In the Matter of Arbitration Between

	:	FMCS No.: 220802-08153 (H&W Rate)
IGUA LOCAL 150,	:	
Union,	:	
and	:	
CENTERRA GROUP, LLC,	:	
	:	
Employer	:	
	:	

Before: Carl C. Bosland, Esq., Arbitrator

Appearances:

For the Union: Scott Kamins
Offit Kurman

For the Company: Kevin J. Morris
Centerra Group, LLC

Hearing: December 9, 2022

Close of Record: February 3, 2023

Date of Decision: March 6, 2023

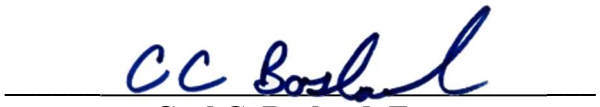
Type of Grievance: Contract

AWARD SUMMARY

The grievance is sustained. For the reasons set forth in this Award, Centerra Group, LLC violated the CBA by not paying members of the Bargaining Unit $4.60 per hour for the Health & Welfare credit through June 22, 2022, and $4.80 per hour thereafter. The "SCA" and "SCA Published" rate for H& W in Article 28 and Attachments G-1 of the Centerra CBA refers to the H&W rates published in AAM 237 and 239, and not lower EO-13706 H&W rates.

As a remedy, consistent with this Award, Centerra Group, LLC is directed to compensate all affected bargaining unit members the difference between what they were paid for health & welfare credits and such higher amounts they should have been paid since the start of their employment with Centerra, including those rates set forth in AAM 237, 239, or such greater rate if the SCA published rate increased before the Award issues. For the remaining term of the current CBA, consistent with this Award and unless the parties agree otherwise, Centerra shall compensate bargaining unit members electing H&W credit in lieu of medical insurance at the

higher H&W SCA rate as may be published by DOL AAM. The Arbitrator will retain jurisdiction for 60 calendar days for purpose of compliance. The Arbitrator will retain jurisdiction for 60 calendar days for purpose of compliance.



Carl C. Bosland, Esq.
Arbitrator

I. STATEMENT OF THE CASE

The decision addresses a contractual pay dispute between the parties.

The arbitration was heard remotely via ZOOM on December 9, 2022. The parties agreed that the matter was properly submitted for adjudication on the merits. At that time, the parties were afforded the full opportunity to present testimony and evidence, to examine and cross-examine witnesses, all of whom were sworn, and to make arguments in support of their respective positions. The record closed on February 3, 2023, with the receipt of closing briefs. Both parties were fully and fairly represented. In reaching the findings and award set forth herein, the Arbitrator has given full and careful consideration to the complete factual record, all arguments, and all cited references.

II. EXHIBTS, WITNESSES, AND POST-HEARING BRIEFS

The record includes one Joint exhibit, the current CBA. The Union offered 25 exhibits into the record, and the Employer offered 18 exhibits. The Union offered the witness testimony of Carlos Snowden, President, IGUA Local 150. The Employer offered the testimony of Richard Easton, Director of Labor Relations, Centerra Group, LLC.

The parties supported their respective positions with post-hearing briefs. The Union submitted a 21-page post-hearing brief supplemented with the following:

- Canteen Corp. v. NLRB, 103 F.3d 1355 (1997)
- Coastal Int'l. Security, Inc. v. NLRB, 320 Fed. Appx. 276, 2009 U.S. App. LEXIS 7575 (5th Cir. April 6, 2009)
- Dupont Dow Elastomers, LLC v. NLRB, 296 F.3d 495 (6th Cir. 2002)
- Int'l. Assoc. of Machin. and Aerospace Workers v. NLRB, 595 F.2d 664 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1070 (1979)

- NLRB v. Edjo, Inc., 631 F.2d 604 (9th Cir. 1980)
- Pepsi-Cola Distrib. Co., 241 NLRB 869 (1979)
- Spruce Up Corp., 209 NLRB 194 (1974)
- IAFF and Employer, 2015 BNA LA Supp. 199259 (Dec. 20, 2015)
- In re Chenega Infinity LLC and TWU, Local 525, FMCS Case No. 17/53286-3, 137 BNA LA 1774 (Sept. 15, 2017)
- Millbrook Distrib. Servs. and UFCW Local Nos. 322, 576, 655, FMCS Case No. 95-09110-9507, 1995 BNA LA Supp. 113925 (September 13, 1995)
- IUE, Local 940 and Kaywood Shutter Co., FMCS Case No. 97 06856, 1998 BNA LA Supp. 103565 (February 20, 1998)
- United/Valley Bell Dairy and Teamsters, Local 175, FMCS Case No. 96-05699, 1996 BNA LA Supp. 101692 (October 2, 1996)
- Olin Mathieson Chem. Corp. and IAM, Lodge 609, 36 BNA LA 1147 (1961)
- ALL AGENCY MEMORANDUM NUMBER 237 (July 16, 2021)
- ALL AGENCY MEMORANDUM NUMBER 239 (June 23, 2022)

The Employer submitted a 14-page post-hearing brief supplemented with the following:

- Nexio Solutions, LLC, 364 NLRB 570 (July 18, 2016)
- Benevolent Assoc. and Employer, 2015 BNA Supp. 199090 (Aug. 31, 2015)
- Texas Utility Generating Division, Comanche Peak Steam Electric Station and IBEW Local 2337, 92 BNA LA 1308 (April 25, 1989)
- Grand Haven Stamped Products, 107 BNA LA 131 (April 16, 1996)
- Albertson's Inc. and SEIU, Local 399 (May 17, 1996)
- St. Paul School District and AFSCME, Local 844, 95 BNA LA 1236 (June 5, 1990)
- National Tea Co. and UFCW, Local 210, 94 BNA LA 730 (April 10, 1990)
- Richard Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 MICH. L. REV. 1017 (2020)
- George E. Failing Co, Div. of Blue Tee Corp. and USW, Local 4800, FMCS Case No. 89/02199 (May 9, 1989).
- Nat. Uniform Serv. and Textile Processors, Local 1, AAA Case No. 53-300-00015-95, 102 BNA LA 981 (June 14, 1995)
- Farm Boys and Amalgamated Meat Cutters, Local 421, FMCS Case No. 82K/24198, 80 BNA LA 617 (Feb. 4, 1983)

III. ISSUE STATEMENT AND STIPULATIONS

The parties agreed on the following statement of the issues for resolution:

> Is Centerra Group, LLC violating the CBA by not paying members of the Bargaining Unit $4.60 per hour for the health & Welfare credit through June 22, 2022, and $4.80 per hour thereafter?
>
> If so, what shall be the remedy?

