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Coastal International Security, Inc. and International Union of United Government Security Officers of America, AFL-CIO, and its Local 2033. Case 16-CA-23864

March 28, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On December 6, 2007, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief to the Respondent's exceptions, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Coastal International Security, Inc., Fort Worth, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The General Counsel moves to strike the Respondent's exceptions on the ground that they do not satisfy Sec. 102.46(b)(1) of the Board's Rules and Regulations. The Respondent's exceptions and briefs do, however, cite transcript testimony, record exhibits, pages of the judge's decision, and supporting arguments and citation of authorities. In these circumstances, we deny the General Counsel's motion because the Respondent's exceptions substantially, if not fully, comply with the Board's requirements. See *Loudon Steel, Inc.*, 340 NLRB 307 fn. 1 (2003), and cases cited therein.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

Dated, Washington, D.C. March 28, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Edward B. Valverde, Esq., for the General Counsel.

John A. Ferguson Jr., Esq., for the Respondent.

James D. Carney, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Fort Worth, Texas, on October 2007, pursuant to a complaint that issued on May 29, 2007.¹ The complaint alleges that the Respondent unilaterally changed the wage rate of newly hired employees in violation of Section 8(a)(1) and (5) of the National Labor Relations Act. The Respondent's answer denies any violation of the Act. I find that the Respondent violated the Act as alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following²

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Coastal International Security, Inc., Coastal, a South Carolina corporation, is engaged in the business of providing security services to Federal, State, and local Government agencies and to private businesses throughout the United States. In 2006, it provided security services to the United States Government in and around Fort Worth, Texas. During that same period it derived gross revenues in excess of \$50,000 for the performance of services to customers outside the State of Texas and purchased materials valued in excess of \$50,000 directly from points outside the State of Texas. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that International Union of United Government Security Officers of America, AFL-CIO, and its Local 203, hereinafter separately referred to as the International and Local 203 and jointly referred to as the Union, is a labor organization within the meaning of Section 2(5) of the Act.

¹ The charge was filed on September 10, 2004, and was amended on September 24, 2004.

² Respondent submitted as a posthearing exhibit, the Union's demand for arbitration dated March 28, 2005. It is hereby received as R. Exh. 6.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Coastal is currently a wholly owned subsidiary of AKAL Security. In 2003, negotiations for the acquisition of Coastal by AKAL were in progress, and management officials of AKAL, including then director, currently Vice President of Human Resources Janet Gunn, were involved in decisions relating to contracts upon which Coastal was bidding, including specifically the contract relating to security services in and around Fort Worth, Texas. Vice President Gunn testified that she was involved in that bid proposal and was aware that there was a collective-bargaining agreement between the Union and Security Consultants Group, Inc., Security Consultants, the company that was then providing the security services. Coastal was awarded the contract and began performance of GSA Security Service Contract #GS-7P-00-HHD-0035, in April 2004. In 2006, the contract was awarded to another company, and Coastal ceased performing services in the Fort Worth area in early October 2006.

The security personnel already performing services in the Fort Worth area have typically been hired by each succeeding successful bidder for the contract. Coastal did hire a majority of the employees formerly employed by Security Consultants, and there was no announcement of any change in their terms and conditions of employment when those employees were hired. There is no issue of successorship. Coastal admits that it is a successor under the criteria set out in *NLRB v. Burns Security Service*, 406 U.S. 272 (1972). On July 30, 2004, Coastal agreed to adopt the existing collective-bargaining agreement between Security Consultants and the Union and both parties agreed to extend the contract until September 30, 2005. On June 6, 2005, they agreed to further extend the agreement until September 30, 2006. Upon the expiration of the extended collective-bargaining agreement, Coastal and the Union entered into a new collective-bargaining agreement effective by its terms from September 29, 2006, to September 30, 2009.

The complaint alleges, and the answer admits, that the appropriate unit is:

INCLUDED: All security officers as defined in Section 9(b)(3) of the National Labor Relations Act, as amended, employed by the company under the GSA security services contract #GS-7P-00-HHD-0035 or any successor contract, in Fort Worth, TX, and surrounding areas.

EXCLUDED: All office clerical employees, professional employees, and supervisors as defined in the Act.

The issue herein is whether Coastal violated the Act by paying \$5.15 per hour, the Federal minimum wage, to newly hired employees while they were in training, a period that typically lasted from 4 to 6 weeks.

B. Facts

Security Officer Ray Matthews was initially hired by Sooner Process and Investigation, Sooner, the predecessor of Security Consultants. Although the employees, at that time, were not represented by a labor union, Matthews was paid as a security guard while in training. Thereafter, the Union became the collective-bargaining representative of the employees, and Sooner

and the Union executed a collective-bargaining agreement. Matthews, who became chief steward, was aware that Sooner continued to pay newly hired employees in training at the contractual rate. Security Consultants took over the GSA contract in March 2001, and the Union and Security Consultants thereafter entered into a collective-bargaining agreement effective from September 30, 2001, until September 29, 2004. It is that contract that the Union and Coastal agreed to extend until September 29, 2006.

