

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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 ANSWERING BRIEF TO RESPONDENT'S  
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Counsel for the Acting General Counsel ("Acting General Counsel"), pursuant to Section 102.46(d)(1), respectfully submits this Answering Brief to Respondent's Exceptions to the Decision ("Decision") of Administrative Law Judge Joel P. Biblowitz (the "ALJ"). The Decision issued on February 4, 2013, in the above captioned cases, finding that First Student, Inc. ("Respondent"), violated Sections 8(a)(1) and (3) of the Act by withholding its annual wage increases to its Step 9 school bus drivers and blaming it on the pending representation election for Teamsters Local No. 174 ("Union").

As a result of finding the above violations, the ALJ determined that the election should be set aside and a new election conducted and that Respondent be ordered to reimburse all of its Step 9 school bus drivers for the losses they suffered, including compound interest. The ALJ determined that it would be appropriate to file a special report with the Social Security Administration allocating the employees' back wages to the appropriate calendar quarters and to compensate the employees for any adverse income tax consequences of receiving these back wages in one lump sum backpay award covering periods longer than 1 year. *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

The ALJ set forth a well-reasoned analysis for his findings that Respondent violated Sections 8(a)(1) and (3) of the Act. While Respondent has indicated that it has made retroactive payments to the affected unit members, instead of allowing the compliance phase of this case to begin, it has filed Exceptions to the Decision resulting in further delay to the rerunning of the election. The ALJ's findings are correct and entitled to deference by the Board notwithstanding the issues raised in Respondent's exceptions, which are addressed below.

### I. ANALYSIS

The ALJ correctly concluded that Respondent violated Sections 8(a)(1) and (3) of the Act by not granting the wage increase to its Step 9 drivers and by telling them that it was withholding the increase because of the upcoming Union election.<sup>1</sup> (ALJD 4:30-33). The ALJ determined that in the past, all drivers received yearly increases on or shortly prior to the beginning of the school year. (ALJD 2:28-31, 34-35). While the drivers below Step 9 received established wage increases yearly, the Step 9 drivers received wage increases that fluctuated from twenty five cents to forty five cents hourly from 2005 to 2012. (ALJD 2:25-31). The ALJ logically concluded that Respondent blamed the Union for its withholding of the wage increase based on Respondent's memorandum distributed to all employees, in which Respondent claimed that Federal Law prohibited them "...from making unilateral changes to the current pay scale when there is a union election pending." (ALJD 3:50-51; 4:1-14). Thus, the ALJ determined that Respondent violated the Act by failing to grant the wage increase to the Step 9 drivers and by blaming the Union for its failure to grant the increase. (ALJD 4:30-33).

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<sup>1</sup> References to the Decision appear as (ALJD \_\_:\_\_). The first number refers to the pages; the second to the lines. References to Joint Exhibits appear as (J Exh. --).

**A. The ALJ properly found that Respondent withheld an annual wage increase to its Step 9 drivers and blamed it on the pending Union election**

Respondent attempts to argue that the wage rate for Step 9 drivers is variable from year to year and that at no time did Respondent represent that a wage increase would not occur at a future date. Respondent also attempts to characterize its decision to not give Step 9 drivers a wage increase in August 2012, as a decision to delay a wage increase rather than as a decision to withhold a wage increase. Respondent seeks to characterize the memorandum it distributed as intentionally vague so that employees would avoid making inferences about whether wage increases would occur, and, if so, by what amount. Respondent argues that because it regularly increased Step 9 drivers' wages, it was a more likely and probable inference that wages were being deferred rather than withheld. Moreover, Respondent contends that this inference was indeed proper since Respondent did, in fact, implement appropriate wage increases retroactive to August 2012 after the hearing date in the instant matter.

In addition to these assertions, Respondent argues in its Exceptions that it was caught between the proverbial "rock and a hard place" and proceeds to list four options that it contends it had: 1). increase the Step 9 driver wages without explanation; 2.) increase Step 9 driver wages and provide a similar explanation to the one given in the present case; 3). maintain the Step 9 drivers at their current wage rate and provide no explanation whatsoever; or 4) maintain the current wage rate and provide an explanation (as it contends it did in the instant matter).

