

No. 09-1344

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

METRO MAYAGUEZ, INC., d/b/a HOSPITAL PAVIA PEREA

Respondent

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND APPELLATE
JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce its Decision and Order issued against Metro Mayaguez, Inc., d/b/a Hospital Pavia Perea (“Metro Mayaguez”). The Board’s Decision and Order issued on April 30, 2008, and is reported at 352

NLRB 418. (A 43-52.)¹ The Board filed its application for enforcement on March 16, 2009. The Board's filing is timely because the Act imposes no time limit on such proceedings.

The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a) (“the Act”)), which authorizes the Board to prevent unfair labor practices affecting commerce. The Court has jurisdiction under Section 10(e) of the Act (29 U.S.C. § 160(e)), because the unfair labor practices occurred in Puerto Rico.

The Board's Order is final under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Board's Order was issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)). In *Northeastern Land Services Ltd. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), *petition for cert. filed* ___ U.S.L.W. ___ (U.S. Aug. 18, 2009), this Court conclusively held that the two-member quorum has authority under Section 3(b) to issue decisions. Accordingly, Metro Mayaguez's contrary contention (Br 16-20) must be rejected.

¹ “A” references are to the appendix filed by Metro Mayaguez. The Board's Decision and Order is located at pages 43-52 of the appendix. “GCX” refers to exhibits introduced by the Board's General Counsel at the unfair labor practice hearing. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of its finding that Metro Mayaguez violated Section 8(a)(1) of the Act by promulgating and maintaining an overly broad no-solicitation and no-distribution policy.

2. Whether substantial evidence supports the Board's finding that Metro Mayaguez, an undisputed successor employer, violated Section 8(a)(5) and (1) of the Act by unilaterally changing unit employees' existing terms and conditions of employment, after it had made "perfectly clear" its intention to retain those employees under their existing terms and conditions of employment.

STATEMENT OF THE CASE

Acting on charges filed by Unidad Laboral De Enfermera(os) y Empleados de la Salud ("the Union"), the Board's General Counsel issued an unfair labor practice complaint against Metro Mayaguez, alleging that it violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the Union about numerous changes in employees' terms and conditions of employment. The complaint also alleged that Metro Mayaguez violated Section 8(a)(1) by promulgating and maintaining an overly broad no-solicitation and no-distribution policy. Following a hearing, an administrative law judge issued a recommended decision, in which he found that Metro Mayaguez violated the Act as alleged. Metro Mayaguez filed exceptions to the judge's decision; the General

Counsel filed cross-exceptions. The Board found that Metro Mayaguez was a “perfectly clear” successor, and that its changes in unit employees’ terms and conditions of employment, without bargaining with the Union, were unlawful.

STATEMENT OF FACTS

I. THE BOARD’S FINDINGS OF FACT

A. Background; Metro Mayaguez Purchases Hospital Pavia Perea from Clinica Dr. Perea on August 11 and, the Next Day, Assumes the Hospital’s Operations Without Any Interruptions to or Changes in Services

For several years, an entity called Clinica Dr. Perea owned and operated a hospital in Mayaguez, Puerto Rico called Hospital Pavia Perea (“the Hospital”). (A 44-45, 50; A 4 ¶ 1.) The Hospital provided medical, surgical, and related health care services to the general public. (A 45; GCX 1(e), (g).)

The Union and the Hospital were signatories to separate collective-bargaining agreements covering three separate bargaining units of employees at the Hospital. (A 45-46; A 2, ¶ 2 GCX 1(e).)² The most recent collective-bargaining

² One unit includes “[a]ll licensed graduate nurses.” The second unit includes “[a]ll licensed practical nurses, pharmacy aides, escorts, and X-ray technicians, including respiratory technicians, operating room technicians, laboratory assistants, E.K.G., phlebotomists, and center supply technicians” The third unit includes “[a]ll laundry, maintenance, non-skilled, warehouse, parking, and housekeeping employees, cooks, diet department employees, and non-professional employees, including plumber, mason, electrician, handyman and refrigeration technicians” (A 45-46; GCX 1(e).)

agreements between Clinica Dr. Perea and the Union ran from June 1, 2003 to May 31, 2006. (A 45; A 2 ¶ 2, GCX 1(e), (g).)

