

**BEFORE THE  
NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

FIRST STUDENT, INC.,

Employer,

and

TEAMSTERS LOCAL 174, affiliated  
with the INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS,

Petitioner.

**Case Nos.: 19-CA-090217  
19-RC-082833**

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**TEAMSTERS LOCAL 174'S BRIEF IN RESPONSE  
TO EMPLOYER'S EXCEPTIONS**

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## **INTRODUCTION**

On September 18, 2012, Teamsters Local 174 (“Local 174”) narrowly lost a representation election at which First Student’s Seattle bus drivers voted on whether to elect Local 174 as their exclusive bargaining representative. In a unit of 417 eligible voters, the Union lost by just 14 votes, 168-154. The Administrative Law Judge (ALJ) correctly found that First Student’s decision to withhold wage increases to its top earning Step 9 drivers violated its well-established past practice of raising the pay ceiling for the top earning drivers at the start of the new school year and violated its duty to proceed with projected wage or benefit improvements as it would if the Union were not on the scene. First Student’s actions violated Sections 8(a)(1) and (3) of the Act, and interfered with employee free choice and laboratory conditions such that a rerun election is necessary. The ALJ’s decision should be adopted in its entirety.

## **STATEMENT OF FACTS**

The facts in this case are essentially undisputed and First Student has not excepted to any of the factual findings made by the ALJ. First Student admitted that it uses a nine tier wage scale to set rates of pay for its drivers. Joint Exhibit 1, p. 2. At the beginning of each school year, drivers automatically advance to the next step up on the tier and automatically receive a pay increase. *Id.* After nine years, drivers reach the top of the pay scale. *Id.* Every year, going back at least to the 2005-2006 school year, First Student has raised the rate of pay for top earning drivers who are at the top of the nine tiers. *Id.* Since 2005-2006, First Student has given an annual increase of this pay rate of between \$0.35 and \$1.45. *Id.* at 3. Drivers are alerted to their new rate of pay in a “Welcome Back” letter, which is mailed to all drivers at the end of August or beginning of September.

On June 11, 2012, Teamsters Local 174 filed a representation petition seeking to represent all of First Student’s Seattle bus drivers. A stipulated election agreement was reached

and an election was held on September 18, 2012. Joint Exhibit 1, p. 2. At the start of the 2012-2013 school year, and for the first time since at least prior to 2005, First Student did not provide a wage increase to drivers at the top of the pay scale. Joint Exhibit 1, Attachment A. The “Welcome Back” letter for top earning drivers indicated that top earning drivers’ rate of pay would be the same as it was from the 2011-2012 school year. The company did not specifically address the fact that wages were being withheld until September 14, 2012, when it disseminated a notice to all Seattle drivers.

We have received many questions from employees who are at the top of the current wage scale regarding why they did not get an increase in their pay at the start of this school year.

The reason for this is 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.

We hope that this answers any questions regarding the wage increases. Please see your manager if you should have any further questions and/or concerns.

Joint Exhibit 1, Attachment A. The record does not contain evidence of other communications concerning the withholding of the pay raise made prior to the election.

At trial, First Student represented that it had since decided that raises will be given to the top earning drivers and that raises will be conferred retroactively to August 12, 2012, when raises normally would have been provided to the drivers. Respondent Exhibit 1. The record makes it clear, however, that no assurance was ever given to the drivers during the pre-election period that the raises would eventually be given after the union election.

After the election, votes were tallied. The Union lost the election by 14 votes, 168-154. General Counsel Exhibit 1(b). The Union timely filed election objections challenging the

Employer's failure to give senior drivers raises, as well as violation of laboratory conditions based on the conduct of Ms. Rosenberg-Lee and Ms. Bentley. *Id.* The Union also filed an 8(a)(1) and (3) charge based on the failure to give raises. The Region issued a complaint on November 21, 2012. General Counsel Exhibit 1(f).

## LEGAL ARGUMENT

### A. THE ALJ DID NOT ERR IN FINDING THE EMPLOYER VIOLATED SECTIONS 8(A)(1) AND (3) OF THE ACT BY FAILING TO GIVE REGULARLY SCHEDULED WAGE INCREASES.

