

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

**FIRST STUDENT, INC.,
A DIVISION OF FIRST GROUP
AMERICA,**

Respondent,

and

**UNITED STEEL, PAPER & FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL
UNION (USW), AFL-CIO·CLC,
AND ITS LOCAL UNION 9036,**

Charging Party

Case 07-CA-092212

**BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION AND
RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE ON BEHALF
OF CHARGING PARTY UNITED STEEL, PAPER & FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS
INTERNATIONAL UNION (USW), AFL-CIO·CLC, AND ITS LOCAL UNION 9036**

Emma Reborn, Assistant General Counsel
United Steelworkers International Union
Five Gateway Center
Pittsburgh, PA 15222
412-562-2562
ereborn@usw.org

Stuart M. Israel
Legghio & Israel, P.C.
306 S. Washington, Suite 600
Royal Oak, MI 48067
28-398-5900
israel@legghioisrael.com

Counsel for the Charging Party Union

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INTRODUCTION¹

This is a “perfectly clear successor” case. It is governed by *NLRB v. Burns International Security and Spruce Up Corp.*, and Board and federal court decisions issued over the last four decades interpreting and clarifying them. *NLRB v. Burns Int’l Sec. Servs., Inc.*, 406 U.S. 272 (1972); *Spruce Up Corp.*, 209 NLRB 194 (1974), *enfd.* 529 F.2d 516 (4th Cir. 1975). Under the perfectly clear successor doctrine, a soon-to-be successor employer has the obligation to bargain initial employment terms with the union that represents its predecessor’s employees. That obligation arises at the moment the successor (a) expresses its intention to hire a majority of the existing employees and (b) does not express the intention to alter those employees’ working conditions.

The case arises from Respondent First Student’s efforts to secure a contract to provide transportation services to the Saginaw Public School District in Michigan. The school district sought a contractor who would treat its bus drivers and bus monitors like “family.” First Student portrayed itself as that contractor. Beginning in July 2011 and throughout the ten-month period

¹ This brief refers to the National Labor Relations Board as the “Board” or the “NLRB.” It refers to the Charging Party, United Steel, Paper and Forestry, Rubber, Manufacturing, Allied Industrial and Service Workers International Union, AFL-CIO-CLC as “USW,” and to its Local Union 9036 as the “local union.” The brief refers to the Charging Party unions collectively as “union.” It refers to the group of bus drivers and monitors central to this case as the “bargaining unit” or the “unit.” It refers to Respondent First Student, Inc., A Division of First Group America as “First Student,” or occasionally the “company.” It refers to Administrative Law Judge Mark Carissimi as the “ALJ,” or “ALJ Carissimi.” The brief refers to the Saginaw Public School District as the “school district,” and to the Saginaw Public School District Board of Education as the “Board of Education” or the “school board.” An unfair labor practice charge is a “ULP” charge.

The brief cites portions of the ALJ’s opinion as (ALJ [page]:[line]). It cites portions of the transcript as (Tr. [page]:[line]). It cites trial exhibits introduced by counsel to the NLRB General Counsel as “GCX.”

The brief refers to witnesses by their last names. The witnesses mentioned in the brief are, in order of appearance:

- | | |
|-------------------|---|
| • Kelley Peatross | Saginaw Public School District assistant superintendent |
| • Robert Bradley | Sodexo manager |
| • Daniel Kinsley | First Student representative |
| • Tonya DeVore | USW staff representative |
| • Douglas Meek | First Student general manager |
| • Clint Bryant | Local Union 9036 unit president |
| • Rick Kellerman | First Student representative |
| • Raymond Walther | First Student attorney |

ending on May 16, 2012, First Student (a) repeatedly expressed its intention to hire a majority of the school district's employees represented by the Charging Party union, and (b) never expressed any intention to alter the unit employees' working conditions.

First Student's false promises secured the \$9.5 million contract. However, the day after the school board voted to approve that contract, First Student circumvented the employees' union and unlawfully announced its unilateral implementation of new working conditions. The new conditions included a two-tiered wage structure, a rate of pay for non-driving duties that reduced wage rates by one-third, and the elimination of the school district's pay-for-training system. Later, First Student also unilaterally changed the attendance policy, imposing a disciplinary procedure for certain types of absences. All changes occurred without notice to or bargaining with USW.

For the six months after its initial unlawful implementation, First Student unlawfully avoided the union, and ignored repeated demands for recognition and bargaining. During this time, First Student dangled the prospect of scheduling negotiations in front of the union, but only on one condition: that the union withdraw its pending unfair labor practice charge.

ALJ Carissimi found that First Student was a successor, and obligated to bargain with the union as of August 17, 2012, after it had hired a substantial and representative component of its employees. (ALJ 18:11-13). As a consequence, he held, First Student's implementation of a new attendance policy was unlawful, as was its further two-month delay in bargaining after that date. (27:42-28:3).

However, the ALJ erroneously found that First Student was not a perfectly clear successor because, the day after the school board approved the contract but "substantially before" First Student commenced operations, the company announced certain unilateral changes

to employees' working conditions. (ALJ 24:2). The date a successor actually assumes control of its predecessor's enterprise is immaterial to the perfectly clear successor doctrine. The ALJ also erred when he found that because First Student conditioned bargaining on ULP withdrawal "only briefly" and "did not insist to impasse on it," the condition was not unlawful. (ALJ 30:26-27). The union excepts to those findings, as articulated more specifically in the exceptions document, and requests that the NLRB modify them for the reasons stated herein.

STATEMENT OF THE CASE

The testimony that the ALJ credited, with the context provided by material undisputed testimony, is sufficient to establish First Student's bargaining obligations as a perfectly clear successor. Where testimony of General Counsel's witnesses conflicted with that of First Student's witnesses, the ALJ credited the testimony of First Student's witnesses. The ALJ was also particularly impressed by the testimony of two neutral witnesses, Saginaw Public School District assistant superintendent Kelley Peatross, and Robert Bradley, who is employed as a manager for Sodexo, a contractor that provides the school district with custodial and maintenance services. (ALJ 10:14-17). The following recitation of facts established at the hearing is drawn, in large part, directly from the ALJ's decision.

The basis for the union's exceptions to the ALJ's decision is not to challenge his rulings on witness credibility, but to demonstrate that he made erroneous legal conclusions based on the evidence he did find credible, and on other undisputed testimony that he did not discredit. Even if every word of First Student's witnesses' testimony were true, there is no material disputed fact that would disturb the conclusion that, as a matter of Board law, First Student was a perfectly clear successor to the Saginaw Public School District.

I. The Credited Testimony

A. The Meeting in July 2011 Between First Student, USW, and the School District.

First Student was one of three private contractors competing to assume responsibility for the school district's transportation functions. (ALJ 8:28-30). In 2012, when the school board awarded the \$9.5 million contract to First Student, about 55 USW-represented bus drivers and monitors were employed by the district and operated the district's school buses to transport students. (ALJ 13:42-47; 17:42-43).

The school district interviewed First Student representative Daniel Kinsley at a meeting in July 2011. (ALJ 8:30-31). Tonya DeVore, the USW staff representative assigned to work with the Saginaw bus driver and monitor unit, attended the interview. (ALJ 8:35-36). The ALJ credited the following account of First Student's presentation at the meeting:

Kinsley stated that the Respondent would hire the bargaining unit employees if they met the Respondent's hiring criteria which included an application, an interview, a background check, a drug screen, and some other tests. Kinsley stated that the Respondent would maintain the current wages and planned to raise wages in the future. When Kinsley was asked whether the Respondent would recognize the Union, he indicated that the Respondent would recognize the Union if it hired 51 percent or more of the School District's employees. Kinsley further indicated that it was the Respondent's intention to hire a majority of the School District's employees if they met the Respondent's hiring protocols. Kinsley also stated that at other locations the Respondent had hired 80 to 90 percent of the existing unit.

(ALJ 8:41-9:2).

The school district's chief financial officer prepared two documents summarizing the three contractors' proposals. (ALJ 9:7-8). The summaries included the following statements about First Student's proposal: first, that First Student "will recognize union," and second, that according to First Student's proposal, "the union will be recognized." (ALJ 9:17, 18). Kinsley

testified that the school district's summaries of First Student's proposal were incomplete. (ALJ 9:28-29). Specifically, the ALJ explained:

Kinsley testified that with regard to the reference to the recognition of the Union . . . the summary was missing the qualifier that that he stated at the meeting that the Respondent would recognize the Union if it hired 51 percent or more of the School District's employees.

(ALJ 9:29-33). The ALJ credited this testimony. (ALJ 9:33-34).

B. The Meeting in March 2012 Between First Student, the Bargaining Unit, and the School District.

First Student initially met with the bargaining unit in March 2012. (ALJ 10:10-13). Douglas Meek, First Student's general manager for the geographic area that includes Saginaw, was the company's "primary spokesman," and communicated directly with the approximately 40 bargaining unit members in attendance. The ALJ found "the testimony of Meek to be the most reliable account" of the meeting, and summarized:

Meek stated that after the completion of the application and the necessary background checks, applicants would be subject to a preemployment drug screen, a physical examination and receive training. Meek stated that after completion of these requirements the Respondent would offer employment to existing employees who met their criteria.

. . . .

Meek indicated that in a conversion between a public school transportation system and the Respondent's operation, the Respondent typically hired 80 to 90 percent of the existing work force. Meek testified that he told the employees that if the workforce was represented and the Respondent hired 51 percent of the existing workforce as its own, the employees would bring their representation with them and a new contract would be negotiated.

. . . .

When asked about how many hours were going to be guaranteed to employees, Meek responded that the Respondent would use the School District's routing system but that the Respondent did not know how many hours would be worked at that time.² He indicated that the respondent would no [sic] more when the routes were established. In response to other questions regarding the conditions

² Specifically, in the portion of his testimony credited by the ALJ, Meek affirmed: "Yes, I did [discuss how First Student does bus routes]. In the Saginaw situation, we were using the district's routing system." (Tr. 421:12-14).

employees would work under if hired by the Respondent, Meek stated that those issues would be subject to negotiations.