On August 11, 2006, Metro Mayaguez purchased the assets of the Hospital from Clinica Dr. Perea and became the successor employer. (A 44-45, 50; A 2 ¶ 1, 4.) The next day, Metro Mayaguez assumed control of the Hospital, and began operating it at the same location with the same employees and without any interruptions or changes. (A 45, 50.)

B. Metro Mayaguez Retains a Majority of the Hospital's Incumbent Employees, but Does Not Inform the Employees or the Union That It Has Any Intention of Setting the Employees' Initial Terms and Conditions of Employment

Prior to assuming control of the Hospital, Metro Mayaguez did not require the Hospital's employees to fill out a job application or undergo an interview to be hired. The employees were not even given offers of employment. (A 45; A 4 ¶ 23.) Rather, to continue their employment at the Hospital, employees only had to show up for work as usual at the Hospital on August 12. (A 45, 50; A 4 ¶ 23.) On August 12, when Metro Mayaguez started operating the Hospital, it employed a majority of the employees who had previously been employed by Clinica Dr. Perea. (A 43 n.2, 45, 50; A 2, ¶ 1.) Because Metro Mayaguez was an undisputed successor to Clinica Dr. Perea, the Union continued to be the unit employees' collective-bargaining representative. (A 45-46, 50; A 2 ¶ 4, GCX 2(b), 1(g).)

Before Metro Mayaguez assumed control, it never informed the unit employees that it intended to set their initial terms and conditions of employment. (A 45-46, 50; A 4 ¶ 24.) Nor did it inform the Union that it had any such intention. (A 45, 48-49.) Thus, when the unit employees showed up for work on August 12, they continued to be employed under the same terms and conditions of employment as when they worked for Clinica Dr. Perea, the predecessor. (A 43 n.2, A 50.)

C. Although Metro Mayaguez Provided No Indication That It Would Set Unit Employees' Initial Terms and Conditions of Employment, It Nonetheless Began to Unilaterally Change a Wide Array of Those Items in August

Although Metro Mayaguez did not tell its employees it intended to set their initial terms and conditions of employment, in August it nonetheless began making changes. (A 48-50; A 1 ¶ 24, A 3-4 ¶ 8-20, 25, A 5 ¶ 26.) Metro Mayaguez did not consult the Union. (A 45, 48-50.)

The changes to unit employees' existing terms and conditions of employment affected a wide array of mandatory subjects of bargaining. (A 48-50; A 1 ¶ 24, A 3-4 ¶ 8-20, 25, A 5 ¶ 26.) Some of the changes affected terms relating to their pay, including their eligibility for salary increases and monetary bonuses. Specifically, Metro Mayaguez unilaterally reduced the rate of bonus money unit employees could receive for achieving perfect attendance; restricted the pool of employees who were eligible to receive the bonus; and, by imposing more

stringent attendance requirements, made it more difficult for employees to qualify for the bonus. It also unilaterally changed the holiday bonus pay practice. Finally, it unilaterally changed the method for determining unit employees' salary increases by linking increases, for the first time, to its ratings of employees in their annual evaluations. (A 48-49; A 3-4.)

Metro Mayaguez also made significant changes to established leave and holiday policies. It unilaterally liquidated all of the vacation hours and Christmas bonuses that unit employees had accrued prior to their being hired by Metro Mayaguez. It unilaterally cut the maximum amount of sick leave unit employees could accumulate. It also reduced the overall number of holidays unit employees could take. (A 48; A 3.)

Additionally, Metro Mayaguez unilaterally decreased the rate at which it would match unit employees' contributions to their retirement plans. (A 49; A 4.) It unilaterally stopped providing unit employees with a yearly allowance to purchase uniforms; instead, it provided three uniforms yearly to those employees required to wear uniforms. (A 49.) Finally, it unilaterally implemented a detailed progressive disciplinary system pursuant to which unit employees could be disciplined for engaging in any one of 78 enumerated infractions. (A 47-48; A 3-5; GCX 3(b).)