#### 1. The Employer Breached Its Duty To Act As Though No Union Was On The Scene.

In *299 Lincoln St., Inc.*, 292 NLRB 172 (1988), the Board articulated the test applicable to determine whether an employer acts lawfully in withholding a benefit while a representation election is pending:

[I]t is well settled that, in deciding whether to grant benefits while a representation election is pending, an employer should act as if no union were in the picture. Thus, if an employer withholds wage increases or accrued benefits because of union activities, and so advises employees, it violates the Act.

*Id.* at 198 (emphasis added). *See also Network Ambulance Services, Inc.*, 329 NLRB 1 (1999) (“The employer is required to proceed with projected wage or benefit improvements as if the union were not on the scene.”); *Progressive Supermarkets*, 259 NLRB 512 (1981) (withholding raises pending a Board election violates the Act if the employees otherwise would have been granted the pay raises in the normal course of the employer’s business). Thus, it is well-established that the Employer’s obligation while a union election is pending is to act as it normally would.

The Employer cites *Lampi, L.L.C.*, 322 NLRB 502 (1996) as suggesting that the withholding of raises only becomes unlawful where the purpose was to influence employees’ vote in the election. Employer’s Brief, p. 4. However, *Lampi* endorsed the exact same rule as

the cases discussed above: “As a general rule, an employer’s legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the union were not on the scene.” *Lampi*, 322 NLRB at 502. Moreover, the *Lampi* Board observed that, “the grant of a wage increase during the pendency of an election constitutes both an unfair labor practice and objectionable conduct *unless* the Respondent can justify the timing of its action.” *Id.* (emphasis added). The *Lampi* decision ultimately concluded that the employer in the case had failed to rebut the inference of unlawful motivation because its actions were not consistent with its past practice. *Id.* As discussed below, it is clear that First Student’s actions are unlawful, even relying solely upon the *Lampi* decision.

The evidence is undisputed, and First Student has not denied, that it had a well-established, unvarying practice of providing cost of living wage increases to its top-earning drivers for at least the past seven years.<sup>1</sup> Joint Exhibit 1, p. 2. It is irrelevant whether, as First Student claimed, it did not change its well-established past practice as a result of ill motive. Under decades of Board law, First Student’s duty was to act as though no union were in the picture. It violated this duty when for the first time in at least seven years, it failed to give its drivers raises.

First Student’s brief notes that “an accurate projection for increases could not yet be determined *in light of the pending election*, and a decision regarding wage increases was being postponed as a result...” *See* Employer’s Brief, p. 4 (emphasis added). This statement perfectly encapsulates the unlawful nature of the Employer’s course of action – it failed to act as it would have if no union were in the picture. *After* the Region issued a complaint, First Student was able

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<sup>1</sup> A seven year period is more than sufficient to establish a past practice of granting benefits for purposes of determining whether Sections 8(a)(1) and (3) are violated by the withholding of raises pending a union election. *See Martin Indus.*, 290 NLRB 857, 858-860 (1988) (past practice established by six years of wage increases); *Med. Ctr. at Princeton*, 269 NLRB 948, 950 (1984) (past practice established by four years of wage increases). By withholding a benefit its drivers have come to expect, First Student violated Sections 8(a)(1) and (3) of the Act.

to determine an appropriate wage increase for its Step 9 drivers, “based on data provided from management at the Seattle location, the contractual relationship with the District, and the changes in the consumer price index and the cost of living.” Employer’s Brief, p. 13. There is no justification why First Student could not have engaged in the same calculus before the union election, as it had in years past, as though no union were in the picture.

First Student also argues that, “the record fails to establish that First Student withheld wages and blamed it on the Union election.” Employer’s Brief, p. 5. However, this argument fails to recognize that in circumstances like those here, in the absence of an explanation as to why raises have been withheld, employees are likely to attribute the failure to give raises to the union. *See Martin Indus.*, 290 NLRB 857, 860 (1988) (“A reasonably prudent employer would have foreseen that such a sterile cessation of past wage practices for bargaining unit employees would be viewed by those employees as punishment for past union activities and as a warning for the future exercise of Section 7 rights in subsequent elections.”).

