

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

FIRST STUDENT, INC.

and

Cases 19-CA-090217
19-RC-082833

GENERAL TEAMSTERS LOCAL UNION
NO. 174, affiliated with the INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

ACTING GENERAL COUNSEL’S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

Counsel for the Acting General Counsel (“Acting General Counsel”) respectfully submits this Brief to Administrative Law Judge Joel P. Biblowitz seeking an Order finding that First Student, Inc. (“Respondent”), violated the Act by unlawfully withholding regularly scheduled wage increases for those drivers at the top of the wage scale in retaliation for their union activity and by issuing a memorandum to employees announcing that step 9 drivers would not receive wage increases because Respondent’s drivers were seeking an election for representation by General Teamsters Union Local 174 (“Union”). Accordingly, Acting General Counsel also seeks an Order requiring Respondent to, *inter alia*, cease and desist from committing these unfair labor practices in violation of the National Labor Relations Act (the “Act”), as amended, 29 U.S.C. § 151 *et seq.*, and make the step 9 drivers whole.

I. INTRODUCTION

This is a straight forward case with undisputed facts. In August 2012, shortly before an election for the Union to represent approximately 417 school bus drivers working for Respondent in Seattle, Washington, Respondent withheld a regularly scheduled wage

increase for the 168 bus drivers at the top step of the wage scale. Respondent admits that this decision was based on the pending Union election. Indeed, Respondent issued a memorandum to its drivers on September 14, 2012, four days before the election, explaining that drivers at the top step of the wage scale did not get a pay increase because there was a union election pending.

On September 18, 2012, the Union lost the representation election by 168 to 154 out of 417 eligible voters. On September 25, 2012, the Union filed objections to the election. On September 27, 2012, the Union filed the charge underlying the instant matter. The objections and the unfair labor practices were consolidated for hearing and a hearing was held on January 8, 2013, before the Honorable Joel P. Biblowitz in Seattle, Washington.

II. STATEMENT OF FACTS¹

A. Background Information

Respondent has a district-wide contract with the Seattle School District to provide transportation for students both to and from schools. (18:6-8). On June 11, 2012, the Union filed representation petition 19-RC-082833 seeking to represent Respondent's approximate 417 school bus drivers employed in Seattle. (19:1-6) (J Exh. 1: ¶ 3; GC Exhs. 1(a), 1(b)). On June 22, 2012, the Regional Director approved a stipulated election agreement setting an election date in mid-September 2012. (J Exh. 1: ¶ 3). On September 18, 2012, the Union lost the election to represent the drivers by 168 to 154 out of 417 eligible voters. (18:22-25; 19:1-8; 23:14-16) (J Exh. 1: ¶ 4) (GC Exh. 1(b)).

¹ References to the transcript appear as (---). The first number refers to the pages; the second to the lines. References to General Counsel Exhibits appear as (GC Exh. --). References to Respondent Exhibits appear as (R Exh. --). References to Joint Exhibits appear as (J Exh. --).

B. Drivers' Wage Scale

Drivers advance through a 9-step wage scale during their tenure with Respondent. (23:20-25) (J Exh. 1: ¶ 5-6). Drivers begin at step 1 in their first year, advancing by a step each year of continuous employment. (23:22-25) (J Exh. 1: ¶ 5). Once drivers top out at the 9th step, after 9 years of employment, drivers receive wage increases based on an analysis of the cost of living, client contract requirements, and Respondent's ability to make adjustments. (24:1-4; 58:17-25; 59:1-7). Approximately 168 out of Respondent's 417 drivers are at step 9; almost half the unit. (J Exh. 1: ¶ 8). Respondent has a history of always giving a cost of living increase to the step 9 drivers. (J Exh. 1: ¶ 7).

As illustrated below, since at least 2005, step 9 drivers have received the following increases:

Top Tier Wage Increases 2005-Present	
<u>Year</u>	<u>Wage (increase)</u>
2005-2006	\$16.60
2006-2007	\$16.95
2007-2008	\$17.35
2008-2009	\$18.80
2009-2010	\$19.05
2010-2011	\$20.25
2011-2012	\$20.70
2012	\$20.70

(J Exh. 1: ¶ 7).

C. Respondent Does Not Give Step 9 Drivers their Annual Wage Increase Due to the Pending Union Election

In around August 2012, the Employer's Senior Vice President for the Western Region, Cal Hull, withheld the step 9 drivers' annual wage increase because the Union had filed a petition for an election despite having always given them this wage increase at the start of the year. (24:6-15)(53:19-25) (J Exh. 1: ¶ 7). Drivers advancing to steps 2 through

8 received their increases, as theirs were inherent in advancing to the next step of the scale. (54:2-3)

On September 14, 2012, Respondent distributed a memorandum flyer to all drivers explaining that the drivers at the top of the pay scale did not receive a wage increase at the start of the year:

...because the company is prohibited by federal law from making unilateral changes to the current pay scale when there is a union election pending. We were unable to change the already existing top pay rate. Employees who were not at the top of the wage scale were advanced to the next step on the scale because those steps were already established. We apologize for this however, we want you to be informed of the reasons.” (24:18-20; 25:18-20) (J Exh. 1: ¶ 12, Attachment “A”; GC Exh. 3).

As Respondent clearly stated in its memorandum flyer, this denial of increase was due to the Union campaign; those locations with no organizing activity received theirs. Respondent gave wage increases to employees at the top of the wage scale at both its Steilacoom and Rochester locations. (J Exh. 1: ¶ 10-11). While topped-out drivers in Steilacoom received a \$.25 an hour wage increase, topped out drivers in Rochester received a \$.30 an hour wage increase. (J Exh. 1: ¶ 10-11).