D. On August 17, the Union Asks Metro Mayaguez to Bargain Over a New Contract; on August 29, Metro Mayaguez Responds that It Recognizes the Union as Unit Employees' Representative, but that It Rejects the Terms and Conditions of Employment Between the Predecessor and the Union, and Intends to Set Initial Terms and Conditions of Employment

On August 17, the Union's executive director, Radamaes Quinones Aponte, sent a letter to Metro Mayaguez's executive director, Jaime Maestre. In his letter, Aponte stated that the Union was available to negotiate over the collective-bargaining agreements. (A 45; A 4 ¶ 21, GCX 8(b).) Metro Mayaguez did not respond to the Union's request until August 29. (A 45; A 3, GCX 2(b).) In its response, Metro Mayaguez acknowledged that it had retained the "absolute majority of the employees that work for [the Hospital]," and stated that, for that reason, it recognized the Union as the unit employees' collective-bargaining representative. (A 45; GCX 2(b).) Metro Mayaguez further stated that it did not recognize the terms and conditions agreed upon by the Union and the predecessor employer, and that it did not agree to the terms of any prior collective-bargaining agreements between the predecessor employer and the Union. (A 45; GCX 2(b).) For the first time, Metro Mayaguez also indicated that it would establish the initial terms and conditions of employment for the unit employees. (A 45; GCX 2(b).)

E. Metro Mayaguez Promulgates a New Policy Banning Solicitation and Distribution in Virtually Every Area of Its Facility

In September, Metro Mayaguez distributed a memorandum to employees informing them that it had established a new “[n]o solicitation and [n]o distribution” policy. (A 46; A 3 ¶ 14, GCX 5(b).) A copy of the new policy was attached to the memorandum. (A 46; GCX 5(b).) Prior to receiving the memorandum, the unit employees and the Union had heard nothing about this matter. (A 46.)

The scope of the new policy was extensive. (A 46; GCX 5(b).) Among other things, it prohibited solicitation and distribution in “the areas of the facilities of [the Hospital] where [employees] have or could have access and/or there is traffic of patients, family members, visitors, suppliers, contractors and/or the general public.” The policy further stated that “[the Hospital] facilities include and are not limited to parking, [the] Hospital, warehouses, work areas, clinic areas, reception, hallways, pharmacy and offices.” (A 46; GCX 5(b).)

II. THE BOARD’S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Schaumber and Member Liebman), in agreement with the administrative law judge, found that Metro Mayaguez was a “perfectly clear” successor, and violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally changing employees’

terms and conditions of employment, specifically, their sick leave days, vacations, uniform incentives, perfect assistance (attendance) bonus, salary, retirement plans, and progressive disciplinary proceedings. The Board also found, in agreement with the judge, that Metro Mayaguez violated Section 8(a)(1) by promulgating and maintaining an overly broad no-solicitation and no-distribution rule. (A 43, 48, 51.)

The Board's Order requires Metro Mayaguez to cease and desist from engaging in the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Board's Order requires Metro Mayaguez to rescind the unilateral changes it made to unit employees' terms and conditions of employment, and continue the terms and conditions of employment in effect prior to August 2006, until Metro Mayaguez negotiates in good faith with the Union to agreement or valid impasse; to rescind the overly broad no-solicitation and no-distribution rule and notify the unit employees, in writing, that this has been done; to make whole the unit employees for any loss of pay or benefits they may have suffered as a result of the unilateral changes; to make available to the Board any records necessary for determining backpay; and to post a remedial notice. (A 43, 51.)

SUMMARY OF ARGUMENT

After acquiring and beginning to operate the Hospital, which it purchased from an entity called Clinica Dr. Perea, Metro Mayaguez committed several unfair labor practices. To begin, Metro Mayaguez does not contest the Board's finding that it unlawfully promulgated and maintained an overly broad no-solicitation and no-distribution policy. Thus, under settled law, the Board is entitled to summary affirmance of that finding.

Substantial evidence supports the Board's finding that Metro Mayaguez, an undisputed successor to Clinica Dr. Perea, was also a "perfectly clear" successor, and was therefore not privileged to set initial terms and conditions of employment for the unit employees who worked at the Hospital without bargaining with the Union.

The Board's "perfectly clear" successor finding is based on stipulated, undisputed facts. Those facts establish that Metro Mayaguez easily qualifies as a "perfectly clear" successor under settled law: it hired a majority of the predecessor's unit employees the day it started operating the Hospital, and it gave them no indication whatsoever that it intended to set their initial terms and conditions of employment.