Security Officer John Mulholland was hired by Security Consultants on January 3, 2002, and was paid what was, at that time, the rate specified in the collective-bargaining agreement for security guards of \$17.50 an hour plus health and welfare benefits while in training. While serving as vice president of Local 203 when Security Consultants was the contractor, there were two training classes. Employees in those classes showed Mulholland “their pay stubs, and they were given the same wage that we were, except they were not receiving the uniform allowance.” Coastal was awarded the GSA contract late in 2003, and, in December 2003, Mulholland and the other security officers employed by Security Consultants “went to a hotel in Arlington, [Texas] and we all applied for our own jobs.”

Coastal began performing security services under the GSA contract in April 2004. Security Officer Michael Montgomery began training with Coastal on October 26, 2004. He was not paid the contractual rate. Montgomery was informed by Contract Manager Robert Wingerter that, during training, the wage paid would be \$5.15, the Federal minimum wage. Wingerter required the individuals in training “to bring in various documents” that Coastal would submit to the Texas Department of Public Safety. The Texas Department of Public Safety issued a license to Montgomery as a “commissioned security officer” on December 14, 2004. Although Montgomery began training on October 26, 2004, the license states his hire date by Coastal as November 12, 2004. Montgomery’s wife, Margaret Montgomery, began training on October 25, 2004. Her license as a “commissioned security officer” issued on December 16, 2004. It reflects that she was hired by Coastal on October 25, 2004, the day she began training. Coastal issued payroll checks to Michael Montgomery reflecting his employee number and the payment of the \$5.15 wage rate. His W-2 form for 2004 from Coastal shows his employee number, his earnings, and deductions for income tax withholding and Social Security tax.

Coastal never informed the Union that it was paying minimum wage rather than the contractual rate to employees in training; thus, the Union was unaware that this was occurring until it came to the attention of officers of the Union in the summer of 2004. At that time, Mulholland was vice president of Local 203. On September 9, 2004, prior to the October class in which the Montgomerys were trained, Mulholland, filed a grievance on behalf of “all new hire personnel” protesting that they “are being paid minimum wage instead of wage rates established in CBA.” Mulholland presented the grievance to Contract Manager Wingerter. They met but were unable to resolve the grievance. The Union then filed the charge herein on September 10, 2004. A complaint was also filed with the Department of Labor.

On September 30, 2004, Nicole Terrell, human resource coordinator for Coastal, responded to Region 16 concerning the charge filed by the Union in a letter stating that the “wages received by Officers” were in accord with the collective-bargaining agreement and that “officers who participate in training time or new weapons qualification” are paid the “agreed upon hourly rate” set out in the contract. The letter does not claim that individuals in training were not employees or were not in the unit. The Regional Director, on October 20, 2004, deferred action upon the charge pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1972).

On February 1, 2005, the Region inquired regarding the status of the grievance, and Jonathan Rhodes, human resource officer for AKAL Security, the parent company of Coastal, replied on February 15, 2005, that Coastal had “not since [the deferral] received any correspondence” from Local 203 concerning “the matter.” The letter does not mention the pending grievance dated September 9, 2004, filed by Vice President Mulholland. Local 203 President Ray Matthews replied to the Region on March 12, 2005, that the Union desired “to go to arbitration.” On March 28, 2005, the Union sent a demand for arbitration to Coastal.

By letter dated April 5, 2005, Terrell replied to the Union’s demand for arbitration stating that the Union “at no time attempted to present this dispute as a grievance after the decision . . . [to defer] on October 20, 2004.” Terrell states that Coastal felt that the arbitration request was invalid because the Union had not followed the steps of the grievance procedure. On the same day, Terrell wrote the Regional Director noting that the Region “deferred this case to the grievance process to be filed in a prompt and timely manner,” and that Coastal had “received nothing” until the demand for arbitration. Neither of Terrell’s letters mentions the grievance dated September 9, 2004, that Mulholland had presented to Contract Manager Wingerter.

As already noted, the Union, in addition to filing the unfair labor practice charge, also contacted the Department of Labor. Vice President Gunn recalls being contacted by a Department of Labor investigator named Lopez in October or November 2004 and “we provided them with a lot of information” including the “hours for approximately five [training] classes that had been held” up to that point. On March 21, 2005, Investigator Perry Lopez prepared a “summary of unpaid wages” listing 14 Coastal employees, all of whom had been trained prior to Coastal actually taking over performance of the contract in April 2004. It does not appear that that document was sent to Coastal at that time. So far as the record shows, Coastal was advised of the alleged underpayment at a conference held in either September or October, some 6 months later. A letter dated October 27, 2005, from Assistant District Director Gary Edwards to Coastal’s Vice President of Administration David Rodgers refers to a recent “final conference” at which Coastal was advised that “14 employees were underpaid in the amount of \$32,286.65 . . . as a result of not paying according to the Wage Decisions, incorporating a collective bargaining agreement, included in the Contract for certain training time.” The letter invites Coastal to submit its views to Denise Flores, regional wage specialist. The record does not reflect any submission to Flores by Coastal. On November 22, 2005, Flores

