

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

FIVE STAR TRANSPORTATION, INC.

Case No. 1-CA-41158

and

TRANSPORTATION DIVISION, UNITED
FOOD AND COMMERCIAL WORKERS UNION,
LOCAL 1459, AFL-CIO

*Elizabeth Tafe and Elizabeth Vorro, Esqs., for the General Counsel.
Robert L. Dambrov, (Cooley, Shrair, P.C.) Springfield, Massachusetts,
for the Respondent.*

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Springfield, Massachusetts on April 20-22, 2004. The charge was filed on August 14, 2003 and the complaint was issued on March 17, 2004.

The General Counsel alleges that Respondent, Five Star Transportation, Inc., violated Section 8(a)(1) of the Act in refusing to consider for hire, and in refusing to hire, eleven job applicants because they engaged in protected concerted activity by writing or sending emails to the Belchertown, Massachusetts School Committee that were critical of Five Star. The eleven alleged discriminatees are former employees of First Student, Inc., which operated the Belchertown school busses before Respondent. Five Star concedes that it refused to consider for hire, or hire any of the eleven alleged discriminatees solely due to the fact that they sent these letters and emails to the school committee. In fact, when four of the alleged discriminatees inquired as to the status of their employment applications, Theresa Lecrenski, Five Star's President, told them they were not being hired due to the fact that they had sent these letters and emails to the School Committee. The General Counsel alleges that in informing these employees that this was the reason they were not being hired, Respondent committed and independent violation of Section 8(a)(1).¹

However, Respondent contends that the letters are not protected due to the fact that they disparaged Respondent and sought to have the school committee award its contract for school bus services to First Student or one of Respondent's other competitors. Respondent also contends that the letters were individual acts and do not constitute concerted activity.

¹ This is alleged as a separate violation in paragraph 8 of the Complaint. Ms. Lecrenski concedes that she told Terri Nadle, Candy Ocasio, Caron Rose and Pauline Taylor that they were not being hired due to these letters and emails.

The General Counsel further alleges that Respondent violated Section 8(a)(5) and (1) of the Act in refusing to recognize and bargain with the Union. This allegation is predicated on a contention that had Five Star not illegally discriminated against the eleven former employees of First Student, it would have been obligated to recognize and bargain with the Union as First Student's successor. Respondent contends that even if it had hired the eleven, a majority of its bargaining unit employees would not have been former members of the First Student bargaining unit. Therefore, it would not have been obligated to recognize and bargain with the Union.

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

Findings of Fact

I. Jurisdiction

Respondent, Five Star Transportation, Inc., a corporation, has its main office in Agawam, Massachusetts and operates school busses under contract with several school districts in the vicinity of Springfield, Massachusetts. It annually derives revenues in excess of \$250,000, and purchases and receives goods at the Agawam facility valued in excess of \$5,000 directly from points outside of the State of Massachusetts. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Local 1459 of the Transportation Division, United Food and Commercial Workers Union (UFCW), is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

The Belchertown School District has contracted with private companies to operate its school busses for a number of years. In 1999, Laidlaw Transit, Inc., which had the contract at the time, voluntarily recognized the Union as the exclusive bargaining representative of all regular bus drivers, spare drivers, utility drivers and trainers employed by Laidlaw at Belchertown. In 2000, Belchertown put its school bus contract out for bids and awarded the contract to Bruce Transportation, Inc., which later changed its name to First Student, Inc. Bruce recognized the Union and signed a collective bargaining agreement.² That agreement included provisions for fringe benefits including several paid holidays, employer contributions to employee health insurance, an employer-paid life insurance policy of \$15,000 and a seniority system for allocating non-revenue work and charter trips. First Student and the Union negotiated a new contract in November 2002 with similar provisions in anticipation of the bidding for the 2003-06 Belchertown school bus contract.

On or about January 16, 2003, Respondent Five Star, and the Union learned that Respondent had been awarded the 2003-2006 Belchertown school bus contract. Five Star has been in business for 35 years operating school busses for a number of localities in the Springfield, Massachusetts area. It has never had employees who were represented by a union.

On January 21, Daniel Clifford, a Union Vice-President and Business Agent for the Belchertown school bus drivers sent one letter to the Associate Superintendent of the

² The collective bargaining agreements between the Union and both Laidlaw and First Student include "special needs drivers" in the bargaining unit. However, the Union apparently never represented such employees.

Belchertown Public Schools and another to Theresa Lecrenski, the President of Five Star. In pertinent part his letter to the Associate Superintendent stated:

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Local 1459 has struggled long and hard over the years negotiating decent wages and benefits in the industry for our school bus drivers. These area standards are subject to erosion by potential “predatory bidding” by less than fair-minded bus operators...

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...Five Star Transportation, Inc. of Agawam bid about \$300,000 lower than the current contractor. They bid about \$30 a day cheaper than the work that is done currently. We question how they will be able to pay the current wage and benefit package, maintain operation costs (fuel, equipment, etc.) and provide safe and effective service at the bargain basement price. In order to create a level playing field and a more equitable bid process, we asked previously that any prospective bidder factor into their bid model the wages and benefits of the current labor agreement.

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The school bus drivers serving Belchertown are your neighbors and fellow taxpayers, their jobs and quality of life are in jeopardy. We hope you will support those that safely transport the district’s school children.

GC Exh. 15.

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Clifford faxed to Lecrenski a letter that stated in part:

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If my information is correct and your organization does intend to seek to replace the current contractor, I want to hear from you promptly and I want to secure from your organization a guarantee that, if you are the successful bidder, our members will continue in their jobs with full seniority, that you will recognize Local 1459 as the exclusive bargaining agent for all of your employees not specifically excluded from representation by the National Labor Relations Act and that you will sit down with Local 1459 immediately upon your selection as the successor to negotiate a successor agreement that our members expect such a contract to be in effect prior to the first bus leaving the yard for the fall semester.

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If we do not hear from your organization promptly on these issues, we will infer that you do not intend to cooperate in these reasonable demands on behalf of our members and if you are awarded the contract, we will exercise all of our legal options as aggressively as a labor organization could be expected to in protecting the hard-won benefits of its members.

GC Exh. 5.

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Theresa Lecrenski received this letter but did not respond to it. Clifford then organized a meeting on January 31, 2003, that was attended by a number of the Belchertown school bus drivers. Two of these drivers, Alma Coderre and Lorrie Poulin, had worked for Five Star previously. Coderre told fellow employees that Five Star had fired her because she was unable to work full time after recovering from an injury. Poulin asserted that when the busses had mechanical problems they were not quickly corrected (Tr. 168).³ Poulin may also have stated

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³ Neither Coderre nor Poulin is an alleged discriminatee in this matter. Neither applied for a
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that Respondent's drivers did not always conduct pre-trip inspections.⁴ In preparation for the meeting Clifford downloaded a number of unflattering newspapers articles concerning Five Star that appeared in the *Daily Hampshire Gazette* in the spring of 1996. He distributed these articles to the drivers on January 31.

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One article concerned an incident in February 1996, in which a number of Five Star busses failed to start in extremely cold weather, resulting in a number of students being stranded at their bus stops in the Amherst-Pelham school district. The Amherst School Superintendent was quoted as criticizing Respondent for not notifying him of the problem in time for him to delay the opening of school. The newspaper article stated, as Ms. Lecrenski testified, that other school bus companies in the Springfield area had similar problems. Lecrenski does not deny that the incident occurred. However, she explained at the instant trial that her busses were new and that her company had followed all the manufacturer's recommendations. There is no evidence that Five Star ever experienced such a problem other than on the one day in question.

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Another article in March 1996 concerned Five Star's employment of a convicted sex offender as a school bus driver in Amherst. Due to the conviction the driver did not have a valid Massachusetts school bus driver's license. Theresa Lecrenski does not deny that the incident occurred. She stated at the instant trial that the employment of the driver was the result of an administrative oversight by the Massachusetts Department of Public Utilities.⁵

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A May 1996 article concerned a Five Star driver, who had consumed alcoholic beverages at lunch and then drove a school bus in the afternoon. As a result of failing to take a Breathalyzer test, the driver was fired. Another article later that month reported that the driver in question had eight driving infractions between 1983 and 1990, including one for drunken driving and another for driving with a revoked license. Ms. Lecrenski does not take issue with the fact that the 1996 incident occurred. No follow-up to any of these stories appeared in any newspaper giving the exculpatory factors about which Ms. Lecrenski testified at the instant hearing.

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A third article appearing in the *Daily Hampshire Gazette* in May 1996 reported that the Amherst school district was abrogating its contract with Respondent and that Respondent was suing the school district for breach of contract. There is no evidence in this record bearing on the accuracy of the story or the outcome of the suit, if there was one.

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At the Union meeting on January 31, the drivers were encouraged to write to the Belchertown School Committee. Copies of the 1996 newspaper articles were disseminated. The eleven discriminatees and a few other drivers, who never applied for a job with Five Star, wrote such letters between February 3 and 8, 2004. During this period Union Vice President Clifford faxed a recognition agreement to Ms. Lecrenski, which she ignored.

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The letters of the discriminatees are not identical, however with the exception of Candy Ocasio's email and Charles Kupras' letter, each one of them explicitly communicates a concern job with Respondent.

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⁴ I infer that either Coderre or Poulin was the source of this assertion by Caron Rose in her letter to the Belchertown School Committee.

⁵ According to the news article, in 1996, someone with a commercial driver's license, but not a school bus driver's license, could drive a school bus in Massachusetts in a "loosely defined" emergency, generally for not more than three consecutive days.

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as to whether Respondent will retain their services if it is awarded the contract and/or whether it will reduce the wages and benefits the drivers received from First Student.⁶ The letters differ with regard to the emphasis they place on these concerns as opposed to the safety of Belchertown school children and in the degree that they disparage Respondent.

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Donald Caouette's letter is written both in the first person singular and first person plural. He wrote, "in speaking collaboratively for the majority of Belchertown drivers, we are extremely concerned about this contract for many reasons and would like the opportunity to convey these concerns to you." Caouette summarized the benefits provided to the drivers by First Student: health insurance, paid holidays, bonus opportunities and a 401K plan. He then complained that the Five Star does not employ part-time drivers. Caouette discussed the incidents set forth in the *Daily Hampshire* articles. With regard to the failure of Five Star's busses to start, Caouette asserted that this occurred on "a couple of days during the winter back a few years ago." However, the news articles mention only one day of such a problem.

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Caouette suggested that the selection of Respondent would compromise the safety of Belchertown's school children. He opined that if Belchertown parents were presented with Respondent's reputation they would be willing to pay a fee to avoid relying on "a company of this stature." He concluded by asking for an opportunity for the incumbent drivers to meet with the school committee members to explain their concerns.

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Patty Grasso's letter also raised child safety concerns citing the 1996 newspaper articles. She also questioned whether Five Star would retain the current Belchertown drivers and whether they would retain their benefits if they were hired.⁷ Her letter concluded, "I ask you to reconsider Five Star Transportation as the new school bus contractor. I believe they have made it perfectly clear that they provide Five Star(s) in name only and not in the service."

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Steve Kahn wrote:

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The bus drivers have two main concerns. The first is that Five Star undercut the other bidders by not agreeing to adhere to our current labor agreement. This created a less than even playing field among bidders.

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Our second concern focuses on student safety: You need to be satisfied with the answer to the following questions...

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The questions posed relate to maintenance, staffing and driver qualifications. Kahn made no accusations about Five Star and did not specifically ask the school committee to award the school bus contract to another bidder. However, Kahn asked that it "consider the worth of proven performance balanced against reasonable cost. Ask yourself, how can one company be able to bid lower than the others? What corners will be cut? Please compare reputations."

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⁶ Ocasio and Kupras' concern for the safety of the busses could be considered as pertaining to a condition of employment, since, if they had been hired, they would be driving one of Respondent's busses.

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⁷ The 2003-2006 contract provided that if the successful bidder was not the current vendor that, "all current drivers and the current supervisor on site *should* be given first consideration for employment (emphasis added)." The 2000-2003 contract provided that if the successful bidder was not the current vendor, "all current drivers must have a first refusal option for employment." Exhs. G.C. 8 & 11.

Charles Kupras wrote:

5 ...Five Star Transportation has intentionally underbid other companies in the hope of taking advantage of the financial problems being forced on our cities and towns by State budget cuts.

10 Five Star has a long publicized history of problems. The primary issue is safety. Five Star buses are of low standard and maintained inadequately. Some drivers are poorly trained and of questionable character. There have been reported incidences of drivers with criminal records. One such driver was allowed to operate while his license was suspended. Five-Star lacks the values of its competitors and fails to warrant the responsibility of transporting our children.



15 The right to re-bid, disregard or veto the low bidder is a decision you must make for the entire community. Please put our children’s safety first.

20 Suzanne LeClair asked the school committee to reconsider awarding the bus contract to Respondent. She stated, “there are several safety concerns with this company, which you have been made aware of, and you can’t put a dollar sign on safety.” LeClair predicted that if Respondent was awarded the contract that the drivers would lose all their benefits. She continued, “What will you be left with?...School bus drivers that don’t know your children or care if they get home safely, or in a timely fashion and poorly maintained busses!?” LeClair concluded by asking the school to either reconsider the award or to re-bid the contract to include the driver’s current wages and benefits. “This would allow more safety oriented companies a fair chance.”

30 Andrea MacDonald in her letter to the school committee characterized Five Star as a “sub standard company” and opined that “the best decision is not made if you chose this company.” She characterized Respondent as having “a poor safety record and work ethic” and being reckless in employing “alcohol abusers, drug offenders, child molesters, and persons that have had their license suspended.” Additionally, she raised the specter of children waiting in the cold beside the road in broken-down busses. MacDonald also expressed concern about wages and benefits and suggested that either the contract should be awarded to a bidder other than Five-Star, or be rebid.

40 In contrast, Terri Nadle’s letter expressed concerns if Five Star was awarded the contract, but made no accusations against Respondent and asked nothing specific from the school committee. Nadle wrote:

I would hope Five Star will keep the drivers that are very familiar with the roads and children. Will the parents and student[s] have the same quality of service? Will the drivers still have the benefits, incentives and wages?

45 Candy Ocasio wrote that awarding the school bus contract to Five Star “might not be a wise decision.” She continued:

50 It has been know[n] in the past that this company has hired not only unlicensed drivers, but there have been two incidents of them hiring a convicted child molester, and a driver who was driving a school bus with a half dozen children under the influence. They have also been known to be unreliable with busses being unsafe.

Ocasio concluded by stating that she would not have her own children ride on Five Star busses due to her lack of confidence in their safety record. In isolation, Ocasio's letter would not provide the reader with an indication that she was concerned with the wages and terms of employment of the Belchertown drivers—other than the safety of the busses employees would have to drive.

Caron Rose told the School Committee that based on her review of newspaper articles and conversations with former Five Star employees that she had concerns about the safety of Belchertown students if Respondent was awarded the school bus contract. She stated that former Five Star drivers (assumedly Coderre and Poulin) had indicated that Respondent did not properly maintain its busses and that it did not require its drivers to complete a pre-trip inspection of the bus before leaving the garage. Rose commented favorably on First Student's maintenance of its busses.

Rose then stated:

Based on Five Star Transportation's past performances, I feel there will be no continuity of the top-notch service, which Belchertown has become accustomed to, from Joan Crowther [First Student's supervisor in Belchertown] and her drivers. I know this company had the low bid for the contract, but can a price be put on the safety and well being of our children?

She concluded by expressing several concerns, including whether Five Star would treat the drivers fairly with regard to wages and benefits.

Pauline Taylor expressed concern about the wages and benefits to be offered by Five Star. She continued:

They are also a non-union company. It also makes you wonder how much quality service they can provide and safety with such a lower bid...

I have heard some stories about Five Stars drivers and how their company is runed (sic). It really worries me. I am concerned about driving for Five Star and very concerned about letting my children ride on their buses.

Taylor then requested that the contract be rebid with what appears to be a union-initiated resolution attached to the bid specifications.⁸

Deborah Wenzel stated that she did not see how, given the amount of its bid, Respondent could give the drivers a wage and benefit package comparable to what they were receiving from First Student. She continued:

I have heard of and read about many of the poor practices of this company. Four of our current drivers left Five Star due to the poor treatment by them. My husband recalls a time when the Belchertown School Committee refused to accept a bid from Five Star. This was because of their mishandling and

⁸ I assume this is the resolution that appears the last page of Exh. G.C. -16. It essentially requires any successor contractor to offer employment to the current Belchertown drivers and abide by the terms of the Union's collective bargaining agreement with First Student. Taylor's letter is the only one of the eleven that makes specific reference to this resolution.

subsequent forfeiture of the Amherst contract before completion of year one of a five-year contract. Do we really want to put our town in this position?

5 The award of the Belchertown school bus contract was delayed while the school committee considered the issues raised in the drivers' letters. Ultimately, however, Respondent was awarded the contract and the Superintendent of Schools provided all eleven letters to Ms. Lecrenski, pursuant to her request and the Massachusetts Freedom of Information statute.

10 Seventeen Belchertown drivers, who were members of the First Student bargaining unit, applied for a bus driver position with Respondent. Six, none of whom wrote letters to the School Committee, were offered employment; four accepted. Respondent gave preference to these drivers over applicants who worked for Five Star in other localities and over new hires. Theresa Lecrenski did not consider hiring any of the eleven letter writers, solely due to the fact that they wrote the aforementioned letters to the school committee.

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Did the Alleged Discriminatees engage in Concerted Protected Activity?

Section 7 of the Act provides:

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Employees shall have the right of self-organization, to form join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection...

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Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7.

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In *Myers Industries*, 268 NLRB 493 (1984), and again in *Myers Industries*, 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, when individual activity, such as the letter writing campaign in the instant case, is a logical outgrowth of concerns expressed by a group of employees, it is a continuation of the concerted activity and protected by Section 7, *Salisbury Hotel*, 283 NLRB 685 (1987); *Every Woman's Place*, 282 NLRB 413 (1986).

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I find that the letter writing campaign to the school committee was a logical outgrowth of the concerns expressed by the employees collectively at the January 31, 2003 meeting. Moreover, the fact that Respondent treated the eleven letter writers as a group in deciding not to consider them for employment, leads me to conclude that Ms. Lecrenski recognized the concerted nature of the letter writing campaign, *Mike Yurosek & Son, Inc.*, 306 NLRB 1037 (1992); 310 NLRB 831 (1993). Respondent's belief that the employees acted in concert brings them within the protection of the Act even if their activities were not concerted, *Daniel Construction Co.*, 277 NLRB 795 n. 4 (1985); *Monarch Water Systems*, 271 NLRB 558 (1984).

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*Were all or some of the letters protected?
Alleged interference with Respondent's contractual relationship*

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Respondent relies on the Board's recent decision in *ATC/Forsythe & Assoc.*, 341 NLRB No. 66 (March 30, 2004) in arguing that the alleged discriminatees' letters to the school committee are not protected by Section 7 because they attempted to interfere with the contractual relationship or potential contractual relationship between Respondent and the Belchertown School Committee.

In *ATC/Forsyth* an employee of a company providing bus service to the city of Tempe, Arizona met with city officials and offered his dissident union group “as an organized alternative to ATC Tempe either as city employees, or as an alternate service provider.” The employer accused the employee of interfering with its contractual relationship with the city and offered the employee an opportunity to explain his activities. The employee refused to respond to the request for information. He was fired for his refusal to cooperate in the company’s investigation. The Board held that the employee’s activities were unprotected because the object was the replacement of his employer as Tempe bus contractor by his dissident union group.

Other cases in which the Board has reached similar conclusions are *Kenai Helicopters*, 235 NLRB 931, 936 (1978), *Associated Advertising Specialists, Inc.*, 232 NLRB 50, 53-54 (1977) and *North American Dismantling Corp.*, 341 NLRB No. 95 (April 30, 2004). In *Kenai Helicopters* the Board found the activities of a helicopter pilot and mechanic unprotected. The two told their employer’s dispatcher that they were going on strike and while doing so would operate as a competitor of their employer, flying tourists around the island of Kauai who otherwise would fly with their employer.

In *Associated Advertising Specialists, Inc.*, the employer produced advertising materials for its customers, the principal one of which was Rite-Aid. The alleged discriminatee, using information he had acquired while working for the employer, underbid it for some of Rite-Aid’s business, as a direct competitor.

In *North American Dismantling Corp.*, an employee told one of his employer’s clients that he could do the job for less than the client was paying his employer. More specifically, the alleged discriminatee told the client that he “could put some people together and do this job for you for cash.”

Thus, each of these cases is distinguishable from the instant matter by the fact that the discharged employee was attempting to compete directly with his employer. I conclude the principle stated in these cases is limited to situations in which employees attempt to engage in the business of their employer as a competitor and does not extend to situations in which employees attempt to prevent a prospective employer from obtaining a contract based on a legitimate fear that this employer will not maintain their wages, hours and working conditions. Moreover, each of these cases rests upon the employees’ duty of loyalty to their employer. At the time, the Belchertown employees wrote to the School Committee, they had no such duty, *American Steel Erectors, Inc.*, 339 NLRB No. 152 (August 26, 20003).

A Union and/or employees acting in concert have a legitimate interest in protecting the employment standards that the union has negotiated from unfair competitive advantages that would be enjoyed by an employer whose labor cost package is less than those of employers subjected to the standards imposed by the Union, *Petrochem Insulation, Inc.*, 330 NLRB 47, 49 (1999).

A Union and/or its members may communicate with third parties to advance such legitimate interests when the communication is not so disloyal, reckless or maliciously untrue to lose the Act’s protection, *Arlington Electric*, 332 NLRB 845 (2000). Thus, I find that nine of the discriminatees were acting in accordance with their Section 7 rights in petitioning the Belchertown School Committee to refrain from awarding its school bus contract to Respondent in view of their reasonable belief that such an award would result in a reduction in their benefits and possibly in the loss of their jobs. I view these letters as a legitimate effort to persuade the School Committee not to save money by contracting with an employer for whom they had every reason to believe would not provide them with benefits such as health insurance.

On the other hand, I find that Candy Ocasio's email and Charles Kupras' letter are unprotected. Other than some very generalized assertions about the quality of Respondent's busses, neither made any other reference to the wages and working conditions of the school bus drivers. Moreover, it is unclear from these two letters that the writers are concerned with the safety of the drivers, as opposed to the schoolchildren.

The Board found activities similar to the discriminatees' letters to be protected in *Montauk Bus Co.*, 324 NLRB 1128 (1997), which is indistinguishable from the instant case except for the fact that union officials, rather individual members wrote to the school district. Moreover, in *Montauk Bus Co.*, the school district had already contracted with the employer prior to some of the union's communications with the school district, whereas in the instant case the Belchertown School Committee had not decided whether to accept Five Star's bid when the discriminatees sent their letters to its members.

The facts in *Montauk Bus Co.* are as follows: the Sachem School District in Long Island, New York, also contracted out most of its school bus services. The drivers, who worked for two different contractors between 1989 and 1995, were represented by a labor organization. In 1995, the School District put its contract out for bids and awarded Montauk Bus Company the home to school transportation contract. As in the instant case, the union contacted Montauk before it was awarded the contract in an attempt to assure that Montauk would hire its members, recognize the union and agree to be bound by the collective bargaining agreement signed by its predecessor. As in the instant case, Montauk ignored the union's overture.

The union continued to seek recognition and a commitment by Montauk to adhere to the collective bargaining agreement. However, a union official also wrote to the school district, asking it to award the contract to Montauk's predecessor. After the contract was awarded, and after the union received what it considered an unsatisfactory response from Montauk, it asked the school district to vacate the award to Montauk.

When school started in the fall of 1995, a majority of the employees driving school buses for Montauk were former employees of its predecessor. Montauk continued to refuse to recognize the union. After working three days, the union commenced a strike and the union wrote the school district about what it alleged was "abysmal service and total disregard for safety." The Union also passed out flyers disparaging the qualifications of Montauk's replacement drivers. Then the Union wrote another letter to the school district alleging that some of Montauk's buses did not comply with New York State safety and registration requirements. The school district determined that these allegations were baseless.

After a week, the union drivers offered to come to work unconditionally. Montauk refused to recall them. As a result of the strike, the Sachem School District assessed Montauk a \$150,000 penalty for nonperformance of its contract.

Montauk Bus Company argued that it was entitled not to recall the strikers because their union was initially trying to get the Sachem School District to accept the bid of its predecessor and then to annul its contract. The judge, who was affirmed by the Board, opined:

...this hardly represents the type of conflict of interest outlawed by the Act. It does not demonstrate, and there is no independent evidence to demonstrate that the Union was acting either as an agent of or in conspiracy with Laidlaw [the predecessor].

...There was, therefore, a legitimate and separate union interest in having the School District retain Laidlaw as the contractor, or failing that, in trying to ensure that any successor contractor would hire all of the employees and assume the terms of the collective bargaining agreement...

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Once the contract was won by Montauk, the Union attempted to contact the company to insure that it would hire the former employees and retain their existing wages and benefits. When the Union met with what can only be described as a stall, it tried to enlist the School Board to convince Montauk to live up to a promise to hire all of the Laidlaw employees. These actions also represented a legitimate interest that the Union had in attempting to save jobs and to have those people hired by Montauk not suffer a loss of wages or benefits.

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15 324 NLRB at 1136.

The Board found that Montauk violated Section 8(a)(3) and (1) in refusing to reinstate the strikers. It rejected the argument that the strike was unprotected because the Union had a conflict of interest due to its attempt to get the school district to cancel Montauk's contract and its disparagement of Montauk's services. The Board distinguished *Kenai Helicopters, supra*, on the grounds that the employees in that case "used the circumstances of a strike by their fellow employees to further their own personnel (sic) interests by trying to get the company's customers to shift work to a company that the two were going to join," 324 NLRB at 1138 n. 10.

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Similarly, the Belchertown employees contacted the School Committee only after Five Star had made it clear that it did not intend to recognize the Union or was likely to accord the drivers the benefits they enjoyed from First Student. Respondent's failure to respond to Clifford's letter, in light of the amount of its bid and 35-year history of union-free operation, would reasonably have led the Union and the drivers to conclude that Five Star intended to employ drivers without the benefits accorded by First Student and would also raise substantial doubt in the minds of the drivers as to whether Respondent intended to employ them.

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I find that in collectively petitioning the school district, at least in part regarding their wages, job security and other terms of their employment, the alleged discriminatees, with the exception of Candy Ocasio and Charles Kupras, were engaging in concerted activities protected by the Act. There is nothing in this record to suggest that the Union or the drivers would have made any effort to deny Five Star the Belchertown contract had Respondent agreed to hire them, recognize the Union and maintain the drivers' wages and benefits.

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Disparagement of Respondent

In *NLRB v. Local 1229 Electrical Workers (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464, 74 S. Ct. 172 (1953) the Supreme Court upheld a Board ruling denying reinstatement to broadcasting technicians who distributed handbills to the public disparaging the quality of programming by their employer. However, the decision rested in large part on the fact that the handbills made no reference to the union, a labor controversy or to collective bargaining.⁹

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⁹ Respondent, at page 10 of its brief, contends that the discriminatees' emails and letters are unprotected because they had never worked for, or even applied for work with Respondent at the time these communications were sent to the School Committee. However, the letters were written after the Union asked for assurances that the discriminatees would be retained and

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Justice Burton, writing for the court, observed, “there is no more elemental cause for discharge of an employee than disloyalty to his employer.” However, legions of cases arising under the Act recognize that Section 7 protects many acts considered by employers to be “disloyal.” Indeed, some, if not many employers would consider support for a union, striking or any concerted effort that interferes with the ability of the employer to run his business as he or she sees fit, to be disloyal. On the other hand, the evolution of the law makes clear that there are limits to what is protected even in the context of a legitimate dispute over wages, hours and the terms and conditions of employment.¹⁰

The Board has held on many occasions that employees may properly engage in communication with a third party in an effort to obtain the third party’s assistance in circumstances where the communication was related to a legitimate, ongoing labor dispute—so long as the communication did not constitute disparagement or vilification of the employer’s product or reputation. Moreover, what an employer may regard as unprotected disparagement or vilification is not necessarily sufficient to forfeit an employee’s statutory protection. Thus, in *Allied Aviation Service Company of New Jersey, Inc.*, 248 NLRB 229, 232 (1980), the Board opined:

In determining whether an employee’s communication to a third party constitutes disparagement of the employer or its product, great care must be taken to distinguish between disparagement and the airing of what may be highly sensitive issues...“absent a malicious motive” an employee’s right to appeal to the public is not dependent on the sensitivity of Respondent to his choice of forum.

In *Emarco, Inc.*, 284 NLRB 832, 833 (1987) the Board found that remarks made by two employees to the general contractor of their employer were not so disloyal, reckless or maliciously untrue to forfeit the Act’s protection. In the context of a dispute centering on their

that their wages and benefits would be preserved. Section 2(9) of the Act defines “labor dispute” very broadly to include “any controversy concerning the terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.”

Respondent’s failure to respond to Clifford’s letter of January 21, 2002, created a “labor dispute.” See, *Fabric Services*, 190 NLRB 540 (1071).

Mountain Shadows Golf Resort, 338 NLRB No. 73 (November 20, 2002), cited by Respondent, turns on the fact that the alleged discriminatee’s unprotected flyer made no reference to a labor controversy or collective bargaining, *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1241 (2000).

¹⁰ Although the employees herein did not have a duty to be loyal to Respondent at the time they wrote to the School Committee, *American Steel Erectors, Inc.*, 339 NLRB No. 152 (August 26, 2003), the test as to whether their letters are protected is essentially the same as if they did have such a duty. I see no practical difference between the standard applied in *American Steel Erectors*, “whether the remarks were “ so flagrant, violent or extreme as to render the individual unfit for further service” [citing *Dreis & Krump*, 221 NLRB 309, 315 (1975)], and the standard applied to writings and utterances of employees who do owe a duty of loyalty to the maligned employer. Thus, employees do not lose the protection of the Act unless their writings and utterances are maliciously false or otherwise reckless. They do not lose the protection of the Act whereas here, their accusations are based on dated information, which appears to be accurate, although missing exculpatory information offered by Ms. Lecrenski at trial.

employer's failure to make timely contributions to the union welfare and pension plan, the two employees told the general contractor that, "these people never pay their bills...can't finish the job...is no damn good" and "this job is too big for them." Obviously, remarks such as these would tend to undermine the contractual relationship between the general contractor and Emarco. However, an employee only loses the protection of the Act in the context of a legitimate labor dispute, if: 1) he or she tries to divert his employer's business to another business entity in which he has an interest unrelated to his status as an employee of the employer, *ATF Forsythe and Associates, supra*; and/or 2) the employee makes a statement "with the knowledge of its falsity, or with reckless disregard of whether it was true or false," *HCA/Portsmouth Regional Hospital*, 316 NLRB 919 (1995).¹¹

In *Sierra Publishing Company v. N.L.R.B.*, 889 F. 2d 210 at 220 (9th Cir. 1989), Judge Fletcher summarized the state of the law regarding disparagement as follows:

In summary, the disloyalty standard is at base a question of whether the employees' efforts to improve their wages or working conditions through influencing strangers to the labor dispute were pursued in a reasonable manner under the circumstances. Product disparagement unconnected to the labor dispute, breach of important confidences, and threats of violence are clearly unreasonable ways to pursue a labor dispute. On the other hand, suggestions that a company's treatment of its employees may have an effect upon the quality of the company's products...are not likely to be unreasonable particularly in cases when the addressees of the information are made aware of the fact that a labor dispute is in progress. Childish ridicule may be unreasonable, while heated rhetoric may be quite proper under the circumstances. Each situation must be examined on its own facts, but with an understanding that the law does favor a robust exchange of viewpoints...

An employee generally has no obligation to investigate whether information he disseminates to third parties in a labor dispute is true or false, at least if he or she has no reason to believe it is false, *KBO, Inc.*, 315 NLRB 570, 571 n. 6 (1994). In the instant case, I find that none of the information or contentions communicated by the eleven drivers to the Belchertown School Committee were made with knowledge of their falsity, or with reckless disregard of the truth. Indeed, many of the unflattering contentions were accurate, albeit dated. The only inaccurate statement in any of the letters is Donald Caouette's assertion that Five Star's buses failed to start on a number of days in the winter of 1996, which actually occurred only on one day. I do not deem that so maliciously false or reckless as to deny him the protection of the Act, *Cincinnati Suburban Press*, 289 NLRB 966 at 968 (1988).

None of the drivers sought to obtain Respondent's side of the story with regard to the incidents reported by the *Daily Hampshire Gazette*, or for assertions made to them by Alma Coderre and Lorrie Poulin. However, the Act placed no obligation on them to do so in order to retain the Act's protection. Although many of their factual assertions and concerns were based

¹¹ Respondent relies on *Patterson-Sargent Co.*, 115 NLRB 1627, 1629 (1956) and its progeny for the proposition that the truth or falsity of the discriminatees' emails and letters has no bearing on whether or not they are protected by Section 7. Numerous Board and Court cases have overruled *Patterson-Sargent, sub silentio*. These include cases cited herein such as *Allied Aviation Service Company, Inc., supra*; *Emarco Co., supra*; *HCA/Portsmouth Regional Hospital, supra*, as well as *Cincinnati Suburban Press, Inc.*, 289 NLRB 966, 967 (1989); and *Sierra Publishing Company*, 291 NLRB 540, 545 (1988) *enfd.* 889 F. 2d 210, 218-19 (9th Cir. 1989).

on very dated newspaper articles, this was not so reckless as to forfeit the protection of the Act in the context of their labor dispute.

Some of the letters constitute protected activity, even assuming that some do not.

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All the letters, save Ocasio's and Kupras', explicitly concern a legitimate concern of the First Student drivers as to their job security and terms of employment. They differ in the degree to which they disparage Respondent. Neither Steve Kahn nor Terri Nadle disparaged Respondent, nor did either one ask that the school bus contract be rebid. Although, Donald Caouette and Deborah Wenzel disparaged Respondent to some extent, Caouette and Wenzel did not specifically ask that the school bus contract be rebid. Suzanne LeClair, Andrea MacDonald and Pauline Taylor disparaged Respondent and asked that the contract be rebid, however, they indicated that an award to Respondent would be acceptable if it safeguarded their current wages and benefits.

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In conclusion, I find that Respondent violated Section 8(a)(1) by refusing to hire and refusing to consider for hire Donald Caouette, Patricia Grasso, Steve Kahn, Suzanne LeClair, Andrea MacDonald, Terri Nadle, Caron Rose, Pauline Taylor and Deborah Wenzel for engaging in protected concerted activity by writing to the members of the Belchertown School Committee.

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Respondent, by Theresa Lecrenski, violated Section 8(a)(1) in telling Terri Nadle, Caron Rose and Pauline Taylor that there were not being hired due to their protected communications with the Belchertown School Committee

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Ms. Lecrenski, in telling discriminatees Nadle, Rose and Taylor that they were not being hired due to their protected communications, committed a separate and distinct violation of Section 8(a)(1), as alleged in the Complaint, *Kunja Knitting Mills, U.S.A.*, 302 NLRB 545 (1991).

Is Five Star a successor employer of First Student?

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An employer, such as Respondent, who takes over the unionized business of another employer, acquires the collective bargaining obligations of its predecessor if it is a successor employer. For Respondent to be a successor employer, the similarities between its operations and those of First Student must manifest "a substantial continuity between the enterprises" and a majority of its employees in an appropriate bargaining unit must be former bargaining unit employees of the predecessor. The bargaining obligation of a successor employer begins when it has hired a "substantial and representative complement" of its workforce, *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972); *Fall River Dyeing and Finishing Corp.*, 482 U.S. 27 (1987).

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In determining whether such substantial continuity exists, the Board generally considers whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs under the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products and has basically the same body of customers. Respondent satisfies all these criteria with respect to First Student, with the exception of the replacement of First Student's supervisor by Ms. Lecrenski. It operated the Belchertown school busses in essentially the same manner as First Student. Five Star is thus a successor of First Student if a majority of Respondent's employees in its bargaining unit were former members of the First Student bargaining unit on the day Respondent started operating with a "substantial and representative complement" of its workforce.

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This calculation must take into account that nine discriminatees would have been hired, absent the discrimination against them, and that the replacements for the seven regular drivers would not have been hired. Thus, absent discrimination, thirteen of Respondent's bargaining unit members would have been former First Student bargaining unit members. The more
 5 difficult issue is the size of Respondent's bargaining unit. Five Star, in its brief, contends that its bargaining unit should include the 33 individuals, other than Theresa Lecrenski, whose names appear on the list submitted for approval to the Belchertown School Superintendent prior to September 1, 2003 (R. Exh. 2) and/or a supplemental list submitted on September 9 (R. Exhs. 1 and GC 9).¹²

10 The critical date for determining the size of Respondent's bargaining unit is the morning of August 27, 2003, the first day of school in Belchertown. On that morning, Respondent, as it was required by its contract, operated all nineteen school bus routes.

15 Respondent's contract with the Belchertown School District provides:

The contractor shall furnish fully and properly licensed drivers to operate any buses or vehicles used in carrying out the transportation services provided under this contract. A list of all persons assigned as regular and substitute drivers must be submitted to the
 20 Superintendent of Schools by August 15, of every year of the contract or as changes occur. All drivers must be acceptable to the Superintendent of Schools...

The School Committee, acting through the Superintendent of Schools, reserves the right to accept or reject any and all drivers if it is deemed in the best interest of the Town to do
 25 so...

GC Exh. 8 (page 6 of the contract specifications, paragraph III A – C).

30 There was some confusion at trial regarding the first list of drivers that Respondent submitted to the School Superintendent. On September 11, 2003, Ms. Lecrenski met with a NLRB agent investigating the Union's charge. She provided a list of approved drivers, Exh. G.C.-9. This is clearly not the first list she provided to the School Superintendent. Although the first list is not in the record, I infer that it was a mirror image of the Superintendent's list of
 35 approved drivers as of September 1, 2003, R. Exh. 2.¹³ From this exhibit and from Respondent's time sheets it is possible, with the exception of route 14, to determine who drove each school bus route for Five Star on the first morning of school:

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¹² At hearing, Respondent also asserted that two individuals not on either list, Raymond Hughes and Kim Stitzinger, who started driving busses in Belchertown later in the fall, should be included in the unit.

45 ¹³ My reasons for so concluding are that R. Exh. 2 includes the names of individuals hired by Respondent on or prior to August 18, 2003, who drove a regular school bus route for Respondent on the morning of August 27, 2003 and who were no longer working for Respondent by September 1, such as Edward Baran and Natalina King. R. 1 is identical to GC 9 except for the fact that it has two pages instead of one and that on its face it indicates that it was provided to the Superintendent on September 9, 2003. It is evident from the markings on
 50 the front of R. 1 that it is a supplemental list reflecting changes in Respondent's drivers that had occurred since the beginning of the school year.

Drivers on the morning of August 27, 2003 by route #

1. Mary MacIntyre-Gadde (AM route)
Kathy Condi, a First Student bargaining unit member, (PM route)¹⁴
- 5 2. Edward Baran, whose employment ended after one shift.
3. Christine Caney
4. Joan Hilliard, a First Student bargaining unit member.
5. Sandra Lepine
6. Kathy Brady
- 10 7. Robin Demetrius
8. Michael Gentile
9. Natalina King, who only worked two days for Five Star.¹⁵
10. Diane Stuller, who only worked two days for Five Star.
11. Pamela Bousquet
- 15 12. Wilfred Auclair, a First Student bargaining unit member.
13. Raymond Forget
14. Unknown¹⁶
15. Christine Abare
16. Amy Randall
- 20 17. Darlene White
18. Paul Greene, a First Student bargaining unit member.
19. Tina Stone

25 Considering just the regular route drivers, I conclude that but for Respondent's refusal to hire the discriminatees, 11 of the 20 regular route drivers on the morning of August 27, 2003 would have been former First Student bargaining unit members. This includes the four First Student drivers who drove bus routes for Respondent on August 27 (Condi, Hilliard, Green and Auclair) and seven discriminatees who were regular drivers for First Student (Wenzel, Kahn, Rose, Nadle, LeClair, Taylor and Grasso). Discriminatees Andrea Macdonald and Donald

30 Caouette were spare drivers for First Student. I conclude that if the discriminatees had been hired, Respondent would not have hired or transferred the seven employees who replaced them as regular route drivers.

35 The critical issue in this case is how many of the individuals listed as drivers in R. Exhibit 2 should be included in the bargaining unit. I exclude anyone whose name does not appear on R, Exhibit 2 because they had not been approved to drive a Belchertown school bus as of September 1, 2003.¹⁷ While Respondent concedes that Ms. Lecrenski should not be included

40 ¹⁴ This route was intended to be split between MacIntyre-Gaddie and Condi from the outset. This situation differs from those routes on which the original driver was replaced.

¹⁵ The timesheets for King, Baran and Stuller in GC Exh. 20 show that they did not drive in Belchertown after August 28 and their names do not appear on the list of approved drivers, which Respondent submitted to the Superintendent on September 9 (GC Exh. 9 and R. 2),.

45 ¹⁶ Petrina Williams-Hidalgo apparently did dry runs on route 14 on August 26 and 27 (GC Exh. 20 (dd)). It is unclear who transported the schoolchildren on route 14 that day. Williams-Hidalgo began driving the route regularly on September 2.

50 ¹⁷ There is no evidence that Respondent submitted the names of any of these individuals to the Superintendent prior to September 9, 2003. On that date, Ms. Lecrenski apparently supplemented her original list to account for the fact that some of the people on that list no longer worked for her. On this basis I would exclude from the bargaining unit, Adolph Pipczynski, Curtis Littlefield and Raymond Hughes (whose name does not appear on either R. 1

Continued

there is an issue with regard to most of the other individuals listed on R. Exhibit 2. Several of these individuals either drove in school districts other than Belchertown or performed significant non-driving functions for Respondent. Some, including four of the regular drivers on the morning of August 27, performed negligible amounts of bargaining unit work.

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An employee should not be included in the bargaining unit solely because he or she appears on Respondent's original list of drivers. There must be some other indicia of a community of interest with the Belchertown school bus drivers, at or immediately following the beginning of the school year, when Respondent began operating with a substantial and representative complement of its workforce. The best examples of why the list is not dispositive are Stephanie Meloni and Barbara LaPalme, whose names appears on the list, but who did not drive a single school bus run in Belchertown up to the date of the hearing.

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The spare drivers are essentially casual, part-time or dual-function employees of Respondent. In the context of a representation proceeding, the Board includes or excludes part-time employees on the basis of their relationship to the job, "whether they perform unit work and whether they have a sufficient regularity of work to give them a community of interest with full-time employees with respect to wages, hours, and other working conditions," *Children's Hospital of Pittsburgh*, 222 NLRB 588, 591 (1976); *Arlington Masonry Supply, Inc.*, 339 NLRB No. 99 (July 21, 2003). The standard that the Board generally applies to casual employees in determining whether they have a sufficient community of interest is whether they regularly average 4 hours or more per week for the last quarter prior to the eligibility date, *Davison-Paxon Company*, 185 NLRB 21, 23-24 (1970).¹⁸

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The spare drivers, who also work in other localities or have other job functions, are essentially dual-function employees, *Syracuse University*, 325 NLRB 162 (1997). As such, the time period in which they performed bargaining work is critical in determining whether or not they should be included in the bargaining unit. In the election context, the Board does not determine voter eligibility on the basis of after-the-fact considerations, *Georgia Pacific Corp.*, 201 NLRB 831, 832 (1973). However, since there is no other way of determining whether Respondent's drivers had a community of interest with the employees who regularly worked in Belchertown, I will apply the *Davison-Paxon* test to the quarter following the commencement of the school year.

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Applying the *Davison-Paxon* test to those individuals who drove a school bus route on the morning of August 27, I would exclude from the bargaining unit the following individuals, on the basis of the negligible number of hours they worked in fall of 2003:

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or R. 2). Additionally, Pipczynski, who drove a regular bus route for Respondent in South Hadley, Massachusetts, never drove a school bus route (as opposed to a charter run) in Belchertown. Hughes could not, pursuant to the contract, drive a school bus in Belchertown until late September since his criminal background check was not complete until then. Curtis Littlefield's name was not submitted to the superintendent until September 9 although he drove in Belchertown prior to that date on September 5. He appears to have alternated between Belchertown and Hadley in September, but did not drive a school bus route in Belchertown between October 1, and December 31, 2003.

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¹⁸ Four hours per week for a quarter amounts to 52 hours. However, a casual employee who worked 52 hours on seven consecutive days at the beginning of a quarter and then didn't work at all afterwards might not be included in a bargaining unit under this formula.

Mary MacIntyre-Gadde-19.5 hours
 Edward Baran – 2.75 hours
 Diane Stuller-11 hours;
 Natalina King-14.12 hours

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The spare drivers appearing on Respondent's original list are the following:

Sharie Truehart. At page 17 of her affidavit of September 11, 2003, GC Exh. 17, which the parties have agreed is to be considered equivalent to her testimony, Ms. Lecrenski stated:

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Sharie Truehart was working for 5-Star, and not working for First Student in Belchertown during the last few months of the 2002-2003 school year. I had prepared to offer her a route, but she did not show up this fall. I called several times and she didn't call back.

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Truehart had no employment relationship with Respondent as of September 11, 2003. She had been laid off at the end of the 2002-2003 school year and had not yet been rehired.¹⁹ She did not drive in Belchertown until November 2003. On this basis I conclude that she was not a member of the bargaining unit on August 27, 2003.

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Susan Rousseau. Respondent hired Susan Rousseau in mid-August as the co-coordinator for the Belchertown garage at a salary of \$650 per week. Rousseau receives no fringe benefits such as health insurance or paid vacations. Unlike other drivers, Rousseau does not fill out timesheets for the time spent driving a school bus.

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Theresa Lecrenski introduced Rousseau to the school board as the person to contact at the Belchertown garage. Respondent's contract with the Belchertown School Committee requires it to "appoint or assign one supervisor on site to be in charge of the routes within the District's transportation system." Rousseau is the person so designated. However, the fact that she is Respondent's "supervisor" within the meaning of its contract with the School District does not mean that she is necessarily a supervisor within the meaning of Section 2(11) of the Act.

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Rousseau's primary function is to make sure that there is a driver for every route, every run. If the regular driver is unavailable, she finds a replacement and sometimes drives a school bus route herself. She sometimes selects replacements on the basis of their familiarity with the route in question. Rousseau checks other drivers' time sheets for accuracy and performs office work when she does not drive. At times she accompanies new drivers to show them their bus route.

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Section 2(11) of the Act, defines "supervisor" as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

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A party seeking to exclude an individual from the category of an "employee" has the burden of establishing supervisory authority. The exercise of independent judgment with

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¹⁹ Five Star drivers are laid off for the summer and collect unemployment insurance. They are rehired in the fall.

respect to any one of the factors set forth in section 2(11) establishes that an individual is a supervisor. However, not all decision-making constitutes the independent judgment necessary to establish that an individual is a statutory supervisor. Similarly, the fact that an individual gives direction to other employees without first checking with a higher authority, does not necessarily make one a supervisor. For example, an individual does not necessarily become a supervisor in situations in which his authority to direct employees emanates solely from his skill or experience, *Southern Bleachery and Print Works, Inc.*, 115 NLRB 787, 791 (1956), enfd. 257 F. 2d 235, 239 (4th Cir. 1958). Moreover, the exercise of supervisory authority on an irregular and sporadic basis is not sufficient to establish supervisory status, *Browne of Houston*, 280 NLRB 1222, 1225 (1986).

Rousseau's exercise of her limited authority does not entail sufficient independent judgment to make her a supervisor. Moreover, I find that the fact that she is salaried and the regular drivers are hourly is insufficient to exclude Rousseau from the bargaining unit as a spare.

However, I find that Respondent has established only that Rousseau drove a school bus route on two days, August 28 and September 24, R. Exh. 9. I give no weight to her testimony that she drove on other days in the fall of 2003, for which there is no documentation. Applying the *Davison-Paxon* criteria, I find that Rousseau has insufficient community of interest to be considered part of the bargaining unit.

Clark Isham: Clark Isham was on Respondent's original list of approved drivers for the Belchertown School District and also on a list Five Star submitted to the South Hadley School District. Between August 27, and December 31, 2003, Isham drove a school bus route in Belchertown on just one occasion, route 2, on the morning of August 28. Due to the paucity of his contacts with other Belchertown drivers, I deem that Isham had an insufficient community of interests with the Belchertown drivers to be included in the bargaining unit.

Judith Marsche: Judy Marsche drove school busses for Respondent between August and December 2003. However, she did not drive a school bus route even once in Belchertown during that time period. Marsche may have driven twice in Belchertown between January and April 2004, but was driving regularly in the town of Hatfield. When Christine Caney left Respondent's employ, Donald Lecrenski took over Caney's route until the Respondent could obtain Marsche's release from her obligations in Hatfield.²⁰ On these facts I deem that Judy Marsche should be excluded from the bargaining unit under the *Davison-Paxton* criteria.

Stephanie Meloni: Stephanie Meloni did not drive a single school bus route in Belchertown between August 27, 2003 and the hearing in this matter. Thus, there is no evidence on which to conclude that she has any interests similar to those of bargaining unit members. She therefore should be excluded from the unit.

²⁰ Of the 20 regular route drivers who drove on the morning of August 27, 2003, at least eight no longer worked for Respondent in Belchertown by the time of the hearing in this matter in April 2004 (MacIntyre-Gaddie, Barran, Caney, Brady, Demetrius, King, Suller and Forget). Thus, there were plenty of openings for employees who had not been bargaining unit employees earlier in the school year.

Donald Lecrenski: Donald Lecrenski, Theresa Lecrenski's brother-in-law, is the fleet manager for Respondent's busses. He is responsible for 70 busses at several different locations. On most days, Donald Lecrenski works at Respondent's garage in Agawam but he has driven school bus routes on a regular basis in Belchertown and did so as early as
 5 September. However, I would exclude Donald Lecrenski from the bargaining unit for other reasons. He is a salaried employee who works twelve months a year (6:30 a.m. to 4:30 p.m.) and doesn't fill out timesheets. Additionally, unlike any bargaining unit employee, Respondent provides Donald Lecrenski with health insurance coverage and paid holidays. I conclude that
 10 given the benefits that Lecrenski is provided, which other unit employees are not offered, that he does not have a sufficient interest in the wages, hours and terms of employment of unit employees to be included in the bargaining unit.

Donald Carter: Although Donald Carter drove in school districts other than Belchertown, he drove regular bus routes on a sufficiently regular basis and early enough in the school year
 15 that he should be included in the bargaining unit. Carter drove routes on August 28 and 29 and on several occasions in September.

Barbara Lapalme (not to be confused with Sandra Lepine, the regular driver on route 5): Barbara Lapalme did not drive a single school bus route in Belchertown as of the date of the
 20 instant hearing. I therefore conclude that she should be excluded from the bargaining unit. LaPalme primarily drove special needs routes in South Hadley. She may also have driven charters in Belchertown.²¹

Other Individuals on Respondent's lists of drivers:

Gregory Hansenko: On the list it provided to the School District on September 9, 2003, Respondent designated Gregory Hansenko as the regular route driver for route 16. Hansenko
 25 is on Respondent's original list of drivers and in fact drove Belchertown route 16 the second week of school. ²² Respondent's Belchertown contract requires it to maintain one full time mechanic. That individual is Gregory Hansenko. Mechanical work that cannot be performed by
 30 Hansenko at Belchertown is performed at Respondent's main garage in Agawam.

Hansenko's terms of employment, however, differ from the other drivers' in a number of respects. He works from 6:30 a.m. to 5 p.m., while bus route drivers work several hours in the
 35 morning and several hours in the afternoon, less than an 8-hour day. Respondent employs Hansenko for twelve months of the year; other drivers are laid off for the summer. He is also salaried and gets a paid vacation in the summer. Additionally, Respondent accords Hansenko paid sick time and on occasion, paid personal days. None of the other Belchertown drivers have
 40 such a benefit and these facts are sufficient in my view to exclude Hansenko from the bargaining unit. Due to his significantly different status, I deem Hansenko to have an insufficient community of interest with the other drivers to be included in the bargaining unit, *Dlubak Corp.*, 307 NLRB 1138, 1167-72 (1992).²³

²¹ I conclude that an employee who drove charter runs and did not regularly drive school bus routes early in the school year is not a member of the bargaining unit. Only those who regularly drove school bus routes had an sufficient community interest with bargaining unit members.

²² Amy Randall, who drove route 16 on the first day of school, switched to route 9, replacing Natalina King, who only drove the first two days.

²³ The fact that certain employees are salaried and receive better benefits than hourly employees does not always warrant excluding them from the same bargaining unit as hourly

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Joseph Marsche: Joseph Marsche, whose name appears on exhibit R-2, began driving route 10 as the regular driver on September 3, 2003. There is no evidence that Joseph Marsche worked as a spare driver in Belchertown. He replaced Diane Stuller as the regular driver on route 10, as R. Exhibit 1 indicates. Applying the *Davison-Paxon* criteria, I include Joseph Marsche in the bargaining unit as a regular driver.

Bienvenido Torres: Torres appears on R. Exhibit 2 and took over route 2 a few days after the beginning of the school year as the regular driver. He is a member of the bargaining unit under *Davison-Paxon* as a regular driver.

Kim Stitzinger: Stitzinger's name appears on neither R-1 or R-2 and she did not drive a school bus in Belchertown until October 13. I exclude Stitzinger from the unit for these reasons.

In conclusion, twenty-three individuals should be included in Respondent's bargaining unit. The twenty-three members of the bargaining unit are 20 regular drivers and three spare drivers. The twenty regular drivers include the seven discriminatees, the four former First Student employees who drove busses for Respondent on August 27, 2003 and the nine drivers who would have hired for available regular driver positions in the absence of Respondent's discriminatory hiring.²⁴

The spare drivers in Respondent's unit are discriminatees Donald Caouette and Andrea MacDonald, and Five Star employee Donald Carter.²⁵ Thus, but for Respondent's illegal refusal to hire the discriminatees on August 27, 2003, thirteen of the twenty-three members of the bargaining unit were former members of the First Student bargaining unit and therefore Respondent was obligated to recognize and bargain with the Union as the exclusive representative of its bargaining unit employees.

Summary of Conclusions of Law

1. Respondent, Five Star Transportation, Inc., violated Section 8(a)(1) of the Act in refusing to consider for hire and in refusing the hire Donald Caouette, Patricia Grasso, Steve Kahn, Suzanne LeClair, Andrea MacDonald, Terri Nadle, Caron Rose, Pauline Taylor and Deborah Wenzel.

employees, *K. G. Knitting Mills*, 320 NLRB 374 (1995) [a case in which, unlike the instant case, such employees performed exclusively bargaining unit work]. However, the totality of the circumstances regarding the wages, hours and terms of employment of Gregory Hansenko and Donald Lecrenski, convinces me that neither have a sufficient community of interest with hourly employees who exclusively drive the school busses. This is even more evident in the case of Lecrenski than it is in Hansenko's situation.

²⁴ Although 14 of Respondent's regular drivers, who were not members of the First Student bargaining unit, qualify as unit members using the *Davison-Paxon* criteria, there would have only been nine regular driver positions available on August 27, had Respondent hired the seven discriminatees who were regular drivers.

²⁵ Benvenido Torres, Joseph Marsche and Petrina Williams-Hidalgo never worked as spare drivers; they each replaced a regular driver who quit on the first or second day of work. Torres replaced Baran as the regular route 2 driver; Marsche replaced Diane Stuller. Williams-Hidalgo was the regular route 14 drivers, although she apparently did not transport students on August 27, GC Exh. 20. On GC Exhibits 9 and R. 1, these three drivers are listed as regular route drivers. The markings on R. Exh. 2 also indicate that these three were never spare drivers for Belchertown.

2. Respondent, in telling discriminatees Nadle, Rose and Taylor that they were not being hired due to their protected communications with the school committee, violated Section 8(a)(1) of the Act.

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3. Respondent had hired a substantial and representative complement of its workforce on the morning of August 27, 2003.

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4. On the morning of August 27, 2003, absent its discriminatory refusal to hire nine discriminatees, a majority of the members of Respondent's bargaining unit, i.e., regular route bus drivers and spare route drivers, would have been members of the bargaining unit of First Student, Inc., the Belchertown school bus contractor prior to Respondent.

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5. Respondent is a successor employer to First Student and is thus obligated to recognize and bargain with the Union, which represented First Student's bargaining unit employees.

Remedy

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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.

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The Respondent having discriminatorily refused to hire employees, it must offer them employment and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date they would have been hired absent discrimination to the date of a proper offer of employment, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁶

ORDER

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The Respondent, Five Star Transportation, Inc., Agawam, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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(a) Refusing to hire or consider for hire any employee for engaging in protected concerted activity or otherwise discriminating against any employee for engaging in protected activity.

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(b) Telling employees that they are not being hired or otherwise being discriminated against due to protected activity.

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²⁶ 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.

(c) 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.

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(a) On request, bargain with the Union as the exclusive representative of the employees in an appropriate bargaining unit consisting of regular school bus route drivers and spare school bus route drivers, concerning terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement.

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(b) Within 14 days from the date of the Board's Order, offer Donald Caouette, Patricia Grasso, Steve Kahn, Suzanne LeClair, Andrea MacDonald, Terri Nadle, Caron Rose, Pauline Taylor and Deborah Wenzel full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

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(c) Make Donald Caouette, Patricia Grasso, Steve Kahn, Suzanne LeClair, Andrea MacDonald, Terri Nadle, Caron Rose, Pauline Taylor and Deborah Wenzel whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the Decision.

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(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discrimination in hiring, and within 3 days thereafter notify the employees in writing that this has been done and that the circumstances surrounding this discrimination will not be used against them in any way.

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(e) 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.

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(f) Within 14 days after service by the Region, post at its Belchertown, Massachusetts facility copies of the attached Notice marked "Appendix."²⁷ Copies of the Notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by the Respondent at any time since August 27, 2003.

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²⁷ 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."

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(g) 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.

5 Dated, Washington, D.C. June 23, 2004.

Arthur J. Amchan
Administrative Law Judge

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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 discriminate against any of you in consideration for employment for engaging in activities protected by the National Labor Relations Act.

WE WILL NOT tell any of you that you are being discriminated against in consideration for employment due to your protected activities.

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

WE WILL, on request, bargain with the Union, Transportation Division, United Food and Commercial Workers Union, Local 1459, and put in writing and sign any agreement reached on terms and conditions of employment for our employees in a bargaining unit consisting of regular school bus route drivers and spare school bus route drivers.

WE WILL, within 14 days from the date of this Order, offer Donald Caouette, Patricia Grasso, Steve Kahn, Suzanne LeClair, Andrea MacDonald, Terri Nadle, Caron Rose, Pauline Taylor and Deborah Wenzel full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Donald Caouette, Patricia Grasso, Steve Kahn, Suzanne LeClair, Andrea MacDonald, Terri Nadle, Caron Rose, Pauline Taylor and Deborah Wenzel whole for any loss of earnings and other benefits resulting from our refusal to hire them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to our unlawful refusal to hire Donald Caouette, Patricia Grasso, Steve Kahn, Suzanne LeClair, Andrea MacDonald, Terri Nadle, Caron Rose, Pauline Taylor and Deborah Wenzel and WE

WILL, within 3 days thereafter, notify each of them in writing that this has been done and that their protected concerted activities will not be used against them in any way.

FIVE STAR TRANSPORTATION, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

10 Causeway Street, Boston Federal Building, 6th Floor, Room 601, Boston, MA 02222-1072
(617) 565-6700, Hours of Operation: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (617) 565-6701.