Respondent leaves out a critical option and the one dictated by the law -- inform employees that wage increases are being deferred until after the election and that the increases will be paid regardless of outcome. See *Noah's Bay Area Bagels, LLC*, 331 NLRB 188, 189 (2000); *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"). Apart from this one exception, contrary to Respondent's arguments, 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); *Lampi LLC*, 322 NLRB 502 (1996); *Atlantic Forest Products*, 282 NLRB 855, 858 (1987).

Rather than informing employees that the expected benefits would be deferred, as it was entitled to do, Respondent informed employees that it was prohibited from changing the pay scale when there was a pending union election. As such, and as the ALJ correctly found, Respondent unlawfully withheld wages and blamed the Union for its decision to do so.

**B. The ALJ properly found that September 18, 2012 election should be set aside and a new election held**

As discussed above, longstanding Board law dictates that during an election campaign for union representation, an employer must proceed with an expected wage or benefit adjustment as if the election campaign had not been in progress. *Grouse Mountain Lodge*, 333 NLRB 1322, 1324 (2001); *Lampi LLC*, 322 NLRB 502 (1996); *Atlantic Forest Products*, 282 NLRB 855, 858 (1987). The clear exception to this rule is that an employer can postpone the implementation of such a wage or benefit adjustment, if the employer makes it clear to its employees that it is postponing the wage or benefit adjustment in order to avoid creating the appearance of interfering with the election, and that the employees are expressly told that the implementation of expected benefits is deferred until after the election regardless of outcome. *Noah's Bay Area Bagels, LLC*, 331 NLRB 188, 189 (2000).

Here, the ALJ correctly found that 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. (ALJD 2:27-32; 3:46-50). This withholding of a wage increase impacted almost half of the unit. (ALJD 2:5-11; 31-32). 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. (J Exh. 1: ¶ 10-11). Indeed, Respondent does not even deny that the election was the sole justification for withholding the wage increase. (ALJD 2:38-51). Accordingly, it was entirely appropriate for the ALJ to order that the September 18, 2012 election be set aside and a new election held since Respondent interfered with employees' free choice in the election by its unlawful actions. *Dorn Transportation Company, Inc.*, 168 NLRB 457 (1967); *The Gates Rubber Company*, 182 NLRB 95 (1970).

**C. The ALJ properly determined the appropriate remedial measures to reimburse the Step 9 drivers**

Respondent argues that because it implemented a \$0.30 an hour wage increase retroactive to August 2012 for the Step 9 drivers after the hearing date, the ALJ's decision regarding remedy should be vacated in its entirety as the employees have been adequately compensated with retroactive increases. This argument is putting the cart before the horse; the appropriate time to make such an argument is during the compliance phase when Respondent can provide evidence showing that it, in fact, paid everyone entitled to the Step 9 increase and that the \$0.30 an hour wage increase was appropriate considering all relevant factors such as cost of living, client contract requirements, and Respondent's ability to make adjustments. Indeed, during the compliance phase of processing this matter it may very well be accurate that employees have been adequately compensated, but that matter is appropriately left to the compliance phase.

Additionally, the ALJ correctly determined that Respondent be required to file a special report with the Social Security Administration allocating the employees' back wages to the appropriate calendar quarters and to compensate the employees for any adverse income tax consequences of receiving these back wages in one lump sum backpay award covering periods longer than 1 year. (ALJD 5:13-18). *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

## II. CONCLUSION

Based on the foregoing, Respondent's Exceptions have no merit. The ALJ's findings and conclusions were based on a correct analysis of the facts and reasonable interpretation and application of the law. As a result, the Board should adopt these findings and conclusions.

DATED at Seattle, Washington, this 14<sup>th</sup> day of March, 2013.



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JUDGE.**

I, the undersigned employee of the National Labor Relations Board, state under oath that on March 14, 2013, I served the above-entitled document(s) by E-File, E-mail and post-paid regular mail upon the following persons, addressed to them at the following addresses:

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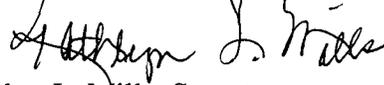
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