wrote Rodgers advising that action was being taken “to request that the contracting agency withhold sufficient funds to satisfy the back wage finding. A copy of our withholding request is enclosed.” The letter also advises Coastal of its right to contest the findings. The withholding request, also dated November 22, 2005, made to Contracting Officer Karen Nelson, repeats that “the employer failed to pay the required wage determination rates, as incorporated by a Collective Bargaining Agreement (CBA) on the contract.” There is no evidence that Coastal contested that finding. On January 13, 2006, Coastal paid the \$32,286.65.

On December 19, 2005, Michael Montgomery, who had been elected president of Local 203 in October 2005, filed two grievances, one relating to payment of minimum wage to employees in training and the other relating to seniority dates. Montgomery met with Contract Manager Robert Wingerter who stated Coastal’s position “that this was company policy, new hires were paid minimum wage during training and were not to be paid any of the other benefits, and that their seniority date would be assigned as of the date that their GSA card 3527 was signed.” Thereafter, on March 28, 2006, the parties held a prearbitration conference call.

The participants in the March 28, 2006, prearbitration conference call for the Union were Local 203 President Montgomery; Dan DeRosa, president of a sister local, Local 213; and then vice president, now president, of the International Union James Carney. The participants for Coastal were Human Resources Coordinator Terrell and Sean Engelin, labor relations manager for AKAL. Carney stated the position of the Union that the seniority date was, and had been, the employee’s initial hire date and that Coastal “had deviated from that practice with its new hires by saying that their seniority dates were somehow different.” He stated the contention of the Union that the payment of less than the collective-bargaining agreement wages to employees in training violated the collective-bargaining agreement, violated the Service Contract Act, and constituted a unilateral change. He noted that, it appeared there were “multiple jurisdictions that applied,” that as a “unilateral change the NLRA would come into effect[,] . . . [i]f it was a deviation from the Department of Labor Wage and Hour Service Contract Act, they would have jurisdiction,” and that if it was a violation of the collective-bargaining agreement then the arbitration provisions of the contract would control.

Human Resource Coordinator Terrell contended that the contract had not been violated. Carney pointed out article XV, section 2, on page 19 of the collective-bargaining agreement which states that “[n]ew hires and incumbent personnel, while attending annual or refresher training specific to the job site, will be paid at the wage rate established in Section 1 of this article.” He stated that the Union believed that “that section holds,” explaining that “it’s always been that the new-hire employees while they’re going through training get the CBA rate.”

Terrell responded that “the employees were not employees . . . they came under Coastal Training Academy, therefore, they’re not subject to the CBA [collective-bargaining agreement]” or the Service Contract Act. Carney asked why Coastal had been required to pay the contractual rate to the first training class. Terrell answered that that occurred “as a result of a clerical

cal error.” Carney asked for copies of “the compliance letters that she had up to that point.”

The conference call ended with Carney stating that the Union wanted to “get some more information, develop the grievance further, and then have another conference call.” Thereafter, on the afternoon of March 28, 2005, Carney sent an e-mail to Terrell and Engelin restating the positions stated in the conference call and requesting information, including specifically information regarding Coastal Training Academy.

On March 31, 2006, Engelin responded by e-mail asking Carney to “[p]lease explain why you believe you are entitled to any of this information. Your bargaining unit does not include trainees.”

Carney responded by e-mail the same day referring to past practice, the collective-bargaining agreement reference to new hires, and the fact that the employees in training had been paid by Coastal, not Coastal Training Academy.

Engelin answered Carney’s e-mail later that same afternoon, March 31, 2006, asserting that trainees were not “new hires,” and restating that Coastal did not “recognize your claim to represent them or your ability to file grievances on their behalf.”

Late that evening, Carney sent an e-mail to Engelin noting, *inter alia*, that Coastal had “never used the term ‘trainees’ until late,” and that the Union would be “going to the NLRB.”

On April 3, 2006, Engelin responded stating that Coastal “had consistently used the term trainees” and incredibly asserted that Coastal “refuted your claim that these people are employees.” On April 4, Carney responded that the Union does “represent the new hires, who you call ‘Trainees.’”

On April 10, 2006, the Union filed a charge that, *inter alia*, again alleged that Coastal had unilaterally changed the terms and conditions of employment with regard to “new hire training wage rates” and failed to provide requested relevant information. A complaint issued with regard to the information request. The allegations of the complaint were settled. The record does not establish the date of the settlement. The initial charge relating to a unilateral change in wage rates, the charge in this proceeding, was still deferred. The record does not establish the date that the Regional Director revoked the October 20, 2004, deferral of the charge herein that had been filed on September 10, 2004. The complaint herein issued on May 29, 2007.

