requires the FAA to charge the Employer for 1% of the monthly cost of the contract. Here, Employee A abandoned (b) (6), (b) (7) post at (b) (6), (b) (7)(C) without permission, allowing a vehicle to enter the facility unimpeded, and Employee B waved through vehicles at (b) (6), (b) (7)(C) without first inspecting them. In addition, FAA personnel essentially “witnessed” each incident. In Employee A’s case, the FAA heard the radio call for assistance regarding an individual who had improperly entered the facility after Employee A stepped away from (b) (6), (b) (7) post. As for Employee B, the FAA witnessed the infraction in real time over live closed circuit video surveillance. Considering FAA’s knowledge of these infractions, the Employer had no choice but to take swift action to remedy the misconduct.

We note that, with respect to Employee B’s infraction, evidence of prior lax enforcement of gate inspection procedures by the Predecessor, and arguably the Employer as well, does not undermine the Employer’s *Wright Line* defense. In this regard, Employee B and several other employees state that it was common practice to wave through contractors they recognized; these statements do not differentiate between the Predecessor’s practices and the Employer’s practices during the month after it commenced operations. One of the Employer’s managers (“Manager A”), who had been responsible for supervising (b) (6), (b) (7)(C) for the Predecessor, states that Employee B, among others, was told to discontinue the practice and that the Predecessor had also issued a memo reminding all employees of proper gate procedures. There is no evidence that the Predecessor disciplined any employees for waving through contractors they recognized. However, there is no question that the “wave through” practice violates the Employer’s obligations under the PWS, and that FAA personnel and Employer management jointly witnessed Employee B’s infraction. And there is no evidence that FAA personnel had been aware of the practice beforehand. Under these circumstances, the Employer’s decision to enforce the rules and terminate Employee B, following an investigation, was not due to (b) (6), (b) (7) Union

---

<sup>29</sup> Although the discipline was rescinded, the Employer’s prohibition on conducting Union business while “on the clock” remained effective.

activity, and, instead, was the result of the Employer's obligations and repercussions under its FAA contract.<sup>30</sup>

Additionally, there is no evidence that the Employer treated Employees A and B differently than others who were caught committing similar infractions. Rather, the evidence shows that the Employer acted consistently. In this regard, we reject the Union's argument that there was disparate treatment between the discipline given to Employees A and B, who (b) (6), (b) (7)(C), and the discipline given to Employee C, who is a member of the Union (b) (6), (b) (7)(C). When the Employer discovered each employee's alleged failure to control access, the respective employee was suspended pending investigation. At the conclusion of the investigations, Employees A and B were terminated for their infractions, whereas Employee C was returned to work following (b) (6), (b) (7)(C) suspension because the Employer determined that (b) (6), (b) (7)(C) was not responsible for any infractions. Indeed, Employee D, who also (b) (6), (b) (7)(C) was found responsible for the failure to control access and was slated for termination, although (b) (6), (b) (7)(C) resigned before the Employer had the opportunity to affirmatively terminate (b) (6), (b) (7)(C).

Accordingly, the Region should dismiss, absent withdrawal, the charges alleging that the Employer unlawfully terminated Employees A and B.<sup>31</sup>

#### **D. Additional Allegations**

##### **i. Pre-Termination Failure to Bargain Under *Alan Ritchey***

The charge alleges that the Employer failed to bargain with the Union over the terminations of Employees A and B pursuant to the *Alan Ritchey*<sup>32</sup> obligation that an employer provide notice and opportunity to bargain before imposing certain types of discipline. The Board's *Alan Ritchey* decision was, among others, vacated by the

---

<sup>30</sup> See *Arnold Ready Mix Corp.*, 259 NLRB 202, 205 (1981) (employee lawfully terminated due to legitimate customer complaints about employee's work that caused customer trouble, cost it money, and endangered other employees).

<sup>31</sup> The Region also sought advice as to whether it should issue a subpoena to the FAA to compel answers to the Region's inquiries as to whether it affirmatively directed the Employer to terminate Employees A and B. Because the PWS requires termination for the employees' infractions, and the PWS governs the Employer's actions and requirements on its contract with the FAA, we conclude that the PWS effectively served as an affirmative directive from the FAA to terminate the employees for their infractions. Accordingly, no further communications with the FAA are required.

<sup>32</sup> 359 NLRB 396 (2012).

Supreme Court in *NLRB v. Noel Canning*<sup>33</sup> because it was decided under an improperly constituted Board. Recently, in *Total Security Management Illinois 1, LLC*,<sup>34</sup> the Board affirmed the holding and rationale of *Alan Ritchey*. However, the Board in *Total Security Management* applied the rule prospectively.<sup>35</sup> Accordingly, because the conduct at issue in the instant case occurred prior to the Board's decision in *Total Security Management*, this portion of the charge must be dismissed, absent withdrawal.