(ALJ 10:35-39; 10:42-47; 11:1-6). Kinsley's testimony "corroborated" Meek's; as found by the ALJ, Kinsley "indicated that questions were posed to Meek regarding issues such as paid time off, vacation pay and sick pay and that Meek responded by saying those items would be subject to negotiations." (ALJ 11:13-15; 12:2).

C. **The Board of Education Meeting on May 16, 2012, Attended by First Student, USW, the Local Union, the Bargaining Unit, and the School District.**

After the school district and First Student finalized the terms of their contract, Kinsley attended a May 16 school board meeting to discuss the contract with members of the school board. (ALJ 12:14-15, 16-17). The meeting was open to the public, and Bradley, DeVore, local unit president Clint Bryant, and five bargaining unit employees were present. The ALJ credited the following account of the meeting:

According to Peatross, Kinsley said that the Respondent would offer positions to the existing employees who satisfied the Respondent's hiring requirements such as background checks and physical exams. In response to a question about the wages that Respondent would offer, Kinsley replied that the Respondent would hire current district employees at the same rate of pay. When asked if the Respondent would recognize the Union, Peatross testified that Kinsley stated that the Respondent would recognize the Union upon hiring 51 percent of the employees.

....

With respect to a question regarding whether the Respondent would recognize the Union, [Kinsley] responded that the Respondent would recognize the Union if it hired 51 percent or more of the existing work force. With regard to the Respondent's hiring process, Kinsley testified that he indicated that employees would have to submit applications, have background checks and drug screens conducted, be interviewed, and perform dexterity tests. When asked what the wages would be, Kinsley stated that the Respondent intended to maintain the wages for the current work force. He denied saying that "everything would remain the same." Kinsley testified that he did not say what terms and conditions would change when the former School District employees became Respondent's employees.

....

According to Bradley, Kinsley stated that if the Respondent hired 51 percent of the employees they would have to recognize the Union. When asked whether the Respondent would hire the existing employees, Kinsley answered that they would offer all of the employees a position as long as they completed the process involving the background checks, the physical examination, and drug screens.

(ALJ 13:2-8, 12-19, 22-26). The school board voted to approve the contract that the district had already negotiated with First Student, and later executed it. (ALJ 13:42-46).

When the meeting adjourned, DeVore and Bryant gathered outside with the bargaining unit employees. (ALJ 14:1-2). Kinsley and Bradley exited the meeting together and, when they passed the group of union members and representatives, they engaged in a conversation with them. The ALJ credited the following account of the conversation:

Bradley testified that as he and Kinsley walked past the group including DeVore and Bryant, DeVore told Kinsley that the company would be required to recognize the Union if it hired 50 percent plus one and not 51 percent of the current work force and that Kinsley should know that.

.....

Kinsley testified that as he and Bradley approached the group including DeVore and Bryant, DeVore told him that his statement about recognizing the Union if it hired 51 percent or more of the employee was incorrect and he should say that the Respondent would recognize the union if it hired 50 percent plus one of the employees. Kinsley acknowledged DeVore's statement was correct. Kinsley then stated to the group of employees that the Respondent's goal was to hire as many employees as it could that met all of the Respondent's hiring 'protocols.' He added that if employees met the Respondent's hiring criteria their wages would be maintained and 'they shouldn't have anything to worry about in coming to work for our Company.' He denied, however, saying that 'everything would remain the same.'

(ALJ 14:14-17, 20-28).³

³ The ALJ made a confusing statement about which witnesses to this conversation he was crediting. He held, "[to] the extent that the testimony of Bradley and Kinsley conflicts with that of DeVore and Bryant, I credit the testimony of Bryant and Kirby." (ALJ 14:30-33). No one named "Kirby" testified at the hearing, so it is likely that the ALJ intended to credit Kinsley. Further, after professing to credit Bryant's testimony, the ALJ noted that "Bradley is an independent witness and his demeanor reflected certainty about how the encounter began." (ALJ 14:33-34). It appears that the ALJ intended to credit Bradley's testimony, to the extent it conflicted with that of the General Counsel's witnesses, DeVore and Bryant.

D. The May 17, 2012 Meeting in the Transportation Garage, Attended by First Student, the Bargaining Unit, and the School District.

The ALJ made no explicit credibility determinations about testimony describing the meeting that First Student held with the bargaining unit on the day following the school board vote. This is likely because First Student's and the General Counsel's witnesses gave relatively consistent accounts of the meeting. (*See* ALJ 14:44-16:23). Material details were documented in a memorandum that First Student representative Rick Kellerman reviewed with the bargaining unit; no union representatives were invited to attend the meeting, although representatives of the local unit attended in their capacity as employees. (ALJ 15:4-6; 16:17-18).

As quoted by the ALJ, the memorandum opened with a paragraph that read:

Welcome to First Student. As you know, First Student has been selected as the student transportation provider for the Saginaw Public Schools. We are looking forward to working with you to serve the community.

(ALJ: 15:8-10). The memorandum continued with an overview of the conditions under which First Student intended to employ the bargaining unit. Those conditions included changes to wage rates, hours-of-work guarantees, and how training was compensated. (ALJ 16:9-15). In addition to the memorandum, First Student distributed employment applications.

E. Discussions in June 2012 Between First Student and the Local Union.

First Student engaged in discussions with local union representatives regarding employee seniority in June, less than a month after the school board vote and before First Student formally offered employment to any bus driver or monitor. (ALJ 17:40-47). The ALJ did not specifically credit or discredit any testimony about First Student's meeting with local union representatives, which occurred on June 14. Testimony from witnesses appearing on behalf of First Student and from those who appeared on behalf of the General Counsel was essentially consistent, however, which suggests that the ALJ did not find it necessary to resolve any discrepancies.

According to the ALJ, on May 17, Bryant introduced himself to First Student representatives as the local union’s president. He also introduced two stewards. (ALJ 17:1-3). First Student representative Kellerman later emailed the local union “requesting a meeting to discuss seniority issues.” (ALJ 17:4). The ALJ found that First Student and the local union met and “discuss[ed] the seniority rankings of employees who held dual roles as bus drivers and monitors . . . [and] the manner in which those employees should be ranked.” (ALJ 17:5-6, 7). After the meeting, First Student emailed the local union thanking Bryant and the stewards “for meeting . . . to try to come up with a mutual way to handle the seniority rankings” (ALJ 17:10-11). Attached to the email was “a preliminary draft of the seniority lists,” which First Student asked the local union to review. First Student asked the local union to notify the company “if there are any changes or further discussions necessary.” (ALJ 17:15-18).

Testimony from First Student’s witness, Kellerman—whose “uncontroverted testimony” on another topic the ALJ credited—established that Bryant had edited the “preliminary draft” and returned it to First Student with the union’s changes. (ALJ 16:20; Tr. 537:7-9). The ALJ found that First Student used the “mutually agreed-upon list . . . as the seniority list for the 2012-2013 school year.” (ALJ 17:25-26).

F. First Student’s Conditioning of Bargaining on USW’s Withdrawal of a ULP Charge in October 2012.

The union’s months-long effort to get First Student to the bargaining table is documented in the ALJ’s decision and the union does not except to his factual or legal findings in that regard. The union does except to the legal conclusion the ALJ drew about the series of communications between DeVore and First Student attorney Raymond Walther. The event that spurred these

communications was an unfair labor practice charge DeVore filed on September 21, alleging that First Student had unlawfully refused to recognize and bargain with the union. (ALJ 19:24-25).⁴

In response to DeVore's repeated requests to bargain, emailed in late September, Walther told her that it would make "the most sense" to delay negotiations further, until November, by which time one of Walther's First Student colleagues would have returned from maternity leave. (ALJ 19:30-33). DeVore agreed to delay negotiations if First Student reinstated the terms and conditions of employment to which the bargaining unit had been subject while employed by the school district. (ALJ 19:36-38). Walther responded to that offer with two emails. The first referenced the September 21 ULP charge. As quoted by the ALJ, the second email read:

I had some time free up in October if you would still like to start negotiations this month. If you're going to withdraw the ULP charge, I can send you a recognition letter and we can get some dates scheduled. (Of course, if you are not willing to withdraw the ULP charge, then we will not be able to begin negotiations until the Board concludes its investigation.) If you agree we can schedule a couple days the week of October 15. Let me know how you would like to proceed.

(ALJ 19:43-20:3). Before DeVore responded, Walther wrote to her again:

Could you please let me know today [October 3, 2012] if the Union intends to begin negotiations on October 15, 2012 and drop the pending ULP charge?

(ALJ 20:6-7; GCX 16). DeVore replied to Walther two days later, informing him that she was "disappointed" that First Student was:

conditioning negotiations on the Union's withdrawal of the ULP charge, filed against First Student because it has failed to bargain with or recognize the union for several months, despite the Union's continuing demand for bargaining and recognition, first made on or around May 18, 2012.

(ALJ 20:7-12; GCX 16). Later on the same day, Walther responded. He wrote that he apologized for the "confusion," adding that First Student was "happy to begin negotiations on 10/15 regardless of whether you withdraw the charge. It's just that I see no point for the charge at this

⁴ The communications are in an email chain, admitted at trial without objection. (Tr. 201-202; GCX 16).

point.” (ALJ 20:12-14). At trial, Walther—who has practiced labor law for four years—testified without contradiction that his emails conditioning recognition and bargaining on USW withdrawal of the ULP charge were “not a mistake.” (Tr. 568).

II. Other Undisputed Testimony

A. The Similarity of First Student’s and the School District’s Hiring Standards.

The hiring standards that First Student referenced before finalizing the transportation services contract were the same standards that bus drivers and monitors had satisfied to qualify for employment with the school district.