At the hearing, Vice President of Human Resources Janet Gunn testified that Coastal operates a training academy in the Washington, D.C. area, Coastal Training Academy, that provides the training necessary to obtain GSA certification. The record does not establish whether the individuals undergoing the training pay tuition, but there is no evidence that these individuals are paid by the academy or are being trained in conjunction with a specific GSA contract. According to Gunn, “about 50 percent of the people who go through the training academy are eventually hired by Coastal, and about 50 percent go to work for other people or fail the course.” Gunn admitted that there was no academy in the Fort Worth area and that the contention that Terrell made in the conference call of employment by the training academy was “a mistake on her part to say it that way.”

Gunn testified that the “clerical error” to which Terrell referred related to the reported date of hire of employees in the first training class, a class begun prior to April to assure that Coastal was not short staffed when it assumed the GSA contract. According to Gunn’s initial testimony the error occurred because Coastal used the GSA Form 139 that it uses to bill the Government, but “whited out the information from the Government” and then used the form as a time sheet for individuals in training because it is in the “standard format of a time sheet.” According to Gunn, the “gentleman who was starting the contract, along with the admin person, . . . took the time sheet, which was the GSA 139, the standard, regular, every day GSA 139” and used that form for the first class. Thereafter “the woman who was doing the data entry,” who worked at Coastal headquarters in South Carolina and whose name Gunn could not recall, “just assumed that that was the hire date.” According to Gunn, because of the foregoing errors, the original report produced in the Wage and Hour investigation showed the individuals in the first class “as being full employees as of that date . . . [b]ecause the hire date was showing the date they started the training.” According to Gunn, it should have shown the date the employee began “working on the contract.”

On cross-examination, when asked, “What was the form that was actually used in the first class that was the wrong record-keeping?” Gunn answered, “I don’t know. . . . We actually tried to figure it out earlier and couldn’t, so—all I know is it was submitted to South Carolina. . . . I can’t remember who—submitted the information wrong into the company’s database, and when the reports were run, they showed something the . . . Department of Labor wasn’t happy with.”

The foregoing testimony by Gunn makes no sense. The crucial error, according to Gunn, was the reporting of the hire date as the date the employee began training, and that error purportedly occurred because the “gentleman who was starting the contract” and administrative person “took the time sheet, which was the GSA 139, the standard, regular, every day GSA 139” and used that form for the first class, instead of whiting out the “information from the Government” on the form. If, as Gunn initially testified, the GSA Form 139s for the first class had not been “whited out,” whereas the “information from the Government” was purportedly whited out for subsequent classes, there should have been no reason that, when “[w]e [Gunn and unidentified others] actually tried to figure it out earlier,” they “couldn’t.”

In actual fact, the date of hire was the date the employees began training. Employers do not deduct income tax withholding and social security tax from the wages of individuals who are not employees. Michael Montgomery’s documentary evidence, payroll checks and a W-2 form for 2004 when he was in training, reflect the \$5.15 wage paid to him and the withholding of income tax and social security tax by Coastal. Those documents also reflect his employee number. The foregoing documents establish that he was an employee and that Coastal was his employer. Although there is no explanation for Coastal’s reporting to the Texas Department of Public Safety that Michael Montgomery was hired on November 14, 2004, rather than October 26, 2004, the date he began training, the financial documents confirm that he was hired in October. The docu-

mentary evidence relating to Margaret Montgomery reflects that Coastal reported to the Texas Department of Public Safety that her hire date was the date she began training, October 25, 2004.

The statement of work relating to the Fort Worth service contract requires the contractor to “follow and complete the procedures listed below to obtain a GSA Certification Form 3527 for each uniformed employee prior to them working a post on an FPS [Federal Protective Service] Task Order/Contract. Paragraph 3 of the statement of work requires that the contractor “[c]onduct required Contractor provided training and testing/qualifying” and “[u]pon successful completion” schedule administration of the written examination, which “tests the employees [sic] knowledge and understanding of the Contract Guard Information Manual.” The statement of work makes no mention of pay and consistently refers to the individuals undergoing training in order to obtain a Form 3527 as employees.

Vice President Gunn testified that, prior to bidding on the contract, she read the collective-bargaining agreement between Security Consultants and the Union and determined that “trainees,” whom she referred to as “candidates,” were not covered by the contract on the basis of the language in the recognition clause which provides that the appropriate unit consists of “[a]ll security officers as defined in Section 9(b)(3) of the National Labor Relations Act, as amended, employed by the company under the GSA security services contract #GS-7P-00-HHD-0035 or any successor contract, in Fort Worth, TX, and surrounding areas.” When asked by counsel for the Respondent, “Did you consider the trainees in the bargaining unit?” Gunn answered, “Candidates are not in the bargaining unit.”