As a "perfectly clear" successor, Metro Mayaguez was legally obligated to consult with the Union before changing unit employees' terms and conditions of

employment. Metro Mayaguez did not do this. Instead, it made numerous unilateral changes to unit employees' terms and conditions of employment. Those changes, which Metro Mayaguez does not dispute, affected a wide array of items.

Metro Mayaguez's claim that it cannot be a "perfectly clear" successor because it did not hire literally "all" of the predecessor's unit employees is simply wrong. The law is settled that to constitute a "perfectly clear" successor, an employer need not hire "all" of the predecessor's employees. Rather, the question is whether it is clear that the union's majority status will continue. As noted above, Metro Mayaguez not only stipulated that it was a "successor" within the meaning of the Act, it undisputedly hired a majority of the predecessor's unit employees and said nothing to them about setting their initial terms and conditions of employment. As such, it is a "perfectly clear" successor.

Finally, seeking to avoid this Court's enforcement of the Board's Order, Metro Mayaguez ignores Supreme Court precedent solidly establishing that regardless of any compliance efforts by Metro Mayaguez, the Board is entitled to have the resumption of unfair labor practices barred by an enforcement decree. Accordingly, the Board is entitled to enforcement of its Order.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY AFFIRMANCE OF ITS FINDING THAT METRO MAYAGUEZ VIOLATED SECTION 8(a)(1) OF THE ACT BY PROMULGATING AND MAINTAINING AN OVERLY BROAD NO-SOLICITATION AND NO-DISTRUBTION RULE

Before this Court, Metro Mayaguez does not contest the Board’s finding (A 46-48, 51) that it promulgated and maintained an unlawful overly broad no-solicitation and no-distribution policy in violation of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)).³ Under settled law, Metro Mayaguez’s failure to contest the Board’s finding (A 43, 48, 51) before the Court in its opening brief constitutes a waiver of any defense and warrants summary enforcement of the portion of the Board’s Order with respect to this violation. *See McGaw of Puerto Rico, Inc. v. NLRB*, 135 F.3d 1, 7-8 (1st Cir. 1997); *NLRB v. Horizon Air Services, Inc.*, 761 F.2d 22, 26 (1st Cir. 1985). *Accord U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1314-15 (7th Cir. 1991) (en banc).⁴

³ Section 7 of the Act guarantees employees “the right to self-organization, to form, join, or assist labor organizations” Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of [those] rights”

⁴ In any event, Metro Mayaguez does not dispute that its policy was unlawful because its policy “covered substantially more than patient care areas.” *Eastern Maine Medical Center v. NLRB*, 658 F.2d 1, 4-5 (1st Cir. 1981).

Moreover, the uncontested violation does not disappear, but remains, “lending [its] aroma to the context in which the [remaining] issues are considered.” *NLRB v. Clark Manor Nursing Home Corp.*, 671 F.2d 657, 660 (1st Cir. 1982). *Accord McGaw of Puerto Rico v. NLRB*, 135 F.3d at 8.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT METRO MAYAGUEZ WAS A “PERFECTLY CLEAR” SUCCESSOR, AND THEREFORE VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY CHANGING UNIT EMPLOYEES’ TERMS AND CONDITIONS OF EMPLOYMENT

A. Applicable Principles and Standard of Review

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees”⁵ Section 8(d) of the Act (29 U.S.C. § 158(d)) defines collective bargaining as “the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.”

It is settled, under those provisions, that upon acquiring a business, a new employer is obligated to bargain with the union that represented its predecessor’s employees if the employer conducts essentially the same business as the former

⁵ A violation of Section 8(a)(5) of the Act results in a derivative violation of Section 8(a)(1). *See Allied Chem. & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 163 n.6 (1971).

employer, and a majority of the work force was formerly employed by the predecessor. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 (1987)(“*Fall River*”); *NLRB v. Burns Int’l Sec. Servs., Inc.*, 406 U.S. 272, 279-81 (1972)(“*Burns*”). Because the composition of the successor’s work force is a “triggering fact” in determining whether it is obligated to bargain with the union, the bargaining obligation is typically not established until the successor has hired “a substantial and representative complement” of its work force. *Fall River*, 482 U.S. at 46-52. Accordingly, a successor employer is “ordinarily free to set initial terms on which it will hire the employees of a predecessor,” without bargaining with the incumbent union. *Burns*, 406 U.S. at 294 (emphasis supplied).