Bradley testified that the only hiring requirements First Student mentioned during the contracting process were background checks, physicals, and drug tests. Specifically, at the July 2011 meeting, Bradley testified that Kinsley said First Student’s hiring “process” included “a physical, the drug screen, and . . . one more component” that Bradley could not remember. (Tr. 399:18, 22-23).⁵ Bradley’s memory of the May 16 school board meeting was fresher. He testified that on that occasion, Kinsley said First Student “would offer all the [district] employees a position as long as they passed the process,” which involved a background check, “physical and drug screen.” (Tr. 403:6-7, 10).

Peatross testified that Kinsley “briefly touched on” hiring requirements at the May 16 school board meeting. Specifically, she testified that Kinsley “just indicated that as long as our current [unit] employees could pass their pre-screeners for employment, they would be hired.” (Tr. 385:20-22).

⁵ DeVore, who attended the July 2011 meeting, corroborated and added detail to Bradley’s account. She testified, without contradiction, that Kinsley told her and school district representatives that district “employees would be hired if they would meet [First Student’s] hiring practices, which consisted of a CDL, a drug screen and a physical, and a background check.” (Tr. 177:7-9). The ALJ only discredited DeVore’s testimony to the extent it conflicted with that of Bradley and Peatross. (ALJ fn.5).

First Student's witnesses corroborated the testimony of the two "neutral" witnesses. (ALJ 13:30). Meek testified that, at the March meeting, he told the unit employees that while First Student required new bus drivers to go through 55 hours of training, the hours of training for the unit employees "would be less based upon their experience." (Tr. 419:12). He continued, explaining that following the training and "completion of the application form and the necessary requirement background checks, which we meet state requirements for hiring bus drivers, and our review to make sure that the physicals, the pre-employment drug screen and all the necessary documentation is in play, then offers of employment would be extended to those whom we felt met all of our criteria." (Tr. 419:14-20). Kellerman agreed that "the drug tests and so forth are Department of Transportation formats." (Tr. 527:19-20).

The consistency of the school district's and First Student's hiring prerequisites was established by the testimony of First Student witnesses. Meek and Kellerman both acknowledged that First Student's prerequisites were state requirements, equally applicable to the existing bus drivers and monitors when they applied for school district positions. (Tr. 419:15-16; 527:19-20). Meek, who the ALJ credited unreservedly, testified that First Student would conduct "the necessary requirement background checks, [through] which we meet state requirements for hiring bus drivers" (Tr. 419:15-16).

Bryant, a bus driver, spoke with the personal knowledge of an employee subject to both school district and First Student hiring requirements. Bryant testified without contradiction that the hiring prerequisites Kinsley announced on May 16 were "much like" the school district's hiring prerequisites. (Tr. 49:15-16). Bryant testified, specifically, that he had undergone a background check, a drug test, and a physical before the school district hired him and that he continued to be subject to regular physicals and random drug tests as a district employee. (Tr.

51:6, 11-12, 14, 17, 21). Bryant testified that based on the hiring requirements that First Student had announced, he and the rest of the bargaining unit believed “all employees were going to transition. Anything we had to do prior to the first day of school [in September 2012] was a formality. We regularly did a physical, we regularly did like a background check. I mean that was nothing new, and also a drug screen. We did drug screens with Saginaw Schools.” (Tr. 153:11-16).

B. First Student’s Announced Adoption of the School District’s School Bus Routing System.

As discussed above, the ALJ credited Meek’s testimony that First Student had told the bargaining unit that it would use the school district’s routing system to plan bus routes for the coming school year. (ALJ 11:2-3). On the same issue, Peatross, whose testimony about the March meeting was also credited by the ALJ, corroborated Meek’s statement and said that Meek “identified that they [First Student] would have to look at what the routes would be in order to determine the hours that would be provided.” (Tr. 383-12-14).

C. First Student’s Announcement that Terms and Conditions of Employment Will Be Subject to Bargaining with USW.

Meek, whose credited testimony emphasized his statements to the bargaining unit that the terms of their employment with First Student were “subject to negotiations,” elaborated on that subject. In undisputed testimony, Meek explained that his references to negotiations—which he made “more than once”—contemplated the following scenario: “[t]he Union that represented the employees of their former employer, when we hire more than 51 percent, they bring with them their representation and not their contract. We negotiate a new contract with that bargaining unit . . . Or union. With the Union that represents those employees.” (Tr. 439:3-13).

D. The District's Priorities that Informed the Contracting Process, and First Student's Desire to Meet Those Priorities.

Peatross testified without contradiction that the school district sought to find a transportation services contractor who would treat the district's bus drivers and monitors the same way the district had: like "family." (Tr. 369:17-18). First Student sought to win the contract, and undisputed testimony—from witnesses for the General Counsel and for First Student—about this objective provides context for the message First Student disseminated—to the school district, the school board, the union, and the employees—from the initial stages of the contracting process in July 2011 to the final school board vote in May 2012.

Peatross' undisputed testimony establishes that there were specific criteria the district would demand from whichever contract bid it chose. First Student representatives' undisputed testimony establishes that First Student wanted to reassure both the district and the bargaining unit that contracting with First Student would meet the district's criteria and not require a difficult adjustment.

When the school district issued its request for proposals in 2011, it asked that each contractor be prepared to "partner" with the district and commit to "transition" the bus drivers and monitors from public to private employment without causing them "harm"—because, Peatross explained—"these were our employees and they're part of our family." (Tr. 369:13-18).

Kinsley testified that at the July 2011 interview his responsibility was to get "new customers" for First Student. (Tr. 490:21-22). Kinsley's testimony corroborated Peatross'; he affirmed First Student's awareness that that the school district asked the contractors to agree to maintain the bargaining unit's wages and to offer benefits comparable to those that the bargaining unit received while employed by the district. (Tr. 472:18-22).

Meek testified, without contradiction, that the purpose of the March 2012 meeting “was to reduce the anxiety, if you will, of the employees.” (Tr. 423:18-19). Meek testified that he provided assurances about hiring and union representation “more than once,” to relieve the employees’ anxiety. (Tr. 436:8). Meek testified:

A: I said in a situation that we typically hire more than 80 percent based upon my experience. We would welcome individuals to apply to First Student. And when we hire more than 51 percent of the existing workforce, they bring with them their representation and not their labor contract.

Q: And you said this to relieve the anxiety of the employees?

A: Yes, I did. More than once.

(Tr. 436:1-8). Kinsley had a similar goal in providing assurances to the union representatives and bargaining unit members with whom he spoke after the May 2012 school board meeting. Kinsley testified that he told the group,

[If the school district employees] all meet our hiring criteria, background checks, and so forth, our wages—their wages would be maintained, that they shouldn’t have anything to worry about coming to work for our Company.

(Tr. 466:18-21). The ALJ credited this testimony. (ALJ 14:20-28).

ARGUMENT

I. The Undisputed Testimony Must Be Considered and Credited

The Board would be remiss in not considering undisputed testimony, particularly when that testimony comes from witnesses whose testimony the ALJ credited to establish other facts. The Board modifies judges’ decisions based on a combination of “evidence which the hearing officer specifically credited” *and* “the undisputed testimony of [a witness] whom the hearing officer credited without exception on other points” *Detroit Hosp.*, 277 NLRB 1225, 1225 (1985); *see also Saint Vincent’s Hosp.*, 265 NLRB 38, 39 fn.5 (1982) (even when no exception to the finding was raised, basing a reversal of an ALJ finding on the undisputed testimony of a witness who the ALJ had credited and relied upon in making a finding that was contrary to the

undisputed testimony); *Arvin Indus., Inc.*, 226 NLRB 925, 926 (1976) (rejecting ALJ’s legal conclusion where “the evidence substantiates [a witness’s] undisputed testimony” that undermines ALJ conclusion); *Browning Indus.*, 226 NLRB 283, 284 (1976) (reversing ALJ’s backpay remedy for certain days, because in its exceptions, employer pointed to “undisputed testimony” that no work was available).

Here, all the salient, credited, and undisputed evidence shows the company’s actions in a decisively different light, and demonstrates that the ALJ’s legal conclusions were legally erroneous. The Board must consider the totality of the credited and undisputed evidence, as it has in other cases. In *Naperville Ready Mix*, the Board prefaced its recitation of the facts on which it based its decision with the following explanation:

This statement of facts reflects findings made by the judge where they are supported by the record and *additional factual findings on matters the judge did not address, where the evidence is uncontradicted*. It is the Board's established policy not to overrule an administrative law judge’s credibility findings unless the clear preponderance of all the relevant evidence convinces us they are incorrect. . . . and we have not reversed any of the judge’s credibility findings in this case. In a number of instances, however, we have drawn different factual inferences from the credited or undisputed testimony.

Naperville Ready Mix, Inc., 329 NLRB 174, 175 fn.2 (1999) (internal citations omitted) (citing *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951)).

Here, the material undisputed testimony—much of it from First Student’s witnesses—demonstrates that First Student’s hiring requirements were essentially identical to the school district’s. Undisputed testimony about the district’s criteria for the contracting process and First Student’s motivation provide essential context for the statements of the witnesses already credited by the ALJ, demonstrating that First Student assumed responsibility as a perfectly clear successor. Finally, emails that First Student’s witnesses authenticated provide the evidence

necessary to conclude that the company unlawfully conditioned bargaining on the withdrawal of an unfair labor practice charge, undermining the Board’s core protection.

In short, all the evidence credited by the ALJ and the other undisputed and un-discredited evidence in the record shows that the ALJ’s decision is legally erroneous. As we show next, the ALJ erred in not finding that First Student is a perfectly clear successor (*infra*, Section II), and he erred in not finding that First Student unlawfully conditioned bargaining on withdrawal of a ULP charge (*infra*, Section III).