Article XV, section 1, of the collective-bargaining agreement specified a single position, guard II, and a single wage rate that, as of September 30, 2003, was \$18.50 an hour. Article XV, section 2 provided that “[n]ew hires and incumbent personnel, while attending annual or refresher training specific to the job site, will be paid at the wage rate established in section 1 of this article” article IX, section 1, provided that “[n]ew employees and those hired after a break in continuity of employment” would be probationary employees for 90 days. Gunn admitted that she was aware that article XV, section 2, of the collective-bargaining agreement referred to new hires and that article IX, section 1, referred to new employees. Despite the foregoing contractual provisions, she acknowledged that she did not contact the Union to inquire regarding the past practice with regard to new hires or new employees because she thought that the “recognition language speaks for itself. . . . Candidates aren’t new hires.”

I do not credit Gunn’s testimony that Coastal based any decision relating to the wages of employees in training upon the recognition clause which Gunn contends does not cover “candidates.” Contract Manager Wingerter claimed only that the payment of minimum wage “was company policy” when denying the grievance filed by Local 203 President Montgomery. If, as Coastal now contends, payment of minimum wage to newly hired guards in training was predicated upon their exclusion from the collective-bargaining agreement by the recognition

clause, Coastal would never have agreed to defer the issue raised by this charge to the grievance procedure.

During the Department of Labor investigation, Gunn obtained an opinion letter from the Department of Labor that had been sent to the Union. President Carney explained that Ron Smith, formerly a vice president but not now employed by the Union, wrote the Administrative Review Board regarding compensation for employees undergoing required training and testing. On October 20, 2004, he received a reply from Timothy Helm of the Office of Enforcement Policy of the Wage and Hour Division, which, in the second paragraph, in pertinent part states that “[w]here pre-award training and testing is mandated by the contract, all the time spent in such training and testing constitutes hours worked regardless of whether the trainee is subsequently hired as a security guard” because “employee coverage may be broadly interpreted to include individuals in a training status who perform duties “necessary to the performance of the contract. . . .” The third and fourth paragraphs of the opinion letter relate to a statement of work that Smith had enclosed, but which is not in evidence. In referring to that statement of work, Helm stated that “the pre-employment training and testing time” would not be subject to the wage determination rate of \$12-an-hour because “the employees, while in training or being tested, are not performing any of the guard services for which wage rates and fringe benefits are specified in the applicable wage determination.” President Carney testified that the reference to \$12 an hour as the wage determination confirms that the letter did not relate to Fort Worth where there was a collective-bargaining agreement in place. The foregoing document makes no mention of a collective-bargaining agreement.

C. Analysis and Concluding Findings

The complaint alleges that the Respondent “changed the wage rate of newly hired employees to \$5.15 an hour.” The answer denies this allegation, but at the hearing the Respondent admitted that, during training, “trainees” were paid that amount.

The General Counsel contends that the undisputed evidence that both of Respondent Coastal’s predecessors, Sooner and Security Consultants, paid guards in training at the contractual rate establishes a past practice that the Respondent was not privileged to change without notice to or bargaining with the Union.

The Respondent argues that it “never included the trainees in the bargaining unit, and always paid the trainees the minimum wage” and “was not aware, and could not have become aware” that Security Consultants “chose to pay its trainees the CBA [collective-bargaining agreement] rate.”

The Respondent claims that that these individuals were not in the unit until the Form 3527 was issued to them and argues that the statement in the October 20, 2004 opinion letter that the wage determination was not applicable because “the employees, while in training or being tested, are not performing any of the guard services for which wage rates and fringe benefits are specified” supports that position. I cannot agree. The statement in the opinion letter relates to “preemployment training” and refers to a \$12-an-hour wage determination. Whether, in that hypothetical situation, the wage determination was not

applicable is immaterial insofar as the issue herein is whether this Respondent made a unilateral change. In this case the individuals in training were employees of Coastal and were identified by an employee number. The statement of work herein requires that the contractor “[c]onduct required Contractor provided training and testing/qualifying.” There was a collective-bargaining agreement in effect, and the Respondent was held liable for underpayment of wages to employees in the first training class because “the employer failed to pay the required wage determination rates, as incorporated by a Collective Bargaining Agreement (CBA) on the contract.”

I make no finding regarding compliance with the Service Contract Act, but I note that Gunn’s simple explanation regarding the Form 139s of the first training class is suspect in view of her admission that the Respondent “tried to figure it out earlier and couldn’t.” Gunn testified that Coastal was held liable because Coastal reported the date of hire of employees in the first class as the first date of training rather than the date the employee began “working on the contract.” If, as the Respondent contends, the relevant date was the date that the employee received a Form 3527 and actually began “working on the contract,” the reporting of a different date of hire would be immaterial. The Respondent could have defended the finding of liability by showing the records reflecting that the employees were in training. There is no evidence that the Respondent did so. Although Gunn testified that records for the “approximately” five classes that had been held were sent to the Wage and Hour Division, the record does not establish exactly what records were sent. Insofar as the Respondent was not reporting employees in subsequent training classes “as being full employees,” the wording Gunn used in her testimony, the Wage and Hour Division would have no basis for determining whether the Respondent was in compliance with the Service Contract Act.