Nevertheless, the Supreme Court recognized that “there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit.” *Burns*, 406 U.S. at 294-95. In such circumstances, where the incumbent union’s eventual majority cannot be doubted, “it will be appropriate to have [the successor employer] initially consult with the [incumbent union] before he fixes terms.” *Id.* at 295. See, e.g., *Bellingham Frozen Foods, Inc. v. NLRB*, 626 F.2d 674, 678-79 (9th Cir. 1980); *Spitzer Akron, Inc.*, 219 NLRB 20, 22 (1975), *enforced*, 540 F.2d 841 (6th Cir. 1976).

The phrase in *Burns*—“all of the employees”—has not, however, been read as a literal requirement that each and every employee must be retained in order for

“perfectly clear” status to attach. Rather, as the Board has held, with judicial approval, an employer may be a “perfectly clear” successor “in cases where, although the plan is to retain a fewer number of predecessor employees, it is still evident that the union’s *majority status* will continue.” *Galloway School Lines*, 321 NLRB 1422, 1426 (1996) (emphasis added). *Accord Spitzer Akron, Inc.*, 219 NLRB 20, 22 (1975), *enforced*, 540 F.2d 841 (6th Cir. 1976).

If an employer, through its statements or conduct, has made “perfectly clear” its intention to retain a majority of unionized employees, it must consult with the employees’ union before altering the existing employment terms established by the predecessor. An employer’s failure to meet its obligation to recognize and bargain with the union before making changes therefore violates Section 8(a)(5) and (1) of the Act. *Dupont Dow Elastomers v. NLRB*, 296 F.3d 495, 501 (6th Cir. 2002). *See also NLRB v. Katz*, 369 U.S. 736 (1962) (employer’s unilateral change in conditions of employment, without notice to or bargaining with the established collective-bargaining representative of its employees, violates Section 8(a)(5)).

The Board has interpreted the “perfectly clear” exception set forth in *Burns* as applying, not only where the new employer has “actively or, by tacit inference, misled employees into believing they would be retained without changes” to their terms and conditions of employment, but also “to circumstances where the new

employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.” *Spruce-Up Corp.*, 209 NLRB 194, 195 (1974), *enforced mem.* 529 F.2d 516 (4th Cir. 1975). Thus, under *Spruce-Up*, an employer that is “silent about its intent with regard to the existing terms and conditions of employment” is a “perfectly clear” successor if it “clearly indicated it would be hiring the predecessor’s employees” before announcing changes. *Canteen Corp.*, 317 NLRB 1052, 1053 (1995), *enforced*, 103 F.3d 1355 (7th Cir. 1997).

The Board’s findings on successorship issues are entitled to a high degree of deference. *See, e.g., NLRB v. South Harlan Coal Co.*, 844 F.2d 380, 383 (6th Cir. 1988). Reviewing courts “recognize that, in ‘applying the general provisions of the Act to the complexities of industrial life,’ . . . the Board brings to its task an expertise that deserves . . . [judicial] deference.” *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). *See also Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 & n.11 (1984) (if a statute is silent or ambiguous with respect to an issue, a court must defer to administrative agency’s permissible construction, even if the court would have construed the statute differently). The Board’s rulings interpreting a successor’s bargaining obligations are, accordingly, entitled to judicial deference provided they are rational and consistent with the Act. *Canteen*, 103 F. 3d at 1361.

The Board's findings of fact are binding on a reviewing court if supported by substantial evidence on the record considered as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)); *NLRB v. Hotel Employees and Restaurant Employees Int'l Union*, 446 F.3d 200, 206 (1st Cir. 2006). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Hotel Employees and Restaurant Employees Int'l Union*, 446 F.3d at 206. *Accord Sociedad Espanola de Auxilio Mutuo y Beneficiencia de P.R. v. NLRB*, 414 F.3d 158, 160 (1st Cir. 2005). A reviewing court may not displace the Board's choice between two fairly conflicting views of the evidence, regardless of whether the Court might rule differently were it to consider the matter *de novo*. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). *Accord Hotel Employees and Restaurant Employees Int'l Union*, 446 F.3d at 206.