Moreover, even seemingly good faith attempts to explain the withholding of raises can be unlawful if they create the appearance that the withholding of wage increases is attributable to the union. In *Canned Foods, Inc.*, 332 NLRB 1449 (2000), the Board concluded that an employer did not blame the union for its failure to give raises when a supervisor explained to employees that, “he could not give [the raises] because it might appear to be a bribe because it was before the vote.” *Id.* at 1451. The supervisor also posted a memo that stated: “*I REGRET THAT I WILL NOT BE ABLE TO GIVE THE RAISES I FEEL MY CREW DESERVES!!!! I APOLOGIZE FOR THE MISUNDERSTANDING.*” *Id.* Despite the fact that the supervisor had not blamed the union, the Board found that the employer violated Sections 8(a)(1) and (3)

because “employees would reasonably tend to believe that they had lost a planned benefit as a result of protected organizational activities.” *Id.* at 1451.

A reasonable employee would interpret First Student’s statement, made in response to “many questions from employees who are at the top of the current wage scale regarding why they did not get an increase in their pay at the start of this school year,” that it was prohibited from making changes to the pay scale, as a proclamation that raises would not be issued that year. Joint Exhibit 1, Attachment A. These facts are very similar to those in *Canned Foods*. Like the supervisor’s explanation that giving raises “might appear to be a bribe because it was before the vote,” here First Student’s explanation here would reasonably tend to make employees believe that that they did not receive raises as a result of having engaged in protected activities.

**2. The Employer Did Not Communicate To Employees That Raises Would Eventually Be Given Regardless Of The Outcome Of The Election And The Exception Articulated In *Uarco* Does Not Apply.**

The Board has carved out a narrow exception to the general rule that employers must proceed with planned benefit and wage increases as though no union were on the scene while a representation election is pending. An employer does not violate the Act when it withholds raises during an election if and only if it makes clear that the benefit increase is only being temporarily suspended and that conferral of the benefit is in no way contingent on the outcome of the election, and that raises are being withheld for the sole purpose of avoiding the appearance of influencing the election. This exception was articulated in *Uarco Inc.*, 169 NLRB 1153 (1968), where the employer posted a notice that wage increases were being postponed to “avoid the appearance of vote-buying” in the upcoming representation election. *Id.* at 1153. The employer also informed employees of its intent to pay the “going wage rates...with or without a union.” *Id.* at 1154. After the election, the employer implemented the raises. Under these narrow circumstances, the Board found that the employer’s actions were not unlawful because

the employer “made clear in its campaign statements ... that whether or not its employees were represented by a union, it planned [to adjust wages] into conformity with prevailing rates in the area; and that the sole purpose of its announcement ... was to avoid the appearance that it sought to interfere with their free choice in any elections which might be directed.” *Id.* at 1154.

The *Uarco* exception does not apply when the employer’s communication about the pay raise is insufficiently clear for employees to understand that the raise is only being temporarily suspended and will be awarded after the election. *See N.L.R.B. v. Indus. Erectors, Inc.*, 712 F.2d 1131, 1135-36 (7th Cir. 1983), enforcing 261 NLRB 888 (1982) (“The company asserts that the notice in effect stated that the management would not try to bribe employees to vote against the union. The notice did not even suggest that this was its purpose, nor do we believe that an employee was likely to interpret it in this manner. If the company intended to tell employees that it was freezing unscheduled raises and benefits in order not to give the appearance of trying to influence the unionizing effort, it could have so stated.”).

First Student did not make clear to employees that the wage increase was only being temporarily suspended and that raises would be issued following the election regardless of its outcome. Calvin Hull, Senior Vice President for First Student’s West Coast operations, testified at trial that employees “understood” that the withholding of wage increases was only temporary and that the raises would be implemented following the election. However, he acknowledged that no such assurance or explanation was articulated in the notice First Student provided to all employees, and that no other such explanations had been disseminated in other communications. Indeed, the Employer admits in its brief that its communication to employees about the withholding of raises was written in a “vague manner in order to avoid inferences by employees regarding whether wage increases would occur, and if so, by what amount.” Employer’s Brief,

pp. 4-5. It also admits that, “From the plain language of the letter, an employee could have just as easily reasonably inferred that wages were being deferred as opposed to withheld.” *Id.* at 6. Such a communication is squarely outside the *Uarco* exception, which would have required the employer to clearly communicate that the raise freeze was only temporary and that raises would eventually be granted regardless of the outcome of the election. Instead, it was vague and unclear, leaving employees to draw their own assumptions.