If so, IGA Local 150 seeks as a remedy that Centerra Group, LLC immediately be required to pay members $4.80 per hour for the health & welfare credit, any increases to the SCA Published rate over and above $4.80 in the event there are such increases, and to pay all affected members of the bargaining unit back health & welfare credit payments, in the amount of the difference between what they had been paid as the health & welfare credit since the start of their employment with Centerra Group, LLC, and $4.60 or $4.80 per hour or such greater rate if the SCA published rate increase before the Award is issued.

Centerra Group, LLC denies any violation of the CBA and denies that members of the Bargaining Unit are entitled to any relief.

The parties also stipulated that the matter is properly before the arbitrator for a decision on the merits.

IV. RELEVANT CONTRACT PROVISIONS

COLLECTIVE BARGAINING AGREMENT
(June 30, 2022 – February 28, 2023)

ARTICLE 2
ENTIRE AGREEMENT

This Agreement, when executed, shall be deemed to define the wages, hours of work, rates of pay, and other conditions of employment covered herby for the term thereof; and except by mutual consent, no new or additional issues not included herein or covered hereby shall be subject to negotiations between the Employer and the Union during the term of this Agreement. This, however, does not apply to changes directed by the client. Such changes will be discussed with the Union prior to implementation, if possible. Lastly, this Agreement will not supersede any DOE Order, Policy, or Manual.

ARTICLE 24
ARBITATION PROCEDURES

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Section 3:
The arbitrator's authority shall be limited to finding a direct violation of the express purposes of the contract provision or provisions in question other than an implied or indirect purpose. The arbitrator cannot modify, amend, add to, detract from or alter the provisions of this contract nor substitute his judgment for that of management. In matters other than discharge, the arbitrator is afforded greater discretion in determining whether the contract terms have been followed.

ARTICLE 28
HEALTH AND WELFARE

The Employer shall contribute to the provision of Employee Health and Welfare plans and programs. The Employer will establish a series of benefits plans/programs and these programs must comply with applicable laws and regulations, specifically those of the Affordable Care Act (ACA).

There are two options in which to participate in the Health and Welfare program.

1. Electing Medical Insurance.
2. Electing Health and Welfare Credit in lieu of medical insurance.

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Section 2: Electing Health and Welfare Credit in Lieu of Medical Insurance

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Employees who elect health and welfare credit in lieu of Medical Insurance will have the amounts identified in Appendix A equal to the base hours worked (not to exceed 40 hours) per week paid as table wages or, in the alternative, diverted to the Company 401k plan as an employer contribution (for clarification purposes, any sums diverted herein from the health and welfare credit would be in addition to, and not in place of, Employer matching contributions as specified in Article 17).

HEALTH & WELFARE

EFFECTIVE	EFFECTIVE	EFFECTIVE
3/18/2020	3/18/2021	3/18/2022
$4.50	SCA Published	SCA

EMPLOYEES WHO UTILIZE COMPANY HEALTH INSURANCE RECEIVE SAME CONTRIBUTIONS AND BENEFIT OPTIONS AS EMPLOYEES HIRED ON OR BEFORE 3-1-16. EMPLOYEES HIRED AFTER 3-1.16 WHO OPT FOR CASH PAYMENTS OF H&W WILL RECEIVE THE FOLLOWING AMOUNTS PER HOURS:

EFFECTIVE	EFFECTIVE	EFFECTIVE
3/18/2020	3/18/2021	3/18/2022
$2.00	$3.00	$4.50

V. FACTUAL BACKGROUND

The core facts are not in dispute. The Employer provides security guard services to the United States Department of Energy (DOE) at facilities in and around Washington D.C. DOL solicited bids for security guard services which Centerra won. Effective May 18, 2022, Centerra began performance under the DOL security services contract on March 18, 2022. Prior to March 18, 2022, the contract for security guard services for DOE was held by Golden Services, LLC for several years. Centerra's contract with DOE has a base period of two years with three yearly option periods.

At all relevant times, Golden Services had a collective bargaining agreement with IGUA Local 150. In 2022, Article 28 of the Golden Services CBA provided for health and welfare (H&W) cash payments to bargaining unit employees in lieu of medical coverage. As a result of collective bargaining negotiations, Golden Services and the Union agreed to a higher rate of H&W payments for bargaining unit employees hired before March 1, 2016, and a lower rate for those hired after that date. As memorialized in Appendix 1 of the Golden Services CBA, the H&W rate for pre-March 2016 hires was $4.50 in 2020, the SCA Published rate for 2021, and the SCA rate for 2022. The terms "SCA Published" and "SCA" are not expressed defined in the Golden Services CBA. For post-March 2016 hires, Golden Services and the Union agreed to H&W rate increases of $2.00 for 2020, $3.00 for 2021, and $4.50 for the third year of the Golden Services CBA.

The SCA Published rate is periodically announced by the Department of Labor (DOL) in All Agency Memorandums (AAMs). The AAMS provide two H&W rates – a higher rate for contracts not covered by EO 13706 and a lower rate for contracts covered by EO 13706. EO 13706 requires parties that enter into covered contracts with the federal government to provide covered employees with up to seven days of paid sick leave annually, including paid leave allowing for family care. The lower rate of H&W for EO 13706 contracts is because the amount excludes additional employer H&W contributions required under the SCA. AAM No. 237 set the higher SCA rate for non-EO 13706 contracts started after July 16, 2021 at $4.60 per hour, and the lower rate for EO 13706 contracts at $4.23 per hour. For contracts started after June 23,

2022, AAM No. 239 set the non-EO 13706 rate at $4.80 per hour and the lower rate for EO 13706 contracts at $4.41 per hour.

In March 2022, before commencing operations at DOE, Centerra offered employment to a majority of the bargaining unit employees employed by Golden Service at DOE facilities. In pertinent part, the offer letters provided:

> Your existing pay rate and economic benefits will remain in accordance with your current applicable CBA, less payroll deductions and all required withholdings, but it is Centerra's intent to set initial terms and conditions of employment in accordance with its policies and procedures and negotiate a new CBA with your bargaining representative. Your start date on contract will be May 8, 2022.

After securing the contract for DOE security guard services, Centerra and the Union began collective bargaining negotiations. The parties were unable to achieve an agreement before Centerra's assumption of DOE security services on May 18, 2022. On May 16, 2022, prior to Centerra's assumption of the DOE contract, the Union, through counsel, notified Centerra that the SCA Published rate for H&W being paid by Golden Services for pre-March 2016 hires was $4.60 per hour. The Union supported its assertion with a conforming paystub for the IGUA Local 150 Union President. As a result of not achieving a CBA, on May 18, 2022, Centerra put in place its policies and procedures and paid pre-March 2016 hired bargaining unit employees electing cash payments $4.50 per hour for H&W. Subsequently, on June 30, 2022, Centerra and the Union signed an agreement to assume the Golden Services CBA without any changes. The Centerra CBA was effective June 30, 2022 to February 28, 2023. Article 2 of the CBA includes a "zipper" clause.