Notwithstanding the foregoing discussion, this is not a case concerning compliance with the Service Contract Act. Numerous cases establish that, although an employer may not pay employees less than the wage determination set out in conjunction with award of a contract under the Service Contract Act, it “does not prohibit the payment of wages higher than those established by the wage determination.” *Old Dominion Security*, 289 NLRB 81 (1988). Whether the Respondent was or was not in compliance with the Service Contract Act is immaterial. The issue in this case is whether there was an unlawful unilateral change.

Irrefutable evidence, the assignment of employee numbers and the making of statutory deductions from their pay, establishes that these guards in training were hired and were employees of the Respondent Coastal. The Respondent’s brief notes that the recognition clause of the collective-bargaining agreement “contains a specific reference to the government contract number” and argues that it does “not cover the trainees before they sta[r]ted working on the contract.” I disagree. The recognition clause states that the unit is “[a]ll security officers as defined in Section 9(b)(3) of the National Labor Relations Act, as amended, employed by the company under the GSA security services contract #GS-7P-00-HHD-0035 or any successor contract, in Fort Worth, TX, and surrounding areas.” In

Old Dominion Security, supra, the guards in training were considered to be guards and subject to a wage determination under the Service Contract Act. The Statement of Work herein consistently refers to the individuals in training as employees and provides that Coastal “[c]onduct required Contractor provided training and testing/qualifying” and “[u]pon successful completion” schedule administration of the written examination, which “tests the employees [sic] knowledge and understanding of the Contract Guard Information Manual.” The employees in this case, unlike students attending Coastal Training Academy in the Washington, D.C. area, in which some 50 percent of the students do not go to work for Coastal, were hired by Coastal to staff a specific contract.

The Respondent first raised the claim that employees undergoing training were not in the unit in the e-mail of March 31, 2006, from Engelin to Carney. In 2004, following the filing of the charge herein, the Respondent agreed to deferral of the charge, thereby acknowledging that these employees were covered by the grievance procedure of the collective-bargaining agreement. Human Resource Coordinator Terrell’s letter to the Union dated April 5, 2005, in response to the Union’s demand for arbitration, argues that the Union “at no time attempted to present this dispute as a grievance after the decision . . . [to defer] on October 20, 2004,” and that the arbitration request was invalid because the Union had not followed the steps of the grievance procedure. In response to the grievance filed by Montgomery on December 19, 2005, Contract Manager Wingerter stated Coastal’s position “that this was company policy.” There was no claim that the issue was not subject to the grievance procedure because employees in training were not employees or were not in the unit. The Respondent was found liable for underpaid wages to the first training class because “the employer failed to pay the required wage determination rates, as incorporated by a Collective Bargaining Agreement (CBA) on the contract.” The Respondent paid those back wages on January 16, 2006. Thereafter, in the conference call of March 28, 2006, Human Resource Coordinator Terrell contended that individuals in training were not employees. Vice President Gunn, at the hearing, acknowledged that Terrell mis-spoke. In an e-mail on March 31, 2006, Engelin claimed that “trainees,” i.e., newly hired employees in training, were not in the unit. The past practice of the predecessors and the conduct of the Respondent confirm that, until March 31, 2006, during the term of the collective-bargaining agreement, there was no contention that newly hired guard employees in training were not in the unit.

The recognition clause includes “[a]ll security officers . . . employed by the company under the GSA . . . contract.” It excludes “office clerical employees, professional employees, and supervisors.” Newly hired guards in training are not separately mentioned. “Candidates” are not mentioned. The collective-bargaining agreement refers to new hires and new employees. The payment of the contractual wage rate by Sooner, the predecessor of Security Consultants, and Security Consultants to newly hired guards in training establishes their historical inclusion in the unit. The Respondent agreed to defer the issue raised by the charge herein to the grievance procedure. “[A]n employer may not unilaterally alter the scope of a bargaining

unit during the term of a collective-bargaining agreement covering that unit.” *Gratiot Community Hospital*, 312 NLRB 1075, 1083 (1993). Newly hired guard employees are in the unit.