Moreover, reasonable employees *would not* interpret the statement to mean that wage increases were only being temporarily suspended, but instead that they were being cancelled altogether. The notice is written exclusively in the past tense, reinforcing the perception that the failure to give raises is a done deal rather than an ongoing issue that will be resolved after the election and regardless of the election’s outcome. Additionally, the fact that wages were not frozen across the board, but instead singled out only the Step 9 drivers, would reasonably tend to cause employees to believe that the process of issuing raises had been completed for the 2012-2013 school year and that top-earning drivers simply would not receive wage increases that year.

Finally, the case relied upon by the Employer, *Somerset Welding & Steel, Inc. & United Steelworkers of Am.*, is inapposite. 304 NLRB 32 (1991). The Employer’s brief relies upon the case for the proposition that an employer’s communication to an employee that a raise is being deferred can in some instances be lawful. However, in *Somerset*, the Board explained that the employer’s actions were acceptable because “the increase in question was available on the basis of an apparently erratic, cyclical evaluation, subject to implementation on the basis of nonobjective, discretionary criteria,” rather than “identifiable because reasonably coextensive with a clearly defined pattern or past practice” *Id.* at 47. “Accordingly, and, as no increase had been preordained through either unmistakable promise or fixed cycle, the Respondent, in this

instance, did not violate Section 8(a)(3) and (1) of the Act.” *Id.* The *Somerset* Board was thus careful to limit its decision to situations in which a raise was not regularly scheduled. In contrast, the annual increase here was given every summer at the same time for at least seven years until the year of the union election. Whereas in *Somerset*, the timing of the employer’s decision to award a raise could justifiably be questioned, in this case the parties had come to expect that a wage increase would be afforded to all drivers at the start of the school year. Therefore, the Board’s decision in *Somerset* in no way excuses the Employer’s conduct here.

### **3. The Employer’s Catch-22 Defense Has Been Rejected By The Board.**

First Student argued at hearing and in its brief in support of its exceptions that it simply chose the least perilous course available to it. As the ALJ correctly recognized, First Student’s “damned if you do, damned if you don’t” defense has been rejected in several Board and federal court decisions. *See Indus. Erectors, supra*, 712 F.2d at 1135 (“Contrary to the company’s suggestion, an employer is not put in a ‘damned if you do, damned if you don’t’ position by the rules governing the granting or withholding of new benefits. Neither granting nor withholding benefits has been declared illegal *per se*. ... A company is supposed to act as though the union were not present.”) (internal citations omitted); *Med. Ctr. at Princeton*, 269 NLRB 948, 952-53 (1984) (Employer’s past practice of granting wage increases was “so well ingrained in the working conditions of Respondent’s employees that Respondent would not have violated the Act by granting increases.”); *NLRB v. Allied Products Corp.*, 548 F.2d 644, 652 (6th Cir. 1977), enforcing the Board Order at 218 NLRB 1246 (1975) (rejecting employer’s argument that it was “caught between the devil and the deep blue sea” and finding that Employer’s denial of a scheduled increase constituted a unilateral change in a condition of employment in violation of the Act.); *Martin Indus.*, 290 NLRB 857, 859 (1988) (“On the surface, wage issues, like those in

the instant case, appear to fall within that ‘damned if you do and damned if you don’t’ category but ‘it ain’t necessarily so’”).

Contrary to the Employer’s suggestion, it was not destined to violate the law regardless of which course it took. The only thing an Employer is prohibited from doing while an election is pending is making a *change*. If an employer regularly gives wage increases, it is clearly lawful for the Employer to continue that course of conduct during the pendency of a union election. *Associated Milk Producers*, 255 NLRB 750 (1981). For years, First Student has raised the pay scale for Step 9 drivers using various criteria, including the economy and the cost of living. First Student should have conducted an analysis using the factors it has always used to determine the amount of the raise for its Step 9 drivers.

Additionally, First Student’s ‘lose-lose’ argument is founded upon its unsubstantiated claim that for some reason, it “did not know if, how much, and when wage increases would occur” at the time it communicated to drivers about its decision not to give raises. Employer’s Brief, p. 9. It provides no explanation why such a calculus could not have been performed in summer 2012, as it had for years prior. This was a clearly lawful path before it, demonstrating the falsity of the lose-lose argument.