ii. Unlawful Delay in Providing Requested Information

The Employer violated 8(a)(5) by its delay in providing information requested by the Union following Employee A's termination. It is well-settled that an employer has an obligation to provide a union, on request, information that is relevant and necessary to the union's role as exclusive bargaining representative of unit employees.<sup>36</sup> Here, Employee B, in (b) (6), (b) (7)(C) capacity as (b) (6), (b) (7)(C) requested information about Employee A's suspension and termination, in preparation for filing a grievance; thus, the information requested was relevant and necessary to the Union's role as bargaining representative. After the Employer did not respond to the initial request, the Union sent a follow up request, and the Employer eventually provided the information approximately one month after the initial request. Because the Employer failed to provide the information in a timely fashion and without any justification for its delay, the Region should issue complaint, absent settlement.<sup>37</sup>

iii. Unlawfully Overbroad Rules

The Employer violated 8(a)(1) by orally promulgating an unlawfully overbroad rule when it instructed and then disciplined Employee A for allegedly doing union work "on the clock."<sup>38</sup> Although the Employer rescinded the discipline, it took no

---

<sup>33</sup> 134 S.Ct. 2550 (2014).

<sup>34</sup> 364 NLRB No. 106 (Aug. 26, 2016).

<sup>35</sup> *Id.*, slip op. at 1–2.

<sup>36</sup> See *Woodland Clinic*, 331 NLRB 735, 736 (2000) (union is entitled to "information at the time it made its initial request, [and] it was [the employer's] duty to furnish it as promptly as possible" (quoting *Penneco, Inc.*, 212 NLRB 677, 678 (1974))).

<sup>37</sup> See *id.* (employer must provide evidence justifying any delay in providing requested relevant evidence).

<sup>38</sup> See *Verizon Wireless*, 349 NLRB 640, 659 (2007) (employer violated 8(a)(1) through maintenance of an unlawfully overbroad, orally promulgated rule).

remedial actions to address the overly broad prohibitions. Because the “on the clock” rule is vague and not confined to work time, employees would reasonably understand the rule to prohibit lawful Section 7 activity during non-work time.<sup>39</sup> Accordingly, the Region should issue complaint, absent settlement.

Further, it would not effectuate the purposes and policies of the Act to issue complaint regarding the numerous handbook rules that the Region determined were unlawful, because the Employer rescinded the rules and no employees were disciplined under the rules while they were in effect. We note that the dismissal should not be based on *Passavant* principles because the Employer did not admit the rules were unlawful prior to rescinding them, nor did it publicize its repudiation or give assurances to employees.<sup>40</sup> Nevertheless, because there is no evidence of harm, it would not effectuate the policies of the Act to issue complaint on this charge.

iv. Alleged Unlawful Statement Threatening Termination

The Employer’s statement to Employee C, that [REDACTED] may be terminated if the Employer could not credibly come up with a reason to distinguish [REDACTED] discipline from Employees A and B, was not an unlawful threat to terminate because it would not reasonably tend to coerce Employee C in the exercise of [REDACTED] Section 7 rights. In particular, the statement was not made in response to any Section 7 activity.<sup>41</sup> Instead, the Employer merely communicated that it needed to be consistent in handing out discipline to employees for similar infractions. Accordingly, absent withdrawal, the charge should be dismissed.

v. Alleged *Weingarten* Violation

---

<sup>39</sup> See *W. D. Manor Mechanical Contractors*, 357 NLRB 1526, 1526, 1544 (2011) (overly broad rule prohibiting solicitation for union activities while “on the clock”); *Brunswick Corp.*, 282 NLRB 794, 795 (1987) (“any rule that requires employees to secure permission from their employer as a precondition to engaging in protected concerted activity on an employee’s free time and in nonwork areas is unlawful”).

<sup>40</sup> See *Passavant Memorial Area Hospital*, 237 NLRB 138, 138-39 (1978) (to relieve itself of liability for unlawful conduct, employer must timely, unambiguously, and specifically repudiate its unlawful conduct; employer must also adequately publicize the repudiation and assure employees that it will not interfere with employees’ exercise of Section 7 rights in the future).

<sup>41</sup> See *Sacramento Recycling & Transfer Station*, 345 NLRB 564, 565 (2005) (manager’s statement that he would not terminate employees unless someone “pissed him off” not unlawful threat of discharge because not made in response to employees’ protected concerted activities).

Although an employee has a right to union representation when the employee reasonably believes an investigatory meeting with [REDACTED] employer may result in disciplinary action,<sup>42</sup> there is no violation in the present case. Here, although the Employer refused to permit a Union representative to be present during the planned investigatory interview, the Employer continually assured Employee E and the Union representative that the meeting was only investigatory in nature and would not result in discipline. Moreover, even assuming Employee E reasonably believed the meeting could result in disciplinary action, the Employer terminated the meeting when Employee E expressed discomfort with proceeding without a Union representative.<sup>43</sup> In any event, Employee E did not cooperate in the Region's investigation. Based on the evidence in hand, the Employer did not violate Employee E's *Weingarten* rights. Accordingly, this portion of the charge should be dismissed, absent withdrawal.

/s/  
B.J.K.

H: ADV.14-CA-176861.Response.DFWSecurity [REDACTED] doc

cc: Injunction Litigation Branch

---

<sup>42</sup> *NLRB v. Weingarten, Inc.*, 420 U.S. at 257.

<sup>43</sup> *Id.* at 258 (employer not obligated to justify refusal to allow union representative's presence, and may lawfully continue investigation of employee without conducting interview).