II. First Student is a Perfectly Clear Successor to the Saginaw Public School District

The ALJ concluded that First Student was not a perfectly clear successor because it “clearly and unequivocally announced new terms of employment substantially before it commenced operations,” specifically, on May 17, 2012. (ALJ 24:1-2). The ALJ based this conclusion on his finding that “when employees submitted applications . . . they knew in detail the initial terms and conditions of employment that were being offered by [First Student].” (ALJ: 24:10-12). These findings are insufficient—even under the cases on which the ALJ’s opinion relies—to nullify First Student’s earlier representations that created its perfectly clear successor bargaining obligations.

A. First Student Failed to Announce Its Intent to Establish A New Set of Working Conditions Prior to Announcing Its Intent To Retain School District Employees.

As early as July 2011, First Student’s representations—as credited by the ALJ—“establish that it was anticipated that the Union would remain the representative of the employees if the Respondent obtained a contract from the School District.” (ALJ 22:6-7). Testimony about subsequent statements that the ALJ credited establishes that First Student repeatedly told the bargaining unit that their terms of employment would be “subject to

negotiations” *with the union*. (ALJ 22:40). This confirms the expectation of all parties involved in the contracting process: a majority of First Student’s employees would be drawn from the pool of current district employees and First Student would recognize and bargain with USW.

In March 2012, testimony that the ALJ credited establishes that First Student told the bargaining unit that it “typically hired 80 to 90 percent of the existing work force” in contracting situations identical to that which happening in Saginaw. (ALJ 22:32-3). At the same meeting, testimony that the ALJ credited establishes that First Student also “stated that after completion of [prehiring] requirements the Respondent *would offer employment to existing employees* who met their criteria.” (ALJ 10:35-9 (emphasis added)).

These findings are sufficient to establish First Student’s bargaining obligation and neither (i) the date on which First Student commenced operations nor (ii) the date on which employees submitted job applications are sufficient to undo that obligation retroactively. The ALJ erred when he based his legal conclusion on those later dates.

1. The Undisputed Fact that the District’s Hiring Requirements Were Essentially Identical to First Student’s is Critical to Understanding the Bargaining Unit’s Reasonable Expectation that they Would Be Retained.

Both transportation and primary education are highly-regulated fields, and the employees would not have assumed that First Student would fail to employ reasonable and typical “hiring practices.” (Tr. 49). Indeed, undisputed testimony establishes that the hiring standards First Student announced were the same as the standards that the school district employed when it hired the bargaining unit members. Like First Student, the district required its drivers and monitors to undergo background checks. Like First Student, the district required its drivers to hold commercial driver’s licenses, and comply with the applicable state regulations that require holders of those licenses to have annual physicals, another of First Student’s hiring standards.

Like First Student, the district required pre-employment drug testing, and probable cause, post-accident, and random drug and alcohol testing, some of which were also already required by law. (Tr. 52; 153; 178-79).

In fact, when First Student itemized its hiring criteria it effectively communicated to the bargaining unit members that there was no need to doubt as to whether they would be retained, because the members of the unit had already demonstrated to the school district that they met its essentially identical criteria. First Student communicated this, as Meek testified, to alleviate the bargaining unit's "anxiety," *i.e.*, to assure them that First Student would offer them employment. (Tr. 423:18).

The ALJ erred when he failed to consider the importance of the essentially identical hiring requirements to the question of whether First Student was a perfectly clear successor to the school district. (ALJ 20:23-27:7). Although the ALJ discussed *Elf Atochem* and mentioned *Hilton's Environmental*, two cases that illustrate the importance of hiring requirements, he did not examine the role that hiring requirements played in the Board's holdings in those cases. (ALJ 25:31-45; 26:16-17).

When a successor employer's staffing plans "would [not] have had the foreseeable and probable consequence of affecting the Union's majority status," the successor cannot escape initial bargaining obligations. *Prime Equip.*, 330 NLRB 815, 818 (2000). Further, the Board considers assertions like "we'll hire you if you work on our terms" insufficiently specific to exempt a successor from the pre-takeover obligation to bargain. Such a vague statement, which the Board has labeled a "conditional offer," is "precisely the kind of ambivalence in which [a successor is] not free to engage" without incurring a bargaining obligation. *Springfield Transit Mgmt.*, 281 NLRB 72, 78 (1986).

Here, the union and the bargaining unit could and did reasonably believe that any bus driver or monitor who was working for the school district would satisfy First Student's requirements easily. For that reason, the company's announcement of those requirements does not diminish its obligations as a perfectly clear successor, and even confirms them: this was an affirmative proclamation that hiring requirements, among other conditions of employment, would not change.

In *Hilton's Environmental*, for example, a federal contractor "stated that it intended to hire all [the predecessor's] employees unless some problem arose as a result of information disclosed on their job application forms," and the Board concluded that the contractor was a perfectly clear successor. *Hilton's Envtl.*, 320 NLRB 437, 438 (1995); also see *Elf Atochem N. Am., Inc.*, 339 NLRB 796, 810 (2003).

Here, the credited and undisputed testimony establishes that First Student's hiring requirements were essentially identical to First Student's. These facts are analogous to those examined by the Division of Advice in *Central Parking. Cent. Parking Sys., Inc.*, NLRB G.C., 21-CA-37718, 2008 WL 1931254. Advice determined that an employer became a perfectly clear successor on the date it announced its plan to recognize the union and retain all of the predecessor's employees who met its employment qualifications, which were similar to the predecessor's. The employer was a perfectly clear successor because the employees would reasonably believe that they would meet the successor employer's hiring qualifications. *Id.*

Bryant's understanding of First Student's hiring practices mirrors Advice's analysis of the facts in *Central Parking*. Bryant testified, without contradiction, that there was never any doubt about whether First Student would extend job offers to the vast majority of district employees. (Tr. 110). He elaborated:

It was never an issue . . . [b]ecause based on what Mr. Kinsley said and what we had been told from the school district, all employees were going to transition. Anything we had to do prior to the first day of school was a formality. We regularly did a physical, we regularly did like a background check. I mean that was nothing new, and also a drug screen. We did drug screens with Saginaw Schools, so.

(Tr. 153:1, 10-16). Based on the hiring requirements First Student announced, it was reasonable for the bargaining unit to believe, first, that the vast majority of existing employees would be hired based on the announced hiring requirements and, second, that there would not be “an issue,” or any risk, of less than fifty percent of First Student’s employees being former district employees.

The significance of the objectively reasonable belief of the bargaining unit in this regard cannot be underestimated. Every perfectly clear successorship case turns on the successor employer’s expressed intent *vis a vis* what would have been reasonable for the bargaining unit to understand.⁶ Here, the essentially identical nature of the school district’s and First Student’s

⁶ The ALJ sustained an objection to Bryant’s testimony about his subjective belief as of May 16 regarding what terms of employment First Student was offering. He explained:

JUDGE CARISSIMI: Isn't it an objective test?

COUNSEL FOR THE GENERAL COUNSEL: Well, I think that it goes to, I mean the Spruce Up cases say that what the employees thought is relevant as to whether a successor is a perfectly clear successor, so this question goes to what his impression is. I mean it is an objective test, but what other people believe is definitely relevant to that—

JUDGE CARISSIMI: In no area in Board law do employees’ subjective reactions generally have anything to do with anything. People have subjective reactions to 8(1) statements. I don't see how this is any different than any other area of Board law. It’s what was said, I credit what was said; based on that I draw the appropriate inferences as to what it means.

COUNSEL FOR THE CHARGING PARTY: Your Honor, may I add that during Respondent’s opening, an argument that was raised is that the bargaining unit could have had no reasonable belief that terms and conditions would have stayed the same. I think that that raises the relevance of what the bargaining unit actually believed.

JUDGE CARISSIMI: No, I disagree. I mean the employees’ reasonable beliefs is [sic] going to be based on the objective testimony. Like it or not, the Board has an objective standard, in the first instance it’s me, and the Board will draw their own conclusions if the case goes there based on the credited facts, but I just don’t see the witnesses’ subjective reaction as to what he was told is any way going to be a meaningful issue for me in deciding this case. So I’m going to sustain the objection.

(Tr. 53:5-54:8).

hiring requirements establishes that bargaining unit members' belief that they would be retained by First Student is objectively reasonable.

As we discuss next, the fact that the unit reasonably believed it would be retained on identical *terms* is established through other evidence.

2. First Student Misled the Bargaining Unit Into Believing that They Would (a) Maintain their Positions Under (b) Unchanged Conditions of Employment; First Student's Later Disavowal of Those Promises Did Not Change Its Obligations as a Perfectly Clear Successor, Because Those Obligations Had Already Attached.

The ALJ erred when he considered statements that First Student made on May 17 when determining whether First Student was a perfectly clear successor. (ALJ 23:24-24:15). The May 17 statements are legally significant because they establish First Student's breach of its perfectly clear successor bargaining obligations, which had already attached.

The statements made before May 17 and over the course of the contracting process establish that First Student's conduct satisfies the standard articulated in *Spruce Up*, in which the Board held that perfectly clear successor bargaining obligations attach in "circumstances in which the new employer has [a] either actively or, by tacit inference, misled employees into believing they would all be retained without [b] change in their wages, hours or conditions of employment, or at least to circumstances where the new employer, unlike the Respondent here, has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." *Spruce Up Corp.*, 209 NLRB 194, 195 (1974).

Testimony that the ALJ credited establishes that on at least three occasions, First Student (a) misled employees into believing that they would be retained, without (b) clearly announcing any intent to establish a new working conditions.

i. July 2011

The credited testimony concerning the July 2011 meeting between First Student, the school district, and the union, establishes that First Student stated it would “hire a majority of the School District’s employees if they met [First Student’s] hiring protocols.” (ALJ 9:2-3). Those hiring protocols were “an application, an interview, a background check, a drug screen, and some other tests.” (ALJ 8:42-43). Undisputed testimony shows that the bargaining unit members had already satisfied such protocols when the school district hired them. (Tr. 153:11-16; 399:18, 22-23; 419:14-20; 527:19-20). First Student “also stated that at other locations the Respondent had hired 80 to 90 percent of the existing unit.” (ALJ 9:4-5).