**B. THE ALJ DID NOT ERR IN FINDING THE UNLAWFUL FAILURE TO GIVE RAISES NECESSITATES A RERUN ELECTION.**

First Student excepted to the ALJ’s decision ordering a new election. However, its argument in support of this exception appears to rest entirely on its argument that the ALJ erred in finding that First Student violated Sections 8(a)(1) and (3). Because the ALJ correctly determined that First Student’s decision to withhold raises from its Step 9 drivers violated the law, and because First Student has not asserted any other arguments why a new election should not be held, the ALJ’s decision to order a new election should be adopted.

First Student's violation of Sections 8(a)(1) and (3) requires a new election because "[c]onduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammelled choice in an election." *Dal-Tex Optical Co., Inc.*, 137 NLRB 1782, 1786-87 (1962). Withholding raises on the pretense of a pending union election is clearly the sort of conduct which not only causes interference with the exercise of rights protected under the Act, but also interferes with employees' free choice in an election, making "laboratory conditions" impossible. An employer's ability to control wages is one of its most powerful means of leverage over employees. First Student's decision to withhold raises would reasonably cause employees to believe that wages could be withheld in the future if the employees unionized, and conversely, that the wage increase would be conferred if employees voted against the Union.

Additionally, First Student's decision to withhold raises affected 168 drivers – a significant portion of the 417 drivers who were eligible to vote in the election. Thus, the violation cannot be said to be "de minimus," as it clearly had the potential to effect the outcome of the election. *See Peppermill Casino, Inc.*, 325 NLRB 1202 (1998). It is also important that the violation occurred not just during the "critical period" between the filing of the petition and the election, *Gibraltar Steel Corp.*, 323 NLRB 601 (1997), but a mere five days before the election. Employee free choice was impossible under these circumstances, causing an egregious departure from "laboratory conditions." Because the Employer's unlawful conduct was not "de minimus" and instead was of a nature that could affect the outcome of the election, the ALJ's decision to order a rerun election should be adopted.

**C. THE ALJ DID NOT ERR IN DETERMINING APPROPRIATE REMEDIAL MEASURES.**

First Student's third exception is without foundation and appears to be moot. First Student excepts to the ALJ's decision to order First Student to pay back wages to drivers for losses caused by withholding yearly wage increases "if they have not already done so."<sup>2</sup> ALJD, 5:6-10. First Student claims that it determined that a raise of \$0.30 per hour was consistent with its actions over the past several years. *See* Employer's Brief, p. 13. If, as First Student claims, it has already "applied those wages retroactively by issuing a check to employees for the retroactive difference in wages," the ALJ's order to pay retroactive wages "if they have not already done so" should have no effect. It is therefore unclear to what First Student is taking exception. First Student's decision that \$0.30 was an appropriate and historically consistent wage increase for Step 9 drivers has not been challenged and is not at issue before the Board at this time. The sole issue is whether it was appropriate for the ALJ to order First Student to pay back wages if it had not already done so. Clearly, it was.

First Student admits in its exceptions that at the time of the hearing, Step 9 drivers had not yet received retroactive pay for their annual raises. *Id.* Instead, it claims that retroactive wage increases were being "processed" and were to be distributed on the following pay period. The record does not reflect whether the raises were in fact distributed at the next paycheck, only that First Student claimed that it planned to do so. It was entirely appropriate for the ALJ to include in his order a requirement that First Student pay its Step 9 drivers back wages "if they have not already done so." The ALJ's decision was not in error and should not be modified.

**CONCLUSION**

For the foregoing reasons, the Board should adopt the ALJ's decision in its entirety.

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<sup>2</sup> First Student's briefing supporting its third exception misquotes the ALJ's decision as requiring them to pay back wages "if they have already done so" rather than "if they have not already done so."

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of March, 2013.

A handwritten signature in black ink, appearing to read "Dmitri Iglitzin". The signature is fluid and cursive, with a horizontal line drawn underneath it.

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## CERTIFICATE OF SERVICE

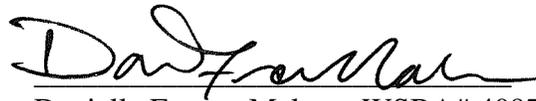
I hereby certify that on this 14<sup>th</sup> day of March, I caused the foregoing Union's Brief in Response to Employer's Exceptions to be filed electronically with the Office of the Executive Secretary at *nrlrb.gov* and a copy to be sent via electronic mail to the following:

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