“An employer’s practices, even if not required by a collective-bargaining agreement, which are regular and longstanding, rather than random or intermittent, . . . cannot be altered without offering . . . [the employees’] collective bargaining representative notice and an opportunity to bargain over the proposed change.” *Sunoco, Inc.*, 349 NLRB No. 26, slip op. at 5 (2007). The payment of the contractual rate to newly hired guard employees in training by the predecessors established a past practice. The Respondent, as a *Burns* successor, was obligated to give notice to and bargain with the Union before changing that past practice. In *Rosdev Hospitality, Secaucus LP*, 349 NLRB No. 20 (2007), although the collective-bargaining agreement between the union and predecessor employer provided that hotel seniority was determined by length of service with the employer and that leave was determined on that basis, in practice the predecessor awarded leave on the basis of the “employee’s tenure at the hotel and not his or her tenure with Felcor [the predecessor employer] itself as stated in the contract.” (Emphasis in the original.) *Id.* slip op. at 2. The successor unilaterally altered this practice by computing leave on the basis of the employee’s tenure with the employer, “not on tenure at the hotel.” The Board, in finding an unlawful unilateral change, held:

A successor employer in Respondent’s position may not unilaterally change the terms and conditions of employment, whether they were established by a previous collective-bargaining agreement or by the predecessor’s past practices. *Blitz Maintenance*, 297 NLRB 1005, 1008–1009 (1990), enf. mem. 919 F.2d 141 (6th Cir. 1990). *Ibid.*

The Respondent’s contention that it “was not aware, and could not have become aware” of the practice of its predecessors has no merit. There can be no claim of ignorance by the Respondent after September 9, 2004, when, after learning that guards in training had not been paid the contractual rate, the Union filed its grievance protesting the payment of “minimum wage instead of wage rate established in CBA.” Although agreeing to waive time limits so that the grievance could be deferred, which it was on October 20, 2004, the Respondent continued to pay minimum wage to the training classes that began thereafter. There can be no justifiable claim of ignorance of the past practice prior to September 9, 2005. Gunn was aware that article XV, section 2, of the collective-bargaining agreement provided that “[n]ew hires and incumbent personnel, while attending annual or refresher training specific to the job site, will be paid at the wage rate established in section 1 of this article” and that article IX, section 1 referred to the probationary period of new employees. Her failure to inquire of the Union regarding the past practice with regard to new hires or new employees because she individually decided that “[c]andidates aren’t new hires,” reveals indifference to the role of the employees’ collective bargaining representative. I concur in the observation in the brief of the General Counsel that the failure of Gunn to make any inquiry of the Union in regard to those

contractual provisions “is troublesome at best.” An employer may not “blind itself” to obvious facts and then claim ignorance. Cf. *Eaton Warehousing Co.*, 297 NLRB 958, 961–962 (1990), enf. mem. 919 F.2d 141 (6th Cir. 1990). Furthermore, ignorance of a past practice by a successor is no defense to its unilateral discontinuation of that past practice. See *Rosdev Hospitality, Secaucus LP*, supra, JD slip op. at 9, citing *Pepsi-Cola Distributing Co.*, 241 NLRB 869 (1979), enf. 646 F.2d 1173 (6th Cir. 1981), cert. denied 456 U.S. 936 (1982). In this case there was no ignorance after September 9, 2004, and any claimed ignorance prior to that date occurred because, despite the contractual provisions relating to new hires and new employees, the Respondent made no inquiry of the Union with regard to the past practices of its predecessors.

Newly hired guard employees are in the unit. The Respondent’s predecessors, Sooner and Security Consultants, paid newly hired guard employees the contractual wage rate when they were in training thereby establishing a past practice. The Respondent changed that past practice without notice to or bargaining with the Union. By unilaterally changing “the wage rate of newly hired employees to \$5.15 an hour,” the Respondent violated Section 8(a)(5) of the Act.

CONCLUSION OF LAW

By unilaterally, without notice to or bargaining with International Union of United Government Security Officers of America, AFL–CIO, and its Local 203, paying newly hired employees \$5.15 per hour rather than the contractual wage rate, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unilaterally paid newly hired employees \$5.15 per hour rather than the contractual wage rate when they were in training, it must make them whole for the difference between that wage rate and the applicable contractual wage rate—\$18.50 per hour prior to September 30, 2005, \$19.06 per hour from October 1, 2005, through September 30, 2005, and \$19.76 per hour from October 1, 2005 through September 30, 2006,—plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Records provided to the Union pursuant to its information request, General Counsel’s Exhibit 14, stipulated at the hearing to be a new hire report, include the names of the 14 employees who were compensated pursuant to the Wage and Hour determination for training prior to May 15, 2004, and their names are omitted from my recommended Order. One of those employees, Alan Boswell, who was compensated for training prior to May 15, 2004, is shown as attending training from July 24 through August 31, 2004, during which he was paid \$5.15 per hour, a period for which he was not compensated. Seven employees: Jennifer Hale, Clinton MacKenzie, DeShawn Moffett, Charles Morris Sr., Matthew O’Del, Wesley Roeder, and Robert Yanick, are

each reported on General Counsel's Exhibit 14 as attending 1 day of training after March 10, 2004. Several employees' names appear on General Counsel's Exhibit 14 with a date prior to March 10, 2004, the 10(b) date, and I have, therefore omitted their names from my recommended Order. Insofar as records furnished pursuant to my recommend Order establish that they were underpaid within the Section 10(b) period, they are similarly situated employees and must be made whole. The record does not establish whether there were additional training classes in 2005 and 2006. My recommended Order will provide that all employees similarly situated, i.e., paid \$5.15 during training after March 10, 2004, the 10(b) date, be made whole. I leave for compliance the determination as to the actual number of underpaid employees. An unprinted stripe on General Counsel's Exhibit 14 makes the spelling of several names uncertain. If any question arises as a result of my attempt at the most likely correct spelling, the respective employee numbers should provide the correct identification.