The Union disputed the propriety of the Employer's lower $4.50 H&W payment by initiating a grievance. Unable to resolve the grievance, the Union appealed the matter to arbitration.

VI. CONTENTIONS

A. Position of the Union

The Union argues the grievance should be sustained. According to the Union, Centerra violated the CBA when it failed to pay pre-March 2016 hired employees who opted for cash in lieu of medical coverage at the contractually agreed upon SCA Published rate. The Union asserts that the Employer agreed to pay the SCA Published rate of $4.60 and $4.80 per hour when it agreed to assume the Golden Services CBA on June 30, 2022. The Union contends that Article 28 and Appendix 1 of the Golden Services CBA prescribes the 2020 rate of health and welfare cash payments in lieu of medical insurance for pre-2016 hires at $4.50 for 2020, and the SCA Published and SCA rate for federal contractors for 2021 and 2022. The Union avers the SCA rate is the rate set by the Department of Labor under the McNamara-O'Hara Service Contract Act. The Union claims the "SCA Published" and "SCA" rates are the same. The Union maintains that evidence that the CBA "SCA" and "SCA Published" rate was tied to the health and welfare fringe benefits issued under the McNamara-O'Hara Service Contract Act was Golden GM Aragon's confirmation of same and the increase of the H&W rate to $4.60 per hour consistent with the July 16, 2021 Department of Labor Memorandum Number 237 reflected in Union President Snowden's paystub.

The Union argues the Employer had notice of the McNamara-O'Hara SCA Published rate when it agreed to assume the Golden Services CBA. According to the Union, by email of May 16, 2022, Union counsel confirmed with Centerra that the SCA Published rate was $4.60 per hour at the time, and attached the Snowden paystub just before the Employer took over the DOE contract from Golden Services. The $4.60 rate for 2022 is the rate prescribed by DOL pursuant to the McNamara-O'Hara Service Contract Act, the Union contends. The Union asserts that the Employer never disputed the Union's communication, the Snowden paystub, or that this was the accurate H&W rate that was being paid by Services Golden before the Employer assumed the CBA.

The Union avers that, unable to reach a new CBA, on June 30, 2022, the parties agreed the Employer would assume, in all respects, the Golden Services CBA. Pursuant to that Agreement,

the Union asserts the Employer agreed to the H&W rates tied to the McNamara-O'Hara Service Contract Act. On June 23, 2022, the DOL issued Memorandum No. 239, which raised the McNamara-O'Hara SCA Published H&W rate from $4.60 to $4.80 per hour. The Union maintains that consistent with the Golden Services CBA for 2022 and 2023, the Employer was required to increase the health and welfare rate to $4.60 and then $4.80 per hour but refused to do so. In so doing, the Employer violated the CBA, the Union contends.

The Union argues the Employer reneged on their agreement to abide by the McNamara-O'Hara SCA Published rate. Instead, the Union asserts the Employer claims that by "SCA" or "SCA Published rate," the parties meant the lower Executive Order 13706 SCA rate. According to the Union, per DOL Memorandum No. 237, the EO 13706 SCA Published rate was $4.23 per hour in 2021, which rose to $4.41 on June 23, 2022. The Union contends the Employer committed in offer letters to bargaining unit members that their "existing pay rate and economic benefits would remain in accordance with the current applicable CBA," which the Employer knew at the time was $4.60 per hour. Moreover, notwithstanding its claim that the CBA reference to "SCA" and "SCA Published" rate was to the EO 13706 SCA Published Rate and not the McNamara-O'Hara SCA Published Rate, the Union claims the Employer is not paying the EO 13706 SCA Published rate but $4.50 per hour to pre-March 1, 2016 hires, which has no support in the CBA.

The Union argues the McNamara-O'Hara Service Contract Act mandates the Employer to maintain the H&W rate paid by Golden Services as a result of Centerra's assumption of the Golden Services CBA. According to the Union, Section 4(c) of the Service Contract Act provides that no contractor under a contract which succeeds a contract subject to the SCA, under which substantially the same services are furnished, shall pay any service employee less than the wages and fringe benefits (including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits) provided for in a collective bargaining agreement to which such service employees would have been entitled if they were employed under the predecessor contract. Here, the Union asserts that, because Golden Services committed to pay $4.60 per hour when that rate was published in June 2021, and then $4.80 per hour when that rate was published in July 2022, the Employer is obligated to maintain this rate.

As a successor to the Golden Services CBA, the Union argues that the Service Contract Act prohibits a successor employer to pay less than the wages and fringe benefits to which employees would have been entitled under the predecessor contractor's CBA. According to the Union, where the wages and benefits provisions of the predecessor CBA are unclear, the SCA provides that the interpretation of those provisions must be based on the intent of the parties to the CBA. Here, as confirmed by their actions, the Union avers that the intention of the Union and Golden Services was to pay pre-March 1, 2016 hires the full SCA Published rate of $4.60, and then $4.80 when it increased for the third year of the CBA. As such, in accordance with the Service Contract Act, that interpretation must be honored by the Employer, the Union contends.

The Union argues the Employer is legally obligated to honor and maintain the terms and conditions of employment in place when it assumed the Golden Services CBA, including payment of the SCA Published rates of $4.60 and then $4.80 per hour. According to the Union, the Employer's assertion that the reservation in its initial offer letter to bargaining unit members of its intent to set initial terms and conditions of employment in accordance with its policies and procedures and negotiate a new CBA freed it from paying the SCA Published rate, is mistaken. The Union asserts the Employer assumed the CBA knowing that Golden Services agreed to pay $4.60 and $4.80; the SCA requires the Employer to continuing paying that rate; the offer letter specifically provides that it would maintain pay rates and economic benefits the employees had in place with Golden Services; and the Employer did not set initial terms and conditions otherwise.

The Union argues that, as a successor that agreed to assume the predecessor's CBA, federal labor law prohibited the Employer from unilaterally terminating or changing an established term and condition of employment, like the H&W rate. According to the Union, federal labor law provides that a successor who has indicated that incumbents will be retained under the terms of the previous CBA without a concurrently announced downward changes in employment terms must bargain with the union before implementing changes. Unilateral changes may only take place after bargaining to impasse, the Union avers.

The Union argues Centerra was contractually committed to honor the Golden Services H&W rate. According to the Union, the H&W rate was not a "past practice" but a contractual commitment of the Employer. The Union contends that where, as here, a successor assumes a CBA with no changes or notifications beforehand that it would not honor the full SCA H&W rate of $4.60, established arbitral precedent provides that the Employer would be required to honor this practice. As support, the Union cites an NLRB decision and awards by Arbitrators Corbett, Kohler, Knott, and Dean.

The Union argues that, even if the H&W SCA Published rate is considered a past practice, the Employer had the opportunity to negotiate the elimination of that practice but its attempt to do so failed. According to the Union, the Employer proposed a Memorandum of Agreement (MOA) to assume the Golden Services CBA which included a provision that the Employer would not be bound by any past practices of the predecessor. The Union asserts it rejected the MOA and it was withdrawn by the Employer. Citing arbitral precedent, the Union contends the Employer cannot win through arbitration – in this case elimination of past practice and/or rates it agreed to assume – what it proposed but was unsuccessful in achieving in negotiations.

The Union requests that the grievance be sustained, and demands as remedial relief:

1. The Employer immediately be required to pay members of the bargaining unit $4.80 per hour for the health & welfare credit; and

2. The Employer be ordered to pay all affected members of the bargaining unit back health & welfare credit payments, in the amount of the difference between what they have been paid as the health & welfare credit since the start of their employment with Employer, and $4.60 until June 23, 3033, when the rate changed to $4.80, and $4.80 per hour from June 23, 3033 until a new rate is negotiated.

B. Position of the Employer

The Employer argues the Union's grievance should be denied. According to Centerra, the Union's claim fails to allege any violation of a contractual provision. Instead, Centerra asserts that, contrary to explicit contractual language, the Union seeks to compel the Employer to continue a predecessor's past practice that was neither accepted nor condoned by the Employer. The Employer contends that it explicitly repudiated the practice by refusing to pay employees the

higher non-applicable SCA rate for H&W immediately upon taking over operations. The "zipper clause" in Article 2 of the CBA, Centerra maintains, eliminates the binding effect of past practices, including the higher pay rate for H&W, and allows the Employer to unilaterally discontinue them. Centerra was not, the Employer avers, a perfectly clear successor nor did it agree to assume the Golden Services CBA retroactive to when it took over at DOE on May 18. The Union's failure to have the higher H&W rate written into the CBA after Centerra repudiated the practice made it nonbinding, the Employer claims. Centerra has abided by the plain language of the four corners of the CBA, the Employer avows.

The Employer argues that its contract with DOE is covered by EO 13706, which requires paid sick leave be provided to employees. According to the Employer, after winning the work, Centerra offered employment to a majority of SPOs employed by Golden Services based on their existing pay rate and fringe benefits contained in the Union's CBA with Golden Services. As a successor employer under the SCA, the Employer contends it was required to keep pay rates and fringe benefits as stated in the CBA at least the same. However, the Employer also expressed in its offer letters its intent to set other initial terms and conditions of employment in accordance with its policies and procedures and negotiate a new CBA. When CBA negotiations failed to reach an agreement, on May 18 the Employer claims it put in place its policies and procedures in place and paid pre-March 2016 hired employees electing cash payments for H&W $4.50 per hour. There was no CBA in place between the parties from the time Centerra took over at DOE on May 18 and the parties entering into an agreement for Centerra to assume the Golden Services CBA on June 30, the Employer avers. Citing NLRB caselaw, the Employer asserts, that, by informing the bargaining unit in offer letters of its intent to set initial terms and conditions of employment in accordance with its policies and procedures and thereafter doing so when it commenced operations, Centerra did not "step into the shoes" of Golden Services as a perfectly clear successor.

The Employer argues the SCA does not require Centerra to pay the H&W rate for non-EO 13706 contracts. According to the Employer, the CBA Centerra agreed to assume provides that H&W is paid pursuant to the SCA. The Employer asserts that, under the SCA, minimum monetary wages and fringe benefits to service employees are established by: (1) a WD made by the U.S.

Department of Labor of prevailing amounts in the locality; or (2) the wages and fringe benefits contained in a CBA applicable to the service employees who performed under a predecessor contract in the same locality. The Employer contends that, under the SCA, an employer must pay service employees at a minimum the WD rates or the rates in a CBA which could be higher or lower. WDs provide two H&W rates – a higher rate for contracts not covered by EO 13706, and a lower rate for contracts covered by EO 13706, the Employer avers.

The Employer argues that Section 4(c) of the SCA provides that a successor employer must only keep in place the wages and benefits provided for in a collective bargaining agreement, not more favorable terms. Here, the Employer argues the $4.60 rate sought by the Union is the DOL published rate for non-EO 13706 contracts started after July 16, 2021, while the lower rate for contracts covered by EO 13706 was $4.23 per hour. For contracts started after June 23, 2022, the Employer asserts the DOL published higher rate for non-EO 13706 contracts is $4.80 per hour and the lower rate for EO 13706 contracts is $4.41 per hour. The Employer contends that Golden Services paid bargaining unit employees $4.60 per hour for H&W despite the SCA Published rate then applicable to EO 13706 contracts being $4.23 per hour.

Centerra argues that, under Appendix 1 of the CBA, it had to pay H&W based upon the SCA rate and/or $4.50 per hour. According to the Employer, that was the obligation that was carried forward and made applicable to Centerra by virtue of the WD (in this case the CBA under Golden Services) being incorporated into its contract with DOE. The SCA rate for a contract covered under EO 13706, the Employer asserts, was $4.23 per hour when Centerra took over the work on May 18. Because the CBA also provided a higher rate of $4.50 per hours for employees hired after March 1, 2016, Centerra contends it paid the higher rate.

The Employer argues that Golden Services past practice of paying the higher H&W rate applicable to non-EO 13706 contracts cannot trump clear and unambiguous contract language. According to the Employer, Appendix 1 clearly provides that H&W is based upon the SCA rate of $4.23 per hour or $4.50 per hour, the latter of which Centerra is currently paying. Centerra asserts that any increase in the WD pursuant to AAM 239 would not be applicable until it is incorporated into the next government contract year (May 18, 2023). Even assuming, arguendo,

that the higher non-applicable H&W rate paid by Golden Services was binding on Centerra upon taking over on May 18, the Employer avers that it repudiated such practice by timely informing employees and the Union of its intent to set its initial terms and conditions of employment and negotiate a new CBA with the Union. The "zipper" clause in Article 2 of the CBA also terminated all past practices, the Employer contends. As repudiated, the Employer maintains that Union was required to have the practice of paying the higher H&W rate written into the new agreement for it to continue to be binding, which did not happen, Centerra claims.

The Employer argues that Article 24, Section 3 of the CBA limits the arbitrator's authority to finding a direct violation of the express purpose of the contract provision or provisions in question other than an implied or indirect purpose, and that the arbitrator cannot modify, amend, add to, detract from or alter the provisions of the contract. According to the Employer, the Union failed to identify any CBA provision allegedly violated. As such, the Employer asserts the Arbitrator should honor the agreement of the parties in their CBA and deny the Union's claim.

VII. DECISION

The issues in this dispute arise from the Employer's winning the bid to provide security guard services to DOE facilities in the Washington DC Metro Area. To resolve the issues stipulated by the Parties, the principle matters in question include (1) whether the Employer is a "perfectly clear" successor with an obligation to bargain to impasse with the Union that represented a bargaining unit of the predecessor employer's employees before imposing initial terms and conditions of employment; and (2) whether the predecessor CBA adopted by the Employer after it began operations required payment of H&W to bargaining unit employees hired prior to March 2016 at the higher contract rate paid by the predecessor or the lower SCA Published Rate for contractors covered by Executive Order 13706.

A. The "Perfectly Clear" Successorship Doctrine

Consistent with Sections 8(a)(5) and 9(a) of the National Labor Relations Act, 29 USC 158(a)(5), (9)(a), the obligation of a new employer to negotiate the initial terms and conditions of employment depends on whether the new employer is an "ordinary successor" or a "perfectly

clear" successor. *Dupont Dow Elstomers, LLC, v. NLRB*, 296 F.3d 495, 500 (6th Cir. 2002). As an ordinary successor, a new employer is generally free to set the initial terms of employment for employees of a predecessor, without bargaining with the incumbent union. NLRB v. Burns Int'l. Sec. Servs., 406 U.S. 272, 281-295, 92. S. Ct. 1571, 32 L. Ed. 2d 61 (1972). Where, however, 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, then the new employer becomes a "perfectly clear" successor and must bargain with the union to impasse before implementing changed terms and conditions of employment. *Id*. at 294-95. *See also* Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 41, 107 S. Ct. 2225, 96 L. Ed. 2d 22 (1987).

The "perfectly clear successor" doctrine was first articulated by the Supreme Court in *Burns*, *supra*:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. In other situations, however, it may not be clear until the successor has hired his full complement of employees that he has duty to bargain with a union, since it will not be evidence until then that the bargaining representative represents a majority of the employees in the unit as required by §§ 9(a) of the Act, 29 USC §§ 159(a).

In Spruce Up Corporation, 209 NLRB 194 (1974), *enf'd,* 529 F.2d 516 (4th Cir. 1975), the Board had its first full opportunity to analyze and apply the Supreme Court's successorship doctrine addressed in *Burns*. The Board held that the "perfectly clear" language created a legal exception to a successor' right to set initial terms. The exception applied to circumstances where the new employer "either actively or, by tacit inference, mislead employees: that they would be retained without change in their terms or where the new employer "failed to clearly announce its intent" to establish new terms prior to inviting the employees to accept employment. *Id*. at 195. Successors who fall into the exception may not set initial terms and must accept the predecessor's existing terms as their own and bargain to impasse to change them. Nexio Solutions, LLC, 364 NLRB 570, 574, 581 (2016).

The rationale for the "perfectly clear" exception has been described as a means to govern successor employer misconduct and negligence when communicating with employees or union of a predecessor, and to protect employees in the successorship process to ensure they had adequate time to arrange their affairs and make a decision about either remaining or seeking other employment. *Id*. at 575-76 (citing Machinists v. NLRB, 595 F.2d 664, 674-75 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1070 (1979)). *See also* First Student, Inc. v. NLRB, 935 F.3d 604, 615-16 (D.C. Cir. 2019).

Since *Spruce Up,* the Board and Courts have addressed the criteria of a "perfectly clear" successor. Pertinent to this case are decisions addressing the clarity of a successor's communication or non-communication of new terms and "perfectly clear" status. The record reflects, and the parties do not dispute, that Centerra hired a majority of the predecessor's employees and initiated collective bargaining with the Union after it was awarded the DOE contract and before it effectively assumed operations on May 18, 2022, when it implemented the contested H&W pay rate.

To avoid becoming a "perfectly clear" successor, Centerra had to "convey its intention to set its own terms and conditions rather than adopt those of the previous employer." First Student, 935 F.3d at 619. An employer need not specify the new terms during its initial communication with employees but only need announce its intent to make unilateral changes; it can determine the details later. *Id*. at 617. As set forth below, to avoid designation as a "perfectly clear successor," the Board and courts require successors to clearly and expressly inform employees that the predecessor's terms and conditions of employment will not apply and/or that it intends on implementing its own terms and conditions.

In Creative Vision Resources, LLC v. NLRB, 364 NLRB 1299 (2016), *enf'd* 882 F.3d 510, 518 (5th Cir. 2018), the Board summarized its past decisions holding that a successor employer may unilaterally set initial terms of employment if it "clearly announce([s] its intent to establish a new set of conditions prior to, or simultaneously with, its expression of intent to retain the predecessor's employees." But after the successor expresses its intent to retain the predecessor' employees, an announcement of new terms, "even if made before formal offers of employment are extended or the successor commences operations, will not vitiate the bargaining obligation."

The Board explained its justification for this prior-or simultaneous-announcement requirement by expressing its intent to retain the predecessor's workforce without concurrently revealing to a majority of employees that different terms will be instituted improperly benefits the employer due to the likelihood that those employees, lacking knowledge that terms and condition will change, will choose to stay in the positions the held with the predecessor, rather than seeking employment elsewhere. 882 F.3d at 518

In First Student, the Board and the court found First Student to be a "perfectly clear" successor because of representations it made to predecessor employees during an initial meeting that terms and conditions of employment would be "subject to negotiations," and in a subsequent meeting told employees that terms would "remain the same." The Employer subsequently changed those terms. The Board and the court found that the failure to announce its initial terms rendered First Student a "perfectly clear" successor as its statements induced employee reliance that terms would remain the same.

In Nexeo Solutions, LLC, *supra*, the successor purchase and sale agreement provided that Nexeo planned to retain all of that predecessor's employees, and that the base salary or wages would be no less favorable than those prior to the closing date, and other benefits would be substantially comparable. That information was conveyed to predecessor employees. In a subsequent meeting with the union before offer letters were sent out, the employer notified the union that it would not accept the union bargaining agreements, not adopt as initial terms any of the agreement provisions, and that there would be benefit changes by Nexeo on health insurance and pension. Offer letters with the new terms went out the next day. The Board held that Nexeo was a "perfectly clear" successor, and its obligation to bargain triggered on the initial date that employees were notified of the acquisition and their continued employment without mentioning Nexeo's changes to terms and conditions of employment. According to the Board, the language that benefits would be "substantially comparable" was not specific enough to notify employees there would be changes.

In Elf Atochem North America, 339 NLRB 796 (2003), the Board held that a new employer became a "perfectly clear" successor as of the date the predecessor's employees received a memo stating that the new employer "will provide employment to all of the exiting workforce," will recognize their seniority, and "will provide employees with equivalent salaries and [a]

comparable health, welfare and benefit package, including pension, savings plan and vacation." *Id*. at 796, 798. The Board found that the successor's subsequent announcement of changed initial terms and conditions of employment in offer letters distributed before operations began came too late to justify the successor's refusal to bargain.

Finally, in Dupont Dow Elastomers, LLC v. NLRB, 296 F.3d 495 (2002), the Sixth Circuit affirmed the determination of the Board that Dupont was a "perfectly clear" successor obligated to bargain with the unions before setting initial terms and conditions of employment. In that case, the successor assured the union and employees in several communications that, with the exception of an added success sharing plan, it intended to continue existing pay and benefits unchanged. One of the successor's communications did, however, include a statement that "as a likely 'successor' company, the venture will set the initial terms and condition of employment." *Id*. at 503. After the formal hiring process had commenced but before taking over operations, Dupont announced changed terms and condition of employment.

With respect its statement that, as a likely successor, it would set the initial terms and conditions of employment, the Court found Dupont's single statement referencing the right to set 'initial terms and conditions of employment' "not sufficiently clear and definite to overcome the impression carefully created by the Company that the terms and conditions would remain the same." *Id*.

The Board and courts have rejected "perfectly clear" successor status where the successor clearly announced its intent to establish a new set of conditions prior to, or simultaneously with, its expression of intent to retain employees.

In Planned Building Services, 318 NLRB 1049 (1995), the Board emphasized that "during its very first contact with [the predecessor's] employees, the Respondent both communicated its plan to retain [the] employees and announced that its offer to the employees was based on changed term and conditions of employment." *Id*. at 1049. Specifically, the successor employer notified employee's that they would receive the same wages, but that the benefits would not be the same. And, because the new employer "stated from the outset that it would be hiring the predecessor's employees pursuant to new terms," the Board held that the new employer was not a "perfectly clear" successor.

Similarly, in Banknote Corp. of America, 315 NLRB 1041, 1043 (1994), *enf'd*, 84 F.3d 637 (2d Cir. 1996), *cert. denied*, 519 U.S. 1109 (1997), the Board found that the new employer was not a "perfectly clear" successor because "simultaneous with its stated intention to retain the predecessor's employees, the Respondent announcement that it did not intend to be bound by the predecessors collective bargaining agreement put the employee's on notice that it would be making changes to terms and conditions of employment. Subsequently, the employer did communicate new terms and conditions of employment to the unions and prospective employees.

Finally, in Henry M. Hald High School Assn., 213 NLRB 415, 415-16, 419-320 (1974), the Board found that the new employer was not a "perfectly clear" successor because the assurances given to the predecessor's employees with respect to continued employment "were accompanied by statements that the [new employer] would offer employment only on the basis of different terms and conditions from those" previously offered by the predecessor.

Here, Centerra relies on the following language included in offer letters to predecessor employees as evidence that it properly informed employees of its intent to set new terms and conditions of employment prior to assuming operations, thereby avoiding the status of a "perfectly clear" successor and permitting it to unilaterally implement its terms and conditions of employment.

> Your existing pay rate and economic benefits will remain in accordance with your current applicable CBA, less payroll deductions and all required withholdings, but it is Centerra's intent to set initial terms and conditions of employment in accordance with its policies and procedures and negotiate a new CBA with your bargaining representative. Your start date on contract will be May 8th, 2022.

Based on the credible evidence of record, as in Dupont Dow Elastomers, the Arbitrator finds that Centerra's general statement referencing the right to set "initial terms and conditions of employment" "was not sufficiently clear and definite to overcome the impression that employee pay and benefits would remain the same. The sentence begins with the Employer's assurance that pay and economic benefits would remain. The H&W benefit in dispute, compensation calculated and monetized on an hourly rate basis in lieu of medical coverage, would reasonably appear to be the kind of "pay rate and economic benefits" that the Employer represented would remain unchanged. Indeed, the Appendix to the CBA that sets forth the H&W rate cross references to Article 16, which addresses wages. In any event, the terms "pay rate" and

"economic benefits" are not defined or otherwise explained, which undermines the clarity of the Employer's notice reserving the right to set initial terms and conditions of employment.

Moreover, the Arbitrator declines to find that, having affirmatively represented to employees to induce them to accept offers of employment that it would not change pay rate and economic benefits, the subsequent inclusion of general language reserving the right to set unidentified initial terms and conditions of employment is sufficient to empower Centerra to reset all initial terms and condition, including pay rates and economic benefits which were the subject of affirmative assurances they would not change. Such an interpretation falls squarely in the "perfectly clear" successor exception articulated in *Spruce Up*, where the new employer "either actively or, by tacit interference mislead employees: that they would be retained without change in their terms or where the new employer "failed to clearly announce its intent" to establish new terms prior to inviting the employees to accept employment.

Similarly, as in *First Student*, the reference in Centerra's offer letter that that it intended to negotiate a new collective bargaining agreement with the Union did not clearly alert employees that the Employer would change the pay rate and economic benefits that it asserted would remain the same.

For all of the above reasons, the Arbitrator finds that Centerra was a "perfectly clear" successor. As such, the Company was required to accept the predecessor's existing terms as their own and bargain to impasse to change them. Here, Centerra on May 16, 2022, the Union alerted Centerra that Golden Services was paying the higher $4.60 per SCA rate. Centerra did not bargain to impasse before implementing changes to the H&W program when it took over operations effective May 18, 2022, and immediately reduced H&W pay rate to $4.50 per hour, the rate paid prior to AAM 237. In so doing, Centerra breached the ongoing requirements of the Golden Services CBA.

B. The SCA Published Rate and Past Practice

The parties dispute the meaning of "SCA" or "SCA Published" . The SCA and SCA Published Rate are referenced in the Appendix 1 to the Golden Services CBA assumed by the

Employer effective June 30, 2022. Article 28 of the CBA addresses the right of bargaining unit employees to elect H&W credit in lieu of medical insurance. The Department of Labor sets two SCA rates for H&W where an employee elect's compensation in lieu of medical insurance coverage. Generally, contracts covered by EO 13706 provide a lower H&W SCA rate than contracts that are not covered by EO 13706. The DOL published rate for non-EO 13706 contracts stated after July 16, 2021 was $4.60 per hour, while the lower rate for EO 13706 contracts was $4.26 per hour. For contracts stated after June 23, 2022, the higher rate was $4.80 per hour and the lower rate was $4.41 per hour. Centerra agreed to assume the Golden Services CBA effective June 30, 2022.

The Union argues the SCA and SCA Published rate included in Appendix 1to the Golden Services CBA assumed by Centerra was the higher rate for non-EO 13706 contracts. As support, the Union referenced bargaining history with Golden Services, confirmation of the higher rate by representatives of Golden Services, payment pursuant to that higher rate by Golden Services, and notice by the Union to Centerra regarding that higher rate prior to when it took over operations.

Centerra argues that the reference to SCA and SCA Published rate for H&W in the Appendix of the Golden Services CBA it assumed refers to the lower EO-13706 rate. According to the Employer, it is only required to keep in place wages and benefits provided for in the collective bargaining agreement, the contract at issue is covered by EO 13706 and, therefore, the CBA reference to SCA and SCA Published refers to the lower SCA rate for EO 13706. According to Centerra, payment of the higher SCA rate by Golden Services was a past practice which cannot trump clear and unambiguous contract language, the practice was repudiated by the Company before it took over the Golden Services CBA, and the Zipper Clause in Article 2 eliminates the binding effect of prior practices.

The Golden Services CBA assumed by Centerra is not clear and unambiguous as to the meaning of the terms SCA and SCA Published. Those terms are not defined in Article 28 or in the Appendix. Nor have the parties referred the Arbitrator to language elsewhere in the CBA where the meaning of those terms are clarified. An electronic search of the CBA for "SCA" revealed only the reference

to same in the Appendix. As such, a plain reading of the CBA does not reveal that the reference to SCA and SCA Published refers to the higher or lower H&W SCA rate.

Similarly, the parties did not identify a location in the CBA or elsewhere establishing that Centerra's contract with DOE is covered by EO 13706. An electronic search of the CBA with the term "EO 13706" did not find any such references. A similar electronic search of the Employer's exhibit DOE HQ Final RFP did result in a reference to "EO 13706" under Subsection 1.56 involving Subcontracts for Commercial Items. The RFP provides that the definition of *Commercial item and commercially available off-the-shelf item* have the meanings contained in Federal Acquisition Regulation 2.101, Definitions. The definition of *commercial item* in the referenced FAR regulation does not include services such as those at issue in this case. A search of the F-1 Applicable DOE Orders also did not result in any hits on EO 13706.

Even assuming, arguendo, that EO 13706 applied to Golden Service's and Centerra's contracts with DOE, the record is void of evidence that an employer is prohibited from electing to pay higher SCA H&W rates than those set by the DOL to conform with EO 13706. Section 2(l) of EO 13706 requires compliance with collective bargaining agreements requiring greater rights than those established by the order. AAM 237 and AAM 239 do not say otherwise. Finally, neither party advanced such an argument.

It is axiomatic that when language of an agreement is ambiguous, arbitrators admit extrinsic evidence to help clarify contractual intent. Theodore J. St. Antoine, Editor, The Common Law of the Workplace: The Views of Arbitrators, Second Edition, § 2.4 (NAA/BNA 2005). Such information may include the parties' bargaining history, past practice, industry standards, and a course of dealing unique to the parties. *Id*. A contract is ambiguous if it is reasonably susceptible to more than one meaning. *Id*. Here, the reference to "SCA" or "SCA Published" is reasonably susceptible to more than one meaning: either the higher non-EO 13706 SCA rate or the lower EO-13706 SCA rate.

The record includes evidence introduced by the Union of bargaining history and past practice with Golden Services to establish that the "SCA" and "SCA Published" rate for H&W referenced in the

CBA Appendix 1 referred to the higher non-EO 13706 rate. In terms of bargaining with Golden Services, the record reflects that on February 28, 2020, the parties reached agreement on the H&W rate for pre-March 2016 hires would increase to $4.50 an hour. According to the Union, that initial rate was a compromise as it was below the $4.54 per hour non-EO 13706 rate at the time, but above the $4.22 per hour EO 13706 rate. The Union argues that, thereafter, so that the rate increased every year, the Golden Services CBA reference to "SCA" and "SCA Published" referred to the higher non-EO 13706 H&W rate. Evidence of that intent included uncontradicted testimony and evidence that, in response to AAM 237, Golden Services GM Aragon confirmed that Golden Services raised the rate to the higher non-EO 13706 SCA rate of $4.60 an hour, and actually paid H&W at that rate.

The Union persuasively asserts that the parties to the Golden Services did not contemplate that the reference to "SCA" and "SCA Published" would result in a reduction of H&W for pre-March 2016 hires in the ensuring contract years, and that the rates received by new hires would be higher than those received by pre-March 2016 hires. Rather, the Union reasonably asserted that the parties to the Golden Services CBA intended that the H&W rates would track higher in the ensuring contract years, and that more senior employees would be compensated at a higher rate than new hires. Here again, the testimony of Union President Snowden was both credible and uncontradicted. Interestingly, former Golden Services General Manager Aragon, who the Union represented (without contradiction) was employed by Centerra, did not testify.

Centerra argues that 41 USC 6707(c)(1) requires that it must only keep in place the wages and fringe benefits provided for in a collective bargaining agreement, not more favorable terms. Section 6707(c)(1) provides:

> **c)PRESERVATION OF WAGES AND BENEFITS DUE UNDER PREDECESSOR CONTRACTS.—**
>
> **(1)IN GENERAL.—**
> Under a contract which succeeds a contract subject to this chapter, and under which substantially the same services are furnished, a contractor or subcontractor may not pay a service employee less than the wages and fringe benefits the service employee would have received under the predecessor contract, including accrued wages and fringe benefits and any prospective increases in

> wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations.

By its plain terms, Section 6707(c)(1) permits, but does not require or preclude, a successor employer from providing greater wage and fringe benefits than required by the predecessor contract. Rather, it requires the successor to pay service employees *no less than* the wages and fringe benefits the service employee would have received under the predecessor contract, including "any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement…" Section 6707(c)(1), sets the minimum requirement, not the mandatory or maximum requirement.

In this case, Section 6707(c)(1) begs the question: what does the Golden Services CBA require be paid to bargaining unit employees for H&W. The record evidence establishes that Golden Service paid $4.50 per hour to pre-March 2016 hires, which is 4 cents below the non-EO 13706 rate (and 28 cents above the EO 13706 rate at the time), and subsequently paid the higher $4.60 rate in response to AAM 237. In contrast, the record is void of evidence that under the 2020 Golden Services CBA adopted without change by Centerra, Golden Service ever paid H&W to bargaining unit employees at the lower EO 13706 H&W rate.

Centerra argues that the past practice of Golden Services to pay the higher non-EO 13706 H&W rate is not binding. According to Centerra, past practice cannot trump clear and ambiguous contract language, and the reference to "SCA" and "SCA Published" in the Golden Services CBA are clear: H&W is based on the EO 13706 rate. For the reasons addressed more fully above, the Arbitrator finds that undefined references to "SCA" and "SCA Published" in the Golden Services and Centerra CBA's are unclear. Both CBA's do define those terms nor reference which of the two SCA H&W standards apply: the higher non-EO 13706 or the lower EO 13706 rate. Again, a term is ambiguous if it is reasonably susceptible to more than one meaning, which is the case here.

Centerra argues that it neither accepted nor condoned the prior H&W practice of Golden Services. Centerra asserts that it made clear in its initial offer letter to employees that it was not agreeing to be bound by any past practices. The Putnam and Snowden offer letters in evidence do not include the phrase "past practice." Nor do the offer letters explicitly disavow all prior past practices.

Rather, after representing that their existing pay rate and economic benefits will remain in accordance with the Golden Services CBA, the Employer stated its intent to set initial terms and conditions of employment in accordance with its polices and negotiate a new CBA. A reasonable reading of the offer letter is that the Company intends on setting initial terms and conditions of employment for matters other than the existing pay rate and economic benefits, which it assured will remain the same as under the Golden Services CBA. H&W falls within existing pay or economic benefits. As set forth above, the Arbitrator rejects as unduly broad, ambiguous, and potentially misleading an interpretation of the offer letter language which reads the Company's amorphous "intent to set initial terms and condition of employment" to vitiate its explicit representation that it was retaining existing pay rates and economic benefits.

Centerra argues that it had the right to unilaterally terminate the past practice on May 18 when it took over the DOL contract from Golden Services. The argument is mistaken. As set forth above, the Arbitrator has found that Centerra was a "perfectly clear" successor. As a "perfectly clear" successor, Centerra was bound to abide by the Golden Services CBA until a new contract was reached or negotiations reached impasse. It is undisputed that the parties did not reach a new CBA or impasse on May 18, but continued to negotiate. The parties entered a new CBA on June 30, 2022, with Centerra's adoption of the terms and condition of the Golden Services CBA unchanged.

Citing Mittenthal for support, Centerra argues that the past practice of Golden Services to pay H&W at the higher SCA rate for non-EO 13706 employers lapsed because the Union failed to include it in the Centerra CBA and because of the "zipper" clause in the Centerra CBA. More relevant to the issue in this case involving the interpretation of ambiguous contract language is the very next paragraph on the same page of the Mittenthal article:

> Consider next a well-established practice which serves to clarify some ambiguity in the agreement. Because the practice is essential to an understanding of the ambiguous provision, it becomes in effect a part of that provision. As such, it will be binding for the life of the agreement. And the mere repudiation of the practice by one side during the negotiation of a new agreement, unless accompanied by a revision of the ambiguous language, would not be significant. For the repudiation alone would not change the meaning of the ambiguous provision and hence would not detract from the effectiveness of the practice.

Accord, The Common Law of the Workplace: The Views of Arbitrators, *supra*, § 2.20.c ("A practice that serves to clarify an ambiguous provision in the agreement becomes the definitive interpretation of that term until there is a mutual agreement on rewriting the contract. The practice cannot be repudiated unilaterally.")

Here, the meaning of "SCA" and "SCA Published" in the Golden Services contract are ambiguous because there are two SCA rates depending on whether the contract is or is not covered by EO 13706. The Union asserts it is the higher rate and Centerra contends it should be the lower rate. The ambiguity was clarified by the practice of Golden Services and the Union, which applied the higher H&W SCA rate. That practice became a part of the Golden Services CBA. Centerra's repudiation of the practice during negotiations for a new contract is of no significance because it's repudiation alone would not change the meaning of the ambiguous provision at issue in this case. That is particularly the case where, as here, Centerra was a "perfectly clear" successor who lacked the authority to unilaterally repudiate the terms of the Golden Services CBA, including the party's interpretation of "SCA" and SCA Published" for purposes of the payment of H&W. What was required to change the meaning of "SCA" and "SCA Published" was a revision of the ambiguous language through contract negotiations, or bargaining to impasse. And that did not happen. The meaning of "SCA" or "SCA Published" was unchanged as a result of Centerra's wholesale adoption of the Golden Service's CBA, including Article 28 and the H&W Appendix at issue.

Finally, the Employer argues that the "zipper clause" in Article 2 of the CBA eliminated the binding effect of past practices, including payment of H&W at the higher SCA rate. Article 2 provides:

> This Agreement, when executed, shall be deemed to define the wages, hours of work, rates of pay, and other conditions of employment covered hereby for the term thereof; and except by mutual consent, no new or additional issues not included herein or covered hereby shall be subject to negotiations between the Employer and the Union during the term of this Agreement. This, however, does not apply to changes directed by the client. Such changes will be discussed with the Union prior to implementation, if possible. Lastly, this Agreement will not supersede any DEO Order, Policy, or Manual.

Arbitrators narrowly interpret "zipper" clauses that arguably eliminate past practices. The Common Law of the Workplace: The Views of Arbitrators, *supra*, § 2.21. Most arbitrators, as well

as the National Labor Relations Board, require clear and unmistakable language to establish a waiver of bargaining or contract rights. *Id*. Arbitrators have held that a general zipper clause, as we have here, would not negate practices that cast light upon ambiguous contact language. *Id*. *See also*, Elkouri & Elkouri, How Arbitration Works, Fifth Edition, p. 646 & n. 74 (BNA 1997). Other arbitrator's hold that a "zipper clause" that does not specifically override a past practice will not negate it and that inferences may still be drawn from express terms of the collective agreement, including recognition of a past practice not mentioned in the contract. The Common Law of the Workplace: The Views of Arbitrators, *supra*, § 2.21.

Here, the "zipper clause" in Article 2 does not specifically negate the interpretation of "SCA" and "SCA Published" at issue. Moreover, the practice serves to clarify the meaning of those terms. As such, the Arbitrator rejects the Employer's "zipper clause" argument as a basis for interpreting the meaning of "SCA" and "SCA Published" for purposes of the rate bargaining unit employees will be compensated H&W in accordance with Article 28 and Appendix 1 of the CBA.

FINDINGS AND AWARD

The grievance is sustained. For the reasons set forth above, Centerra Group, LLC violated the CBA by not paying members of the Bargaining Unit $4.60 per hour for the Health & Welfare credit through June 22, 2022, and $4.80 per hour thereafter. The "SCA" and "SCA Published" rate for H&W in Article 28 and Appendix 1 of the Centerra CBA refers to the higher H&W rates published in AAM 237 and 239, and not lower EO-13706 H&W rates.

As a remedy, consistent with this Award, Centerra Group, LLC is directed to compensate all affected bargaining unit members the difference between what they were paid for health & welfare credits and such higher amounts they should have been paid since the start of their employment with Centerra, as set forth in AAM 237, 239, or such greater rate thereafter if the SCA published a rate increase before the Award is issued. For the remaining term of the current CBA, consistent with this Award and unless the parties agree otherwise, Centerra shall compensate bargaining unit members electing H&W credit in lieu of medical insurance at the higher H&W SCA rate as may be published by DOL AAM. The Arbitrator will retain jurisdiction for 60 calendar days for purpose of compliance.