B. Substantial Evidence Supports the Board's Finding that Metro Mayaguez Was a Perfectly Clear Successor, and that by Unilaterally Changing Employees' Existing Terms and Conditions of Employment, It Violated Section 8(a)(5) and (1) of the Act

The Board found (A 45, 50), and Metro Mayaguez does not dispute (A 45, 50; A 2 ¶ 4), that Metro Mayaguez was a *Burns* successor, and that it was therefore obligated to recognize and bargain with the Union on that basis. *See Burns*, 406 U.S. at 279-81; *Fall River*, 482 U.S. at 42-46. Likewise, Metro Mayaguez does not dispute that it unilaterally changed unit employees' existing terms and conditions

of employment. (A 50.) As we now show, substantial evidence supports the Board's contested finding that Metro Mayaguez was a "perfectly clear" successor and was therefore not privileged to set initial terms and conditions of employment for the unit employees without bargaining with the Union. *See* cases cited at pp. 15-17.

As explained above, an employer is deemed a "perfectly clear" successor in circumstances where the union's majority status cannot be doubted (*Spitzer Akron, Inc.*, 219 NLRB 20, 22 (1975), *enforced*, 540 F.2d 841 (6th Cir. 1976)), and where the employer "actively or, by tacit inference, misled employees into believing they would be retained without changes" to their terms and conditions of employment, or "failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." *Spruce-Up Corp.*, 209 NLRB 194, 195 (1974), *enforced mem.* 529 F.2d 516 (4th Cir. 1975).

The stipulated, undisputed facts clearly establish that Metro Mayaguez is a "perfectly clear" successor. Before Metro Mayaguez assumed control of the Hospital and began operations on August 12, employees who had worked for the predecessor were not informed that they had to apply for employment with Metro Mayaguez, were not required to fill out a job application for Metro Mayaguez, and were not interviewed to be hired by Metro Mayaguez. (A 50; A 4 ¶ 23.) Metro Mayaguez gave the unit employees no indication whatsoever that it intended to set

their initial terms and conditions of employment before it began operations on August 12. (A 50; A 2 ¶ 1, A 4 ¶ 24.) To retain their jobs, unit employees simply had to show up for work as usual. (A 45, 50; A 4 ¶ 23.) Since it began operations on August 12, Metro Mayaguez employed a majority of the predecessor's unit employees and does not contest that a majority of its employees had been employed by the predecessor. (A 50; A 2 ¶ 1.)

Thus, Metro Mayaguez, through its undisputed conduct, did not make it “clear from the outset that [it] intended to set [its] own initial terms, and that whether or not [it] would in fact retain [employees] . . . would depend on their willingness to accept those terms.” *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), *enforced mem.* 529 F.2d 516 (4th Cir. 1975). Rather, by hiring unit employees and saying nothing to them about setting their initial terms and conditions of employment, the employees “were actively led to believe, or at least misled by tacit inference into believing, that they would be retained without change in their terms and conditions of employment.” (A 50.) Indeed, it is settled that an employer that is “silent about its intent with regard to the existing terms and conditions of employment” is a “perfectly clear” successor if it “clearly indicated it would be hiring the predecessor’s employees” before announcing changes. *Spruce Up Corp.*, 209 NLRB at 195; *see also Canteen Corp.*, 103 F.3d at 1363-64.

As the Board found, Metro Mayaguez’s actions—as well as its silence—viewed from the unit employees’ perspective, gave the employees every reason to believe that they were hired under, and would continue working under, their existing terms and conditions of employment. (A 43 n.2, 49-50.) *See, e.g., Fall River*, 482 U.S. at 40-41. Thus, the undisputed facts conclusively demonstrate Metro Mayaguez’s “perfectly clear” successor status.

As a “perfectly clear” successor, Metro Mayaguez was required to bargain with the Union before implementing initial terms and conditions of employment different from those the unit employees had been receiving. *See, e.g., Spitzer-Akron*, 540 F.2d at 845-46, and cases cited at pp. 15-17. However, it failed to do this. Instead, as Metro Mayaguez admits, it implemented numerous unilateral changes in salaries and benefits and working conditions, described above at pp. 6-7. Because Metro Mayaguez was a “perfectly clear” successor, its unilateral actions violated Section 8(a)(5) and (1) of the Act. *See, e.g., Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991).