The Respondent, having ceased performing services in the Fort Worth area, must also mail an appropriate notice as set out in the recommended Order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, Coastal International Security, Inc., Surfside Beach, South Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally, without notice to or bargaining with International Union of United Government Security Officers of America, AFL-CIO, and its Local 203, paying newly hired unit employees \$5.15 per hour rather than the contractual wage rate. The appropriate unit is:

INCLUDED: All security officers as defined in Section 9(b)(3) of the National Labor Relations Act, as amended, employed by the company under the GSA security services contract #GS-7P-00-HHD-0035 or any successor contract, in Fort Worth, TX, and surrounding areas.

EXCLUDED: All office clerical employees, professional employees, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole the following named employees and all similarly situated employees who were underpaid during their training after March 10, 2004, for their loss of earnings in the manner set forth in the remedy section of the decision:

Edwin Alexander	Roger McFann
Michael Baker	James Miller
Joseph Barnes	DeShawn Moffett
Alan Boswell	Margaret Montgomery
Walter Braggs Jr.	Michael Montgomery
Glenn Bueker	Charles Morris Sr.
Roy Burns	Matthew O'Del
Mark Carnes	Jimmie Page
David Chapman	Carl Pittman
Will Finley	Jeremy Pitts
Steven Frazier	Samuel Polk
Rafael Garza Jr.	Hector Reynoso
Tony Gutierrez	Taylor Rice
Jennifer Hale	Taylor Rivers
Brian Hancock	Wesley Roeder
Mark Harbin	David Rooks
Bill Henderson	Sidney Ross
Scott Hunt	Roger McFann
Danny Kelly	James Miller
Edward Kenney	Steven Sharlow
Charles Kersey	Joe Tittle
Jerry Long	Matthew Trubenstein
Clinton MacKenzie	John Villaneal
Iqbal Mahmud	Derrick Void
William Marr	Roy Walsh
Alan Matheny	Dawnyale Williams
Douglas Maxwell	Tyra Williams
James McDaniel	Robert Yanick

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, the Respondent shall mail copies of the attached notice marked "Appendix"⁴ to all former unit employees employed by the Respondent in the Fort Worth, Texas area, at any time since March 10, 2004. The notice, after being signed by the Respondent's authorized representative, shall be duplicated and mailed at the Respondent's own expense to the last known address of each employee.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 6, 2007

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally, without notice to or bargaining with International Union of United Government Security Officers of America, AFL-CIO, and its Local 203, pay newly hired unit employees \$5.15 per hour rather than the contractual wage rate. The appropriate unit is:

INCLUDED: All security officers as defined in Section 9(b)(3) of the National Labor Relations Act, as amended, employed by the company under the GSA security services contract #GS-7P-00-HHD-0035 or any successor contract, in Fort Worth, TX, and surrounding areas.

EXCLUDED: All office clerical employees, professional employees, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the exercise of your rights guaranteed by Section 7 of the Act.

WE WILL make whole the following employees and all similarly situated employees who were underpaid during their training after March 10, 2004, for their lost earnings in the manner set forth in the remedy section of the Decision:

Edwin Alexander	Roger McFann
Michael Baker	James Miller
Joseph Barnes	DeShawn Moffett
Alan Boswell	Margaret Montgomery
Walter Braggs Jr.	Michael Montgomery
Glenn Bueker	Charles Morris Sr.
Roy Burns	Matthew O'Del
Mark Carnes	Jimmie Page
David Chapman	Carl Pittman
Will Finley	Jeremy Pitts
Steven Frazier	Samuel Polk
Rafael Garza Jr.	Hector Reynoso
Tony Gutierrez	Taylor Rice
Jennifer Hale	Taylor Rivers
Brian Hancock	Wesley Roeder
Mark Harbin	David Rooks
Bill Henderson	Sidney Ross
Scott Hunt	Roger McFann
Danny Kelly	James Miller
Edward Kenney	Steven Sharlow
Charles Kersey	Joe Tittle
Jerry Long	Matthew Trubenstein
Clinton MacKenzie	John Villaneal
Iqbal Mahmud	Derrick Void
William Marr	Roy Walsh
Alan Matheny	Dawnyale Williams
Douglas Maxwell	Tyra Williams
James McDaniel	Robert Yanick

COASTAL INTERNATIONAL SECURITY, INC.