No testimony about this meeting, credited or not, alleged that First Student identified any working condition that would change, or expressed any intent to establish new working conditions. In fact, credited testimony establishes that First Student stated it “would maintain the current wages” and “had planned increases, but nothing specific” for the bargaining unit. (ALJ 8:44; Tr. 452-453).

ii. March 2012

First Student met with the bargaining unit in March 2012. Credited testimony concerning this meeting establishes that First Student identified its hiring requirements as a background check, a drug screen, a physical examination, and training. (ALJ 10:35-39). First Student stated that “after [employees’] completion of these requirements,” First Student “would offer employment to existing employees who met their criteria.” (ALJ 10:35-39). Again, undisputed testimony shows that the bargaining unit had already satisfied essentially identical criteria when the school district hired them. (Tr. 153:11-16; 399:18, 22-23; 419:14-20; 527:19-20). At the

same meeting, First Student reiterated that it “typically hired 80 to 90 percent of the existing work force.” (ALJ 10:42-47).

Again, no testimony about this meeting, credited or not, alleged that First Student identified any working condition that would change, or expressed any intent to establish a new set of working conditions. In fact, credited testimony establishes that First Student stated it would be “using the district’s routing system” for determining school bus routes, and that in response to “questions regarding the conditions employees would work under if hired by the Respondent,” specifically about “paid time off, vacation pay and sick pay,” First Student “stated that those issues would be subject to negotiations.” (ALJ 11:1-6, 13-15).

iii. May 16, 2012

The credited testimony concerning the May 16 school board meeting establishes that, at the very latest, First Student’s perfectly clear successor bargaining obligations had attached by that date. Testimony that the ALJ credited reflects that the May 16 statements echo the statements First Student made on the earlier two occasions. First Student said that it “would offer positions to the existing employees who satisfied [its] hiring requirements such as background checks and physical exams.” (ALJ 12:2-8). And, it bears repeating, undisputed testimony shows that the bargaining unit had already satisfied such requirements when the school district hired them. (Tr. 153:11-16; 399:18, 22-23; 419:14-20; 527:19-20).

No testimony about this meeting, credited or not, alleged that First Student identified any working condition that would change. Indeed, First Student specifically assured the school board, union, and bargaining unit that it “would hire current district employees at the same rate of pay” as they received from the school district. (ALJ 13:2-8). The ALJ expressly credited the testimony of the First Student representative present at this meeting that “he did not say what

terms and conditions would change when the former School District employees became Respondent's employees." (ALJ 13:12-19).

iv. Analysis

First Student's credited statements during those three encounters, in the context of the undisputed testimony, establish that First Student was not entitled to unilaterally set initial employment terms because it (a) had not announced those terms before or at the same time as it (b) expressed its intent to retain all or most of the school district's employees. First Student was a perfectly clear successor.

Once an initial bargaining obligation has attached, a successor employer cannot escape it by disavowing its earlier failure to clearly announce changes to employment conditions. The ALJ erroneously turned the requirement of clarity in the Board's application of the perfectly clear successorship doctrine on its head. The ALJ held that, in the meeting on May 17—after the school board had approved the transportation services contract—the company escaped its perfectly clear successor obligations because on that date it “clearly and unequivocally announced” the working conditions it sought to implement, which it had never mentioned in the months of earlier communication with the bargaining unit, the union, or the school district. (ALJ 23:25).

This “clear announcement” did not come until after First Student had already incurred a bargaining obligation. The belated announcement is immaterial to the bargaining obligation because First Student had already expressed its intent to retain the district employees, and at the same time, failed to clearly announce new employment conditions.

The ALJ ignored the consistent precedent holding that a clear announcement of changed employment terms must occur *before or at the same time* as the expression of intent to employ a

predecessor's employees. Here, First Student had expressed its intent to employ the school district's employees as early as July 2011, and at the very latest, on May 16, 2012. First Student's attempt to change the bargaining unit's expectations on May 17, after it was awarded the transportation services contract, is immaterial.

When determining whether a successor employer has perfectly clear successor bargaining obligations, the Board looks to the moment in time "when the successor employer announces its offer of different terms of employment *in relation to its expression of intent to retain the predecessor's employees.*" *Fremont Ford*, 289 NLRB 1290, 1296 (1988) (emphasis added) (citing *Spruce Up Corp.*, 209 NLRB 194 (1974)).

In *Starco Farmers Market*, the Board held that "where the new employer's offer of different terms was simultaneous with the expression of intent to retain the predecessor's employees, the Board has found no duty to bargain over initial employment terms. . . [W]here the offer of different terms was subsequent to the expression of intent to retain the predecessor's employees, the Board has regarded the expression of intent as controlling and has found that the new employer was obligated to bargain with union before fixing initial terms." *Starco Farmers Mrkt.*, 237 NLRB 373, 373 (1978) (internal citations omitted).

The Board and federal courts have applied this principle consistently.

In *Elf Atochem*, the Board reiterated that a successor incurs the "obligation to bargain over initial terms of employment *when it displays an intent to employ the predecessor's employees* without making it clear to those employees that their employment will be on terms different from those in place with the predecessor [e]mployer." *Elf Atochem N. Am., Inc.*, 339 NLRB 796, 807 (2003) (emphasis added).

The Court of Appeals for the Sixth Circuit approved the same standard in *DuPont Dow Elastomers*, in which the Board explained that it “has consistently found that an announcement of new terms will not justify a refusal to bargain if, as in this case, the employer has earlier expressed an intent to retain its predecessor’s employees without indicating that employment is conditioned on acceptance of new terms.” *DuPont Dow Elastomers, LLC*, 332 NLRB 1071, 1074 (2000), *enfd.* 296 F.3d 495 (6th Cir. 2002) (distinguishing *Peters v. NLRB*, 153 F.3d 289 (6th Cir. 1998)).

The Seventh Circuit enforced a similar holding in *Canteen Co.*, in which the Board reasoned that because a successor “did not announce the new wage rates until [a date] *after* it had effectively announced its intent to retain the predecessor employees, we agree with the judge that the [successor] violated the Act by unilaterally changing the terms and conditions of employment.” *Canteen Co.*, 317 NLRB 1052, 1054 (1995), *enfd.* 103 F.3d 1355 (7th Cir. 1997) (emphasis in original).

Spruce Up is distinguishable on this ground. In that case—which has since been supplanted and clarified by the above decisions—the successor employer announced during a single meeting with the union that (a) it intended to hire “[a]ll the barbers who [were] willing to work,” and (b) it would be changing the commission by which the barbers’ wages were determined. *Spruce Up Corp.*, 209 NLRB 194, 195, 204 (1974). Because the union was on notice that the successor intended to change terms as of the same date the successor announced its intent to hire the barbers, *Spruce Up* permissibly offered employment to the barbers conditioned on their acceptance of those commission rates later in the same month. Here, First Student failed to announce that any working conditions would change in the ten months preceding its receipt of

the school district transportation contract; and, during that same period, it repeatedly stated that it would hire the existing bargaining unit employees.

When Kinsley, in a statement the ALJ credited, told bargaining unit employees that ‘they shouldn’t have anything to worry about in coming to work for our Company,’ those employees really didn’t have anything to worry about. (ALJ 14:20-28; Tr. 466:18-21)). First Student had expressed an intent to hire them once they satisfied prerequisites the employees knew would not be a problem; it was evident that, based on those prerequisites, a majority of First Student’s employees would be former school district employees; First Student had promised to negotiate with the employees’ union based on an expectation of that majority; and, until that happened, First Student had specifically assured the bargaining unit employees that their wages wouldn’t change.

First Student explicitly created the expectation that it would retain the vast majority of unit employees under unchanged working conditions, while it negotiated necessary details with the union. With that said, even implicit intent is enough to establish perfectly clear successorship, as the Sixth Circuit has affirmed. In *Spitzer Akron, Inc. v. NLRB*, a successor employer indicated to its predecessor’s employees that the operation “would carry on as usual.” 540 F.2d 841 (6th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977). The court concluded, “the facts in the instant case are sufficient . . . to establish that the employees were misled by ‘*tacit inference*’ into believing they would be retained without change from the condition of employment.” *Id.* at 846; *also see Spruce Up*, 209 NLRB at 195.

In July 2011, and in March and May 2012, First Student assured USW, the local union, the bargaining unit and the school district, orally and in writing, that (a) it would hire the school district’s transportation employees and (b) it did not intend to change their terms or conditions of

employment. Those two factors are the *sine qua non* of the perfectly clear successorship doctrine, and First Student conclusively incurred the “obligation to bargain over initial terms of employment” on each of the three occasions “when it display[ed] an intent to employ the predecessor’s employees without making it clear to those employees that their employment will be on terms different from those in place with the predecessor [e]mployer.” *Elf Atochem N. Am., Inc.*, 339 NLRB 796, 807 (2003).

3. First Student’s Assurances That Certain Employment Conditions Would be “Subject to Bargaining” Was Not a Clear Announcement of New Working Conditions; Rather, It Was Confirmation of First Student’s Obligations as a Perfectly Clear Successor.

The ALJ interpreted Board law incorrectly when analyzing First Student’s statements that certain working conditions would be “subject to negotiations,” and that the company would negotiate a new contract with the union. (ALJ 23:15, 19). First, the ALJ mistakenly held that such statements “indicate that the Respondent would not be adopting the School District’s collective-bargaining agreement” and second, he mistakenly held that the statements suggest “that new working conditions would be established.” These holdings led to the ALJ’s mistaken conclusion that First Student was not a perfectly clear successor. (ALJ 23:19-21). This inference is erroneous because it is unsupported by Board precedent.