Having conceded that it unilaterally changed a wide variety of terms and conditions of employment, Metro Mayaguez primarily rests its defense on a challenge to the Board’s finding that it was a “perfectly clear” successor. As we now show, that challenge is utterly devoid of legal merit, as is Metro Mayaguez’s other attempt to avoid enforcement.

C. Metro Mayaguez’s Contentions Are Without Merit

1. There is no merit to Metro Mayaguez’s claim that it was not a “perfectly clear” successor

Metro Mayaguez’s sole argument (Br 20-29)—that it could not be found a “perfectly clear” successor because it did not initially hire *literally all* of the predecessor’s employees—is simply wrong as a matter of well-settled law.

As the Board observed (A 43 n.2), contrary to Metro Mayaguez’s contention (Br 20-29), the law is well settled that a successor employer *does not* have to hire “all”—or even virtually all—of a predecessor’s unit employees to qualify as a “perfectly clear” successor. Simply put, the “all or nothing” dichotomy Metro Mayaguez tries to read into “perfectly clear” successor law does not exist. The Board made this plain in a leading decision issued decades ago. Thus, in *Spitzer Akron, Inc.*, 219 NLRB 20, 22 (1975), *enforced*, 540 F.2d 841 (6th Cir. 1976), the Board, reasonably interpreting the language, meaning, and context of *Burns*, held that the “perfectly clear” doctrine covers “not only the situation where the successor’s plan includes every employee in the unit, *but also situations where it includes a lesser number but still enough to make it evident that the union’s majority status will continue.*” (Emphasis supplied.) Tellingly, Metro Mayaguez does not dispute that the Union remained the unit employees’ majority representative when it began operating the Hospital on August 12. *See Galloway School Lines*, 321 NLRB 1422, 1426-27 (1996) (“perfectly clear” successor status

attached when majority of new employer's work force consisted of unit employees of predecessor). *Accord DuPont Dow Elastomers LLC v. NLRB*, 296 F.3d 495, 500-01 (6th Cir. 2002); *Bellingham Frozen Foods, Inc. v. NLRB*, 626 F.2d 674, 679 (9th Cir. 1980). Metro Mayaguez fails to explain why this Court should reject the Board's well-reasoned approach as set forth in *Spitzer-Akron* and its progeny.

None of the cases cited by Metro Mayaguez advances its claim or casts any doubt on the settled law discussed above. *DuPont Dow Elastomers LLC v. NLRB*, 296 F.3d 495, 500-01 (6th Cir. 2002), in fact, endorses the principle that "perfectly clear" successor status attaches when "it is 'perfectly clear' that the new employer intends to retain the unionized employees of its predecessor as a majority of its own work force under essentially the same terms as their former employment." *Banknote Corp. of America, Inc. v. NLRB*, 84 F.3d 637 (2d Cir. 1996), which Metro Mayaguez also cites, is readily distinguishable from the instant case. In *Banknote Corp. of America*, 84 F.3d at 643, the employer was not a "perfectly clear" successor because, prior to hiring, it communicated to the employees' union that it intended to make certain changes in their terms and conditions of employment. Metro Mayaguez did no such thing—it gave no indication that it would change unit employees' terms and conditions of employment prior to hiring the former employees. Likewise, *S&F Market Street Healthcare, LLC v. NLRB*, ___ F.3d ___, 2009 WL 1851770 (D.C. Cir. 2009), which Metro Mayaguez cites,

involved a successor who, unlike Metro Mayaguez, indicated to employees during the hiring process and on its application form that they would be hired on terms different from their existing terms and conditions of employment.

In a somewhat related vein, Metro Mayaguez claims (Br 24) that its conduct during the hiring transition did not create a “tacit inference” that unit employees would be retained without any changes in their terms and conditions of employment. This claim is simply contrary to the stipulated record, and defies logic. Metro Mayaguez “did not inform employees of intentions to set initial terms and conditions of employment.” (A 4 ¶ 24.) Its silence, along with its failure to implement any job application process, created the very inference that employees would be retained under their existing terms and conditions.