Senior Vice President Hull testified that Respondent never officially explained to its Seattle drivers that step 9 drivers would receive a wage increase after the election. (59:13-18). Hull further testified that this memorandum flyer similarly made no mention of step 9 drivers’ prospectively receiving wage increases after the election or that the wage increase was only temporarily delayed. (59:13-25; 60:1-2). (J Exh. 1: ¶ 12, Attachment “A”, GC Exh. 3). The only evidence that Respondent informed step 9 drivers that they would receive a wage increase at all occurred one week after the election in a one-on-one conversation between step 9 driver Richard Drummond and Senior Contract Manager Gail Heaton. (27:1-21).

III. ARGUMENT

Respondent violated Sections 8(a)(1) and (3) of the Act by withholding regularly scheduled wage increases for its step 9 drivers shortly before the election. Respondent further violated Section 8(a)(1) by informing its drivers in its September 14, 2012 memorandum that it was withholding wage increases for its step 9 drivers, which constitute nearly half of the unit, because of the pending election that was a direct result of employees' Union and protected activities.

A. Respondent Violated § 8(a)(3) when it Unlawfully Withheld Regularly Scheduled Wage Increases because Employees sought Union Representation

It is well established that, in the midst of an on-going union organizing or election campaign, an employer must proceed with an expected wage or benefit adjustment as if the organizing or election campaign had not been in progress. *Grouse Mountain Lodge*, 333 NLRB 1322, 1324 (2001); *Atlantic Forest Products*, 282 NLRB 855, 858 (1987). The only exception to this rule is the postponement of the implementation of such a wage or benefit adjustment, if the employer makes it clear to its employees that the granting of the adjustment is not dependent upon the result of the union campaign and that the 'sole purpose' of the postponement is to avoid the appearance of influencing employees in their decision to support the union or influence the election's outcome. *Grouse Mountain Lodge*, 333 NLRB at 1324; *KMST-TV, Channel 46*, 302 NLRB 381, 382 (1991). Moreover, the Board has found that an employer violates Section 8(a)(3) when it attributes the absence of a regular wage increase to a union and/or union activity. *Aluminum Casting & Engineering co., Inc.*, 328 NLRB 8, 8-9 (1999).

As this record reveals, Respondent regularly gave annual wage increases to step 9 drivers and the sole reason it withheld the wage increase in 2012 was the pending election. This withholding of a wage increase impacted almost half of the unit. Moreover,

Respondent gave wage increases to its top step drivers at its two other non-union facilities demonstrating that the only factor in withholding the wage increase was the pending election. Indeed, Respondent does not even deny that the election was the sole justification for withholding the wage increase.

B. Respondent Violated §8(a)(1) because it was not Justified in Withholding the Annual Step 9 Wage Increases and by Blaming the Union for Withholding the Step 9 Wage Increases

Respondent, in the September 14 memorandum, excused its withholding of the step 9 drivers' regularly scheduled increases because of the pending representation election. This implicitly placed the blame on the Union and those employees seeking representation. Moreover, Respondent's September 14 memorandum distributed to all the drivers did not contain any of the safeguards described in *Atlantic Forest Products*, 282 NLRB 855, 858 (1987), necessary to invoke the exception. More specifically, Respondent, did not state that the wage increase was withheld solely to prevent the appearance that it was interfering with employee choice and that the wage increase was not contingent upon the outcome of the election.

Respondent's failure is comparable to *Centre Engineering*, 253 NLRB 419 (1980), where the employer unlawfully stated that it could not give a raise while the election was pending because its "hands were tied." See also *Keeler Brass Company*, 327 NLRB 585, 587 (1999) (employer unlawfully withheld favorable changes to retirement plan when told employees that "Our hands are tied now. We can't change anything that could be viewed as a bribe, in view of a possible new election"). Finally, the September 14, 2012 memorandum was distributed to all employees in the unit, which is far in excess of the level of distribution required by *Crown Bolt, Inc.*, 343 NLRB 776 (2005).

IV. CONCLUSION

Based on the foregoing, Acting General Counsel requests that the Administrative Law Judge find that Respondents violated Sections 8(a)(1) and (3) of the Act as alleged and order that Respondents make whole step 9 drivers by paying them wage increases; reimburse step 9 drivers for amounts equal to the difference in taxes owed upon receipt of a lump sum payment and taxes that would have been owed had there been no discrimination; submit appropriate documentation to the Social Security Administration so that backpay received is allocated to the appropriate period; find that Respondent made unlawful statements in its September 14, 2012 memorandum issued to drivers by blaming the pending Union election for the step 9 drivers' failure to receive wage increases; require that Respondent post an appropriate Notice to Employees, and order such other relief as may be necessary and appropriate to effectuate the policies and purposes of the Act.

DATED at Seattle, Washington, this 22nd day of January, 2013.



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**AFFIDAVIT OF SERVICE OF ACTING GENERAL COUNSEL'S BRIEF TO THE
ADMINISTRATIVE LAW JUDGE.**

I, the undersigned employee of the National Labor Relations Board, state under oath that on January 22, 2013, I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

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ADMINISTRATIVE LAW JUDGE
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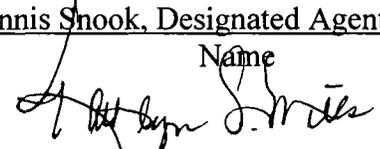
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January 22, 2013.
Date

/s/ DENNIS SNOOK
Dennis Snook, Designated Agent of NLRB
Name

Kathlyn L. Mills, Secretary
Signature