It is well-established that a perfectly clear successor need not adopt its predecessor’s CBA. *EG & G Florida, Inc.*, 279 NLRB 444, 453 (1986). Here, during the ten months preceding First Student’s assumption of responsibility for district transportation services, the bargaining unit learned that the company would not assume the CBA between the district and the union. This was expected, and does not weaken the company’s obligations under *Burns*. For example, in *Springfield Transit*, the Board based its conclusion that the bus line contractor was a perfectly

clear successor on evidence of its communications to employees and its agreement with its predecessor to offer employment to those employees. *Springfield Transit Mgmt.*, 281 NLRB 72 (1986). The question of whether the successor was required to assume the contract was immaterial—in fact, the Board emphasized that its duty was to negotiate a new collective bargaining agreement governing initial terms of employment. *Id.* at 78.

Testimony in this case establishes that the bargaining unit knew or should have known that First Student would not become a party to the CBA with the school district. For one thing, according to Peatross’ undisputed testimony, the CBA’s expiration date was July 31, a month after First Student assumed responsibility for transportation services, making contract adoption of scant value. (Tr. 383:21-23).

Most important, as recounted in credited testimony, Meek repeatedly said initial terms of employment were “negotiable.” In so doing, Meek provided assurances that First Student would be negotiating with the union—an event that would only occur if First Student hired a majority of its employees from the pool of existing Saginaw drivers and monitors. First Student had the perfect opportunity to announce whether it intended to change employees’ working conditions when the bargaining unit asked specifically during the March 2012 meeting whether First Student would change “paid time off, vacation pay and sick pay.” Instead of answering in the affirmative and making a simple statement that might have absolved it of perfectly clear successor bargaining obligations,⁷ First Student said “those items would be subject to negotiations.” (ALJ 11:13-15; 12:2).

As the Board recognizes, “the applicability of the ‘perfectly clear’ successor doctrine largely ‘rests in the hands of the successor.’” *Rd. & Rail Servs., Inc.*, 348 NLRB 1160 (2006)

⁷ But which also might have alienated the school district, which was present at the meeting and wanted the employees treated like “family.” (Tr. 369:18).

(quoting *Canteen Corp. v. NLRB*, 103 F.3d 1355, 1364-1365 (7th Cir. 1997) (quoting *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 41 (1987))). The March meeting was just one of First Student's many opportunities to announce the intent to change working conditions. Instead of seizing the opportunity, First Student reassured the bargaining unit that it would be negotiating with their union.

The Board has found successor statements of intent to negotiate compelling in determining whether the successors have perfectly clear bargaining obligations. In *Road & Rail Services*, the Board found perfectly clear successorship based on the following facts:

The Respondent [Road & Rail] clearly informed the Union of its intent to staff the three facilities with Caliber's existing employees, which, in fact, it did. At the same time, the Respondent gave no indication that it intended to invoke a right to unilaterally establish initial terms and conditions of employment. Although the Respondent indicated a desire to make some changes to the existing employment terms, the Respondent repeatedly made clear that it intended to negotiate any such changes with the Union.

Road & Rail Servs., 348 NLRB 1160, 1161 (2006) (emphasis added). Road & Rail's statements that it would negotiate terms of employment with the union showed that it planned to hire enough existing employees so that the union would have majority support and, consequently, that Road & Rail was a perfectly clear successor. All *Road & Rail* elements are present in this case; therefore, as in *Road & Rail*, the "particular circumstances of the present case bring it within the Burns 'perfectly-clear' caveat." *Id.* First Student's assurances that it would negotiate working conditions with the bargaining unit's representative confirm its obligations as a perfectly clear successor.

4. First Student Announced Its Intention To Maintain the System By Which Hours of Work Were Assigned; Its Admission that It Did Not Know Precisely How Many Hours Each Bargaining Unit Employee Would Work Is Not a Clear Announcement of A New Working Condition.

The ALJ found that First Student “indicated it did not know how many hours would be worked by employees.” (ALJ 23:16). Based in part on this finding, the ALJ mistakenly concluded that First Student’s statements between July 2011 and May 16, 2012, “indicate[d] that . . . new working conditions would be implemented.” (ALJ 23:19-21).

The ALJ found Meek to be the most “reliable” witness to the March meeting, and specifically credited his testimony that First Student said it “would use the School District’s routing system but that [First Student] did not know how many hours would be worked” as of the March meeting, six months before the company would begin providing bus service. (ALJ 11:2-3; 12:1-2). The ALJ incorrectly concluded that this statement constituted an expression of First Student’s intent to impose changed terms of employment. In fact, employees never knew exactly how many hours they would work before any school year began, because their workload and trip times were necessarily determined by the size and geographical diversity of the district’s student population. The school district’s “routing system” took precisely those variables into account.

It is well-established that an annual change to an employment term takes on the character of an employment term itself—the change cannot be suspended unilaterally, for example. As the Board recently affirmed, “[r]egular and longstanding practices that are neither random nor intermittent become terms and conditions of employment even if not addressed in a collective-bargaining agreement.” *Nacco Material Handling Grp., Inc.*, 359 NLRB No. 139, at *13 (2013); *also see Courier-Journal*, 342 NLRB 1093, 1094 (2004) (“A unilateral change made pursuant to

a longstanding practice is essentially a continuation of the status quo—not a violation of Section 8(a)(5).”).

When First Student informed the bargaining unit that it would be using the school district’s routing system, and would know more about what hours the unit would work once the routes were planned, it was informing the bargaining unit that the method of assigning work to them would remain unchanged.⁸ Rather than creating uncertainty around hours of work, the planned adoption of the district’s system was just another reason why it was reasonable for the bargaining unit to believe it would be retained without change to its employment terms.

5. Neither the Date on Which First Student Commenced Operations Nor the Date on Which the Bargaining Unit Submitted Application Forms is Relevant to the Question of Whether First Student is a Perfectly Clear Successor.

First Student’s attempt to disavow its initial bargaining obligations on May 17 was ineffective, and neither the fact that the school district was still the bargaining unit’s employer nor the fact that the district had approved but not executed the contract at that time change the inefficacy of the disavowal.

The ALJ mistakenly held that because First Student announced its unilateral change to working conditions “substantially before it commenced operations,” it was not a perfectly clear

⁸ Even if First Student’s use of the school district’s routing system did augur some change, and we only consider the uncertainty of First Student’s commitment to a specific number of hours, the announcement that First Student did not yet know what hours the bargaining unit would work are the kind of “general and vague statements portending future changes [that] are not sufficient to establish initial terms” *Windsor Convalescent Ctr.*, 351 NLRB 975, 990 (2007). At the very least, the uncertainty about hours places First Student squarely within the *Spruce Up*’s definition of a perfectly clear successor:

[Perfectly clear successor bargaining obligations apply in] circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours or conditions of employment, or at least to circumstances where the new employer, unlike the Respondent here, has failed to clearly announced its intent to establish a new set of conditions prior to inviting former employees to accept employment.

Spruce Up Corp., 209 NLRB 194, 195 (1974).

successor. (ALJ 24:2). This is not the correct standard for judging whether an employer is a perfectly clear successor, and the union excepts to the ALJ's reliance on this finding. (ALJ 23:42-27:6). In *CME, Inc.*, the Board fixed the date the successor's bargaining obligation attached "as the date on which it made it perfectly clear that it planned to retain all or substantially all of the employees in the unit." 225 NLRB 514, 514-15 (1976). Later, in *Helnick Corp.*, the Board "agree[d] with the judge that the [company's] bargaining obligation attached when it informed employees that they could expect to be retained when it took over the operation." 301 NLRB 128, 128 fn.1 (1991).

The question of whether an employer can become a perfectly clear successor before it has "commenced operations" arises frequently in contracting scenarios such as the one here, and it is consistently answered in the affirmative. The Board acknowledged the context of such cases in

Morris Healthcare:

In this case, the Respondent indicated its intent to retain its predecessor's employees without indicating that employment would be conditioned upon their acceptance of new terms. The transfer of the nursing home from a public employer, Grundy County, to the [private contractor] Respondent was a politically sensitive transaction that required reassuring public statements by Borsellino, the Respondent's owner, regarding the future care of the nursing home's residents and the job security of its employees. At the August 22 Grundy County Board meeting, Borsellino stated the Respondent's intention to rehire the overwhelming number of the nursing home's staff, except for a few with absenteeism problems. As a result, the Grundy County Board approved the transfer of the nursing home and a lease agreement to the Respondent on the condition that the Respondent's hiring process defer to the incumbent staff, including senior management and the medical director.

Morris Healthcare & Rehab. Ctr., LLC, 348 NLRB 1360, 1367 (2006). The Board held that "[i]n adopting the judge's conclusion, we rely on his finding that the Respondent was a "perfectly clear" successor [sic] and, thus, was not privileged to set initial terms and conditions of employment." *Id.* at 1360 fn.1. The same political concerns and need for "reassuring public

statements” regarding job security are present here. *Also see Nazareth Reg’l High Sch. v. NLRB*, 549 F.2d 873 (2d Cir. 1977) (enforcing Board decision that high school was perfectly clear successor, because it had expressed intent to retain all its predecessor’s teachers in March 1974, and that despite the disavowal of that promise in April, the bargaining obligation had attached in March, months before the successor actually took over school operations, which didn’t happen until September).

The ALJ erred when he focused on the date First Student began operating the district’s buses to determine whether First Student had effectively avoided its perfectly clear successor obligations. Here, the perfectly clear successor obligation was created by First Student’s repeated assurances in 2011 and 2012 and attached, at the latest, on May 16, 2012. Any change or any announcement of a change following a successor’s assertion of its intent to retain the workforce and not change their employment terms violates 8(a)(5), whether or not the successor has already assumed control of the enterprise. *See Freemont Ford*, 289 NLRB 1290, 1297 (1988); *Helnick Corp.*, 301 NLRB 128, 134 (1991).