Metro Mayaguez’s final argument is that, “prior to retaining the predecessor’s employees[,] [it] could not have known whether it had an obligation to announce any change in working conditions before commencing operations.” (Br 29). This claim is unpersuasive. The question of how many unit employees Metro Mayaguez would hire was within Metro Mayaguez’s control. Here, since August 12, Metro Mayaguez has hired a majority of its predecessor’s employees. (A 50; A 2 ¶ 1.)

Moreover, Metro Mayaguez *could have* made its desire to change unit employees’ terms and conditions of employment known at the appropriate time,

that is, when it was hiring them. *See, e.g., Spruce-Up*, 209 NLRB at 195 (providing a roadmap for avoiding “perfectly clear” successor status). Indeed, a successor employer “may explore all options with respect to the composition of its workforce. However, when it determines that it will retain the workforce of its predecessor, it cannot ignore the union those employees have chosen when it becomes time to determine conditions of employment.” *Canteen*, 103 F.3d at 1364-65. If Metro Mayaguez had done this in a manner consistent with extant law, it would not have been required to bargain with the Union before setting initial terms. Clearly, the question of what to say or what not to say to the unit employees was within Metro Mayaguez’s control. Metro Mayaguez’s failure to follow the legal playbook is hardly a basis for unsettling the Board’s finding that it was a “perfectly clear” successor. *See Fall River*, 482 U.S. at 40-41 (successor issues are largely in “the hands of the successor”).

2. There is no merit to Metro Mayaguez’s contention that the Board is not entitled to seek enforcement of its Order

In seeking to avoid this Court’s enforcement of the Board’s Order, Metro Mayaguez argues (Br 30-35), in effect, that, because it “has complied” (Br 30) with the Board’s Order, it is unfair for the Board to pursue enforcement. Metro Mayaguez is wrong both factually and legally.

As the Supreme Court has held, even if Metro Mayaguez had fully complied with the Order—which it has not—the Board would nevertheless be

entitled to enforcement. *NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 567 (1950) (“[a]n employer’s compliance with an order of the Board does not render the cause moot, depriving the Board of its opportunity to secure enforcement from an appropriate court”). *Accord NLRB v. Local 1445, Food and Commercial Workers*, 647 F.2d 214, 217-18 (1st Cir. 1981); *NLRB v. Pearl Bookbinding Co., Inc.*, 517 F.2d 1108, 1114 (1st Cir. 1975). Compliance does not render a case moot—a Board order imposes a “continuing obligation” and “provides the Board with an effective enforcement procedure should the employer resume the unfair labor practices in the future.” *NLRB v. Unoco Apparel, Inc.*, 508 F.2d 1368, 1371 (5th Cir. 1975) Indeed, the Board’s Order requires Metro Mayaguez to cease and desist from restraining or coercing employees in the exercise of their statutory rights.

Moreover, although Metro Mayaguez claims that it “has complied” with the Order, it later concedes (Br 30) that it has not, actually, fully complied. As Metro Mayaguez acknowledges (Br 30), important compliance issues remain. As case law explains, “a remedial order issued by the [Board] is not self-executing . . . the respondent can violate it with impunity until a court of appeals issues an order

enforcing it” (*NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 890 (7th Cir. 1990))⁶. As such, enforcement is appropriate.

⁶ As Metro Mayaguez observes (Br 33), the Board’s General Counsel has alleged, in another unfair labor practice case, that Metro Mayaguez subsequently violated the Act in various respects, including making additional unilateral changes. The Board has been administratively advised that those allegations are scheduled to be heard before an administrative law judge. The district court’s denial of the Board’s petition for an injunction under Section 10(j) of the Act (29 U.S.C. § 160(j)) in that case, is irrelevant to whether enforcement is appropriate here.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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National Labor Relations Board

September 2009

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*
	*
Petitioner	* No. 09-1344
	*
v.	*
	*
METRO MAYAGUEZ, INC., d/b/a HOSPITAL PAVIA PEREA	*
	*
	*
Respondent	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 6,162 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 8th day of September 2009

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	*
	*
Respondent	*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's final brief and has served two copies of the final brief by first-class mail upon the following counsel at the address listed below:

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Dated at Washington, DC
this 8th day of September 2009