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Spruce Up Survives, But a Successor's First Communication to a Predecessor's Employees is More Critical Than Ever

BY TOM DOWD

In *Paragon Systems, Inc.*, 364 NLRB No. 75 (2016), the National Labor Relations Board declined the General Counsel's request to overturn its 42-year-old decision in *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), *enfd. per curiam* 529 F.2d 516 (4th Cir. 1975). *Spruce Up* held that a successor employer that plans to offer employment to its predecessor's union-represented employees is free to set its own starting terms and conditions of employment unilaterally, provided it does not: (1) actively, or by tacit inference, mislead employees into believing they will be retained without changes in wages, hours or conditions of employment; or (2) fail to clearly announce its intent to establish new employment terms prior to inviting those employees to accept employment. A series of recent Board decisions show that *Spruce Up* is not likely to be overturned, but that asset purchasers that wish to set their own initial terms and conditions of employment need to pay attention to the timing and substance of their first communication to the predecessor's employees.

The Legal Landscape

The U.S. Supreme Court ruled long ago that, when a successor employer takes over a predecessor's unionized operations, the successor is not obligated to adopt the predecessor's union contract, nor is the successor obligated to keep the predecessor's terms and conditions of employment in place when the successor starts operations. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). Instead, the new employer can set its own initial terms and conditions (including new wages and benefits), and then bargain with the predecessor's union if a majority of the predecessor's employees choose to accept employment under the successor's terms.

Burns identified a narrow exception for situations in which it is "perfectly clear" that the successor plans to retain all of the predecessor's employees. In such cases, the Court said there was a duty to "consult"

with the union before setting those initial terms and conditions. In *Spruce Up*, the Board clarified that, if the successor announces starting terms and conditions that are different from those of the predecessor, then it is not “perfectly clear” that a successor will hire a majority of the prior workforce. This is true because, even if the successor wants the employees to accept the offer, the employer cannot know that a majority of the workers will do so under conditions that are different from what the predecessor provided. The Board cautioned, however, that an employer would lose this unilateral ability if it communicated an intent to offer its predecessor’s employees jobs in a way that misled the employees or their union to believe there would be no changes or that failed to put them on notice changes would be forthcoming, and later announced new terms and conditions at a point when it was too late for those incumbents to seek other employment opportunities.

Efforts to Overturn *Spruce Up*

Recently, the Board has issued a number of decisions expanding the type of conduct that constitutes “misleading” employees about whether changes in conditions are going to occur.¹ The Board’s decisions have been so expansive that the narrow “perfectly clear” exception noted by the Supreme Court in *Burns* now threatens to swallow the fundamental principle established in *Burns* – that successors “ordinarily” are free to set their own initial terms and conditions of operation.

The Board’s General Counsel has sought to go further by stockpiling successor cases over the past few years and asking the Board to overturn *Spruce Up*. As such, the General Counsel has argued that a successor must consult with the predecessor’s union about starting conditions any time the successor’s conduct shows that the successor “intends” to hire the prior workforce.

There had been recent signals from the Board that the General Counsel’s request to overturn *Spruce Up* was a bridge too far. In *GVS Properties, L.L.C.*, 362 NLRB No. 194 (2015), two Board Members held that a city statute (which required successors to retain the predecessor’s employees for 90 days) created an immediate bargaining obligation with the predecessor’s union, but when the dissenting Board Members asserted that the other two Board Members were trying to undermine *Spruce Up* and the “perfectly clear successor” doctrine, the two Board Members denied they were doing so in “the instant case.” Then in *Nexeo Solutions, L.L.C.*, 364 NLRB No. 44 (2016), the same two Board Members found it “unnecessary to consider the requests” to overrule *Spruce Up* because their decision treated the employer as a perfectly clear successor based on their conclusion that the employer did not quickly enough communicate to the predecessor’s employees that the successor’s starting terms of employment would be different from the predecessor’s terms.

Paragon Systems

Paragon Systems, Inc. seemed to provide an excellent opportunity for the General Counsel’s efforts to overturn *Spruce Up*. Paragon had taken over a federal contract to provide guard services at a federal building where the predecessor’s work force had union representation. As a federal contractor, Paragon had a legal obligation under Executive Order 13495 to offer employment to the predecessor’s union-represented employees on a first-refusal basis. Paragon also had a legal obligation under the Service Contract Act (SCA) to provide the incumbent employees with wage rates and fringe benefit amounts that were at least equal in value to the wage rates and fringe benefit amounts that were paid by the predecessor. So, while Paragon might set up a variety of starting terms and conditions that were different from those of its predecessor, all guards would be receiving offers of employment at the predecessor’s wage and fringe benefit levels. The

¹ See, e.g., *Adams & Associates, Inc.*, 363 NLRB No. 193 (2016) and *Creative Vision Resources, LLC*, 364 NLRB No. 91 (2016).

General Counsel argued this meant Paragon was a perfectly clear successor who knew that a majority of the prior workforce would accept employment offers.

In response, Paragon pointed out that its offer letters to the incumbent guards expressly notified those guards that Paragon would be setting its own starting terms and conditions of employment, and the letters set forth some of the ways in which Paragon's terms would be different from its predecessor. To avoid any assertion it had misled incumbents about what it planned to do, Paragon had refrained from any pre-offer letter communications with the incumbents, except for a short, posted memo informing guards that Paragon had been awarded the contract and that Paragon would be hosting a job fair to discuss employment. The memo asked guards to fill out applications at Paragon's website in advance of the job fair. The applications would allow Paragon to prepare personalized offer letters and other materials for the job fair.

The administrative law judge (ALJ) found that Paragon's memo about filling out applications was the equivalent of an offer of employment. The ALJ agreed with the General Counsel's assertion that the SCA and Executive Order requirements automatically made Paragon a perfectly clear successor. He also argued at length that *Spruce Up* was wrongly decided and should be overturned.

The three Members rejected the ALJ's conclusions and unanimously found that Paragon's memo announcing the job fair was not an invitation to accept employment and that Paragon's status as a federal contractor did not mean Paragon was automatically a perfectly clear successor. The Members relied on *Spruce Up* in support of their decision, but declined to throw their full weight behind the case, saying in a footnote: "[w]e decline to rule on the General Counsel's request [to overturn *Spruce Up*] in this case" (emphasis added), holding open the possibility that they could do so in a different set of circumstances. Realistically, however, the General Counsel's failure to prevail under such favorable circumstances in *Paragon Systems* demonstrates that the Board is unlikely to overturn *Spruce Up*.

What Lessons Should Employers Learn From These Cases?

While the essential principle in *Spruce Up* appears likely to survive, the case has been significantly weakened and the Board remains receptive to creating as many exceptions as possible to the fundamental legal principle announced in *Spruce Up*. As such, employers should anticipate that the General Counsel will remain vigilant in looking for flaws in the way successors communicate with the prior workforce, and that the standard for whether an existing employee has been "misled" about initial job terms is likely to be continually rebalanced in favor of the predecessor's employees.

If an employer wishes to establish its own terms and conditions of employment following an asset purchase, the critical takeaway from the Board's recent decisions is that a successor's **FIRST** communication of any type to a predecessor's workforce should clearly and unambiguously inform the predecessor's employees that:

1. The successor is not adopting the predecessor's union contract.
2. The successor is going to be setting its own initial terms and conditions of employment.
3. The successor's initial terms and conditions of employment are going to be substantially different from the terms and conditions that were in place under the predecessor.
4. No predecessor employee should presume that any particular practice, procedure or term of employment used by the predecessor will continue unchanged under the successor's leadership and policies.
5. The predecessor is not authorized to make any statements on the successor's behalf about what the successor will or will not do in connection with setting initial terms and conditions of employment, and

the predecessor's employees should not rely on any statements or information that they have heard from any source other than the successor.

6. If the successor is taking over a federal contract, then the successor should add that the successor will meet its legal obligation by offering nothing lower than the wage rates and base fringe benefit amount paid by its predecessor, but the successor should emphasize: (a) that the base fringe benefit amount may be provided in a manner different from that of the predecessor; and (b) that continuation of prior wage rates and fringe benefit amounts is not a signal that any other term or condition of employment will remain unchanged.