In *Elf Atochem*, the successor Atochem’s bargaining obligation attached ten months before it took over its predecessor’s operations, when a memorandum was distributed to employees that included the following statements:

Elf Atochem will provide employment to all of the existing workforce dedicated to the AtoHaas business.

Elf Atochem will recognize employees’ past years of service with AtoHaas and Rohm and Haas, and will provide employees with equivalent salaries and comparable health, welfare and benefits package, including pension, savings plan and vacation.

Elf Atochem N. Am., Inc., 339 NLRB 796, 807-08 (2003). Employees received the quoted memorandum in January. Atochem did not extend offers of employment to the bargaining unit

until October of that year, and the transaction between Atochem and its predecessor did not close until that November.

The Board concluded that Atochem's bargaining obligation attached when employees received the January memorandum, because (1) on that date the successor informed employees they would be retained and (2) the successor did not, at the same time, inform the employees that any term or condition of employment would change. *Id.* at 807-08. Rather, the employees were told that their salaries would be "equivalent" and their benefits would be "comparable." *Id.* The ten months between the announcement of retention on comparable terms and the actual control of the enterprise did not affect the Board's analysis. Similarly, here, First Student's bargaining obligation attached, at the latest, on May 16, when it announced to the school board, the union, and its future employees that it intended to hire them pending satisfaction of the same employment criteria that they satisfied as school district employees. The date First Student "actually commenced operations" is irrelevant to its preexisting bargaining obligation. (ALJ 24:22).

The ALJ's focus on the dates of First Student's offer of employment or the employees' acceptance is also misguided. (ALJ 24:1-15). As the Division of Advice recognized in this very case:

[E]mployers need not make unconditional offers of employment to employees before becoming perfectly clear successors; any employer who is silent about terms and conditions of employment when it stated its intent to retain all the predecessor employees is a perfectly clear successor.

First Student, Inc., NLRB Div. of Advice, No. 07-CA-092212 (April 4, 2013) (citing *Canteen Co.*, 317 NLRB 1052, 1053 (1995)).

In *Morris Healthcare*, which also involved a contracting transaction, albeit one that happened more quickly than the transaction here, the contractor had expressed its intent to hire

from the pool of the predecessor's employees and, at that time, expressed no intent to change working conditions. *Morris Healthcare & Rehab. Ctr., LLC*, 348 NLRB 1360, 1363-64 (2006). However, after the contractor had been awarded the contract but before it commenced operations, certain groups of employees were informed that the contractor intended to change their wage rates. *Id.* And, at orientation sessions that also occurred before the successor commenced operations, employees were provided with a handbook that reflected other changes to the employees' benefits and working conditions. *Id.* at 1364, 1364-65. The Board affirmed that the successor's unilateral changes were unlawful, because it "has consistently found that an announcement of new terms will not justify a refusal to bargain if, as in this case, the employer has *earlier* indicated its intent to retain its predecessor's employees without indicating that employment is conditioned on acceptance of new terms." *Id.* at 1367 (emphasis added).

Similarly, in *Canteen Co.*, the Board concluded that an employer was a perfectly clear successor even though it had announced a change to working conditions before its predecessor's employees applied for jobs, and before it had commenced operations. *Canteen Co.*, 317 NLRB 1052 (1995), *enfd.* 103 F.3d 1355 (7th Cir. 1997). The Board based its affirmance of the ALJ's opinion on the following course of events.

In *Canteen Co.*, a predecessor employer informed a catering contractor that it was the successful bidder for a food services contract in late May or early June 1992. *Id.* at 1062. Here, First Student knew—at the latest—by May 16, 2012, that it had won the bid to provide the school district's transportation services. (ALJ 13:42-46).

In *Canteen Co.*, the caterer "urged each predecessor employee to fill out an application and schedule an interview" in early to mid-June. *Id.* Here, in March 2012, First Student stated that after employees completed its application requirements, including an application, First

Student “would offer employment to existing employees who met their criteria.” (ALJ 10:35-39). And, on May 16, First Student said that it “would offer positions to the existing employees who satisfied the Respondent’s hiring requirements such as background checks and physical exams.” (ALJ 13:2-8).

In *Canteen Co.*, the caterer approached the union and negotiated a new non-bargaining unit position and a probationary period, also in June. *Id.* Here, First Student engaged in negotiations with local union representatives regarding employee seniority in June, and reached an agreement on that term, months before it had commenced operations or formally offered employment to any bus driver or monitor. (ALJ 17:40-47).

The Board concluded that,

by its contacts to the employees to urge them to apply, and by its discussions with the Union, including the agreement it reached with the Union that the predecessor employees would serve a probationary period, the Respondent had made it ‘perfectly clear’ by June 22 [before it extended offers or commenced operations] to both the Union and the employees, that it intended to hire all the predecessor employees.

Id. (emphasis added). Therefore, the Board held, the caterer’s announcement on June 23, before it had extended offers or commenced operations, that it intended to reduce wages “violated Section 8(a)(5) of the Act;” and “as it was ‘perfectly clear’ on June 22 that the Respondent planned to retain the predecessor employees, the Respondent was not entitled to unilaterally implement new wage rates thereafter.” *Id.* at 1052-53.

Not one of the cases on which the ALJ based his decision turn on the date the successor commenced operations or on the date on which the predecessor’s employees submitted application forms to the successor. First, the ALJ relies on *Banknote Corp.* In that case, the predecessor employer told the bargaining unit that the successor had “already agreed to recognize the unions” at the facility being purchased, and had “already agreed to be bound to the

terms and conditions of the existing collective bargaining agreements at the facility.” *Banknote Corp.*, 315 NLRB 1041, 1047 (1994). The predecessor had no actual authority to speak on behalf of the successor, as the successor soon told the bargaining unit. In that communication, the successor told the bargaining unit that it would “attempt to hire its initial workforce from among the employees currently working at the [purchased] facility,” but it expressly disavowed its predecessor’s statements about union recognition and continuity of working conditions. *Id.*

The Board held that this disavowal—which was the first communication the successor had with the bargaining unit—“put the employees on notice that the [successor] would be making changes in the employment terms of the predecessor.” The Board explained:

In our view, the [successor’s] statements in the letter convey to the predecessor’s employees the message that the [successor] would not be adopting the predecessor’s terms and conditions of employment. Thus, simultaneous with its stated intention to retain the predecessor’s employees, the [successor] announced new terms and conditions of employment.

Id. at 1043. Here, in contrast, First Student did not say it was not adopting the school district’s terms and conditions of employment. Rather, First Student said only that it would negotiate a new collective bargaining agreement. (ALJ 23:14-22). This does not correct any expectation that the terms themselves would stay the same unless and until negotiations resulted in union-approved changes. In fact, in the same statement, First Student said it was maintaining what is assuredly the single most important employment term to any group of workers: wages.

In *Banknote*, the successor communicated a clear disavowal of any intention to recognize the union or to preserve current working conditions, in marked contrast to First Student. Unlike the express disavowal in *Banknote*, First Student encouraged reasonable expectations among the district employees that it would maintain their working conditions—and it continued this

encouragement for months, until the day after it won the contract bid. The ALJ was mistaken; his conclusion was not “in accord” with *Banknote*. (ALJ 24:29).

The ALJ’s reliance on *Specialty Envelope* is even less appropriate. (ALJ 25:13-18). In that case, which arose in a bankruptcy and sale situation, the successor did not “demonstrate that it intended to hire” its predecessor’s employees “until after the employees had an opportunity to review the application forms,” which “announced what terms of employment would be in effect, thereby informing applicants that if they applied and were accepted for employment, there would be different terms.” *Specialty Envelope Co.*, 321 NLRB 828, 832 (1996). Here, First Student did “demonstrate that it intended to hire” the school district’s employees, and did so *before* it informed those employees that it would be implementing different employment terms.

The ALJ’s reliance on *Bekins Moving & Storage* is also erroneous. (ALJ 25:22-28). In *Bekins*, the Board affirmed that a successor was not a perfectly clear successor only because two people who advised employees that the successor would probably retain them were not the successor’s agents—they worked as managers for the predecessor employer. *Bekins Moving & Storage Co., LLC*, 330 NLRB 761, 761 fn.1 (2000) (“In affirming the judge’s finding that the Respondent did not violate the Act, we rely on the General Counsel’s failure to establish that General Manager Bill Lovejoy was an agent of the Respondent in May 1997 and had authority at that time to advise employees, on behalf of the Respondent, that the Respondent would probably retain them following its purchase of the facility.”). First Student has not denied Kinsley, Meek, Kellerman, or Walther were its agents or that they lacked authority to bind the company. *Bekins* is irrelevant and easily distinguishable.

Planned Building Services is also distinguishable. In that case, the Board found no perfectly clear successorship bargaining obligations because on the day of the successor’s “very

first contact with [the predecessor's] employees, the [successor] both communicated its plan to retain [the] employees and announced that its offer to the employees was based on changed terms and conditions of employment." *Planned Bldg. Servs., Inc.*, 318 NLRB 1049, 1049 (1995). On the day of First Student's very first contact with the school district's employees, in July 2011, it said nothing about changing terms or conditions of employment. (ALJ 8:41-9:5).

And, finally, *Marriott Management* is distinguishable. Before making any commitment to hire its predecessor's employees, the successor told the employees' union that it would be changing health, welfare, and pension benefits. *Marriott Mgmt. Servs., Inc.*, 318 NLRB 144, 144 (1995). The timeline here is reversed: First Student committed to hiring the school district's employees before announcing any benefit changes.

The ALJ's mistaken reliance on these distinguishable cases led to his improper dismissal of the allegation that First Student unlawfully failed to bargain with the union before changing the bargaining unit's terms and conditions of employment.

B. In the ALJ's Erroneous Application of the Perfectly Clear Successor Doctrine to the Credited and Undisputed Facts, the Employer Gains From, But Bears No Responsibility For, Its Broken Promises.

The policy underlying the perfectly clear successorship doctrine honors the bargaining unit's selection of a representative when the bargaining unit's scope and working conditions are maintained, and it allows employers to gain the trust of a predecessor employer and the experience of a tested group of employees. The policy ensures that perfectly clear successors keep their promises when they assure the prospective employees and the incumbent union that they intend to hire a majority of their employees from their predecessor's existing unit. A successor makes such promises out of self-interest, to satisfy its predecessor and to ensure that it will have a stable work force. When successors decide to make such promises—a decision that

rests entirely in their hands—and create worker expectations, they also create perfectly clear successor obligations. Consistent with the policies of this Act, the Board requires successors to live up to their promises and fulfill the expectations they create.

The ALJ's decision here respects the intent of the doctrine to the extent that it benefits First Student, and rejects the doctrine to the extent it should benefit the bargain unit and their choice of a bargaining representative.

In *Prime Equipment*, the Board affirmed the existence of perfectly clear successor obligations when “record evidence [was] abundantly clear that the [successor] planned for, anticipated, and expected a ‘seamless transition.’” 330 NLRB 815, 818 (2000). Here, First Student knew that the district's workforce had “experience,” and would require less training than new employees. (Tr. 419:12). Here, before First Student began operations, it requested the local union's input and agreement on changes to the seniority system, and thanked the local president for his help. (ALJ 17:10-11).

First Student also benefited from targeting its assurances to satisfy school district's priorities. The district sought a contractor who would treat the bargaining unit like “family,” and, until May 17, First Student presented itself as such. (Tr. 369:13-18). Throughout that time, First Student sought to reassure the bargaining unit and the district that the contracting process would be seamless, and therefore painless. Meek made statements at the March 2012 meeting “to reduce the anxiety, if you will, of the employees.” (Tr. 423:18-19). On May 16, Kinsley told employees that they shouldn't worry. (ALJ 14:27). From July 2011 to May 16, 2012, when the school board approved the \$9.5 million contract, First Student's overriding goal was to be selected by the school district, and it made the pitch it needed to achieve it.

As soon as First Student had received the benefit of its assurances, it retreated from the assurances that had swayed the district and alleviated the employees' anxiety, and denied the bargaining unit its end of the bargain. The perfectly clear successor doctrine protects employees' democratic designation of a bargaining representative. The Seventh Circuit acknowledged as much when enforcing the Board's decision in *Canteen Co.*; the court held that when a successor "determines that it will retain the workforce of its predecessor, it cannot ignore the [u]nion those employees have chosen when it comes time to determine the conditions of employment." *Canteen Co. v. NLRB*, 103 F.3d 1355, 1364-65 (7th Cir. 1997). In those situations, including the instant one, an obligation to notify and bargain with the union exists prior to setting any terms and conditions of employment, because the decision to retain the workforce eliminates all prudent doubt on the part of the new employer that the union continues to be the spokesman for the members of the new bargaining unit. *Springfield Transit Mgmt.*, 281 NLRB 72, 78 (1986).

Instead of complying with its legally mandated bargaining obligations here, First Student ignored the union. (ALJ 29:30-31). As the ALJ found, for five months before the first bargaining session, the union "earnestly pursued" First Student, and First Student spent the time treating the union's repeated demands for recognition and bargaining in a "cavalier" and "dilatory fashion." (ALJ 29:10, 17, 32). The ALJ's decision rewards and encourages such conduct and in so doing, it defeats the policy behind the perfectly clear successor doctrine.

III. First Student Unlawfully Conditioned Bargaining on Withdrawal of An Unfair Labor Practice Charge, and the ALJ's Contrary Finding is Based on a Fundamental Misunderstanding of Board Law and Underlying Policy

Employees cannot be required to sacrifice certain statutory rights to vindicate others. *WWOR-TV, Inc.*, 330 NLRB 1265, 1266 (2000). The settlement of unfair labor practice charges is "undisputedly" a non-mandatory subject of bargaining, and thus conditioning bargaining on

satisfaction of a settlement demand constitutes an unlawful refusal to bargain. *Laredo Packing Co.*, 254 NLRB 1, 18 (1981). The policy articulated in *Laredo Packing* and its progeny is indispensable to preserving the Board's existential purpose: workers should not fear retaliation when they act in concert to seek NLRA protection. If the ALJ was correct in concluding that First Student's conduct here does not warrant the Board's action, it is unclear whether any conduct does.

First Student refused to set a negotiation date unless and until the Union agreed to withdraw the unfair labor practice charge that gave rise to the initial investigation into the instant case. First Student lawyer Walther set this condition in an email to union representative DeVore that reads:

Tonya,
I had some time free up in October if you would still like to start negotiations this month. *If you are willing to withdraw the ULP charge, I can send you a recognition letter and we can get some dates scheduled. (Of course, if you are not willing to withdraw the ULP charge, then we will not be able to begin negotiations until the Board concludes its investigation.)* If you agree, we can schedule a couple dates the week of October 15th. Let me know how you would like to proceed.

(ALJ 19:42-20:3). This email was authenticated without dispute.

First Student imposed the unlawful condition twice. First, Walther stated, "if you are willing to withdraw the ULP charge, I can send you a recognition letter and we can get some dates scheduled." (ALJ 19:44-45). In the same email, in a coercive attempt to characterize that condition as a logical consequence of the Union's resort to statutory remedies, Walther wrote: "if you are not willing to withdraw the ULP charge, then we will not be able to begin negotiations" (ALJ 19:45-20:1). Second, days later, First Student reasserted the condition; in an email, Walther wrote, "[c]ould you please let me know today if the Union intends to begin negotiations on October 15, 2012 and drop the pending ULP charge?" (ALJ 20:6-7).

The ALJ set a new and untenable barrier to protected concerted activity when he concluded that, because First Student “did not insist to impasse” that the union withdraw the ULP charge, Walther’s conditioning of bargaining did “not rise to the level of a separate unfair labor practice.” (ALJ 30:27). The union excepts to this conclusion.

The Board has rightly found that such conditions, no matter for how long they impede bargaining, “impermissibly impede access to the Board’s processes and interfere with the implementation of the policies of the Act.” *John Wanamaker*, 279 NLRB 1034, 1047 (1986). Even though, after union protest, First Student came to understand that it had imposed an unlawful condition and later revised that condition, the condition constituted restraint and coercion of the employees’ Section 7 rights in violation of Section 8(a)(1).

The union alerted First Student to the unlawful nature of the company’s bargaining posture. (*See* ALJ 20:8) (finding that the union expressed “disappointment” that First Student was “conditioning negotiations on the Union’s withdrawal of the ULP charge”). The Union’s prompt protest does not excuse First Student’s unlawful act. The ALJ based his conclusion on the brevity of the delay that Walther’s email caused. (ALJ 30:25-26). This amounts to denying the union statutory rights because it asserted them promptly, which is a destructive position for the Board to adopt. It is also a position that is at odds with scores of cases in which the Board has reached a contrary conclusion.

For example, when an employer stated that it “would not arrange any bargaining meetings” until a union withdrew its unfair labor practice charges, the employer committed an independent 8(a)(1) violation even when the union had *already* withdrawn the charge at issue. *United Broth. of Carpenters*, 195 NLRB 799, 806 (1972). In *Caribe Staple*, the employer refused to set a “firm date” for negotiations unless the union agreed to an array of unlawful conditions,

including the withdrawal of unfair labor practice charges. *Caribe Staple Co.*, 313 NLRB 877, 892 (1994). Because the parties were communicating by post, rather than electronic mail, the union responded to the employer two weeks later. In that response, the union contested the legality of the employer's conditions. Several days after receiving the union's response, the employer "elected not to press its illegal design." *Id.* The Board affirmed that the employer's "approach to bargaining was cavalier, if not lackadaisical," and that each of "the independent 8(a)(5) violations [including the unlawful condition to bargaining] constituted a serious threat to the process." *Id.* at 893. First Student's action here poses an equally serious a threat to the integrity of the collective bargaining process, and yet the ALJ endorsed it.

In *Caribe*, the union successfully convinced the employer to begin acting lawfully. In this case, the union appears to have done the same, at least in relation to this issue. However, the damage and distraction caused by an initial refusal to bargain did not change the Board's conclusion in *Caribe* and cannot change the conclusion here.

ALJ Carissimi's *de minimis* approach will encourage employers to set illegal conditions by permitting them to do so with impunity. If an employer is successful—if a union succumbs and withdraws a ULP charge—the employer will have profited from its illegal conduct, and such illegal conduct will never be brought to the Board's attention. If, on the other hand, the union refuses to succumb, and protests, and files another ULP to address the unlawful condition, the employer will suffer no consequence by adopting First Student's "never mind" strategy, which the ALJ's *de minimis* approach endorses. Any unscrupulous employer will—quite rationally—recognize that there is no cost to such illegal action, thanks to ALJ Carissimi's unprecedented rule.

Again, there is no stronger case for Board action than instances, such as this one, where an employer—through its staff labor lawyer—unlawfully seeks to force a union to trade one NLRA right to secure another. ALJ Carissimi’s holding is contrary to the letter and spirit of the Act. If the Board will not vigorously protect those who seek protection against unlawful coercion through ULP charges, who will it protect?

CONCLUSION

For the foregoing reasons, Charging Party Local 9036, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), AFL-CIO·CLC, respectfully requests that the NLRB modify the Decision and Recommended Order issued by Administrative Law Judge Carissimi to find that Respondent First Student, Inc., A Division of First Group America, also violated Section 8(a)(5) and (1) of the Act as described in the complaint in NLRB Case No. 07-CA-092212, by (a) bypassing the Charging Party union and dealing directly with unit employees by announcing unilateral changes to the employees’ terms and conditions of employment, as alleged in complaint paragraphs 16 and 21; (b) unilaterally changing terms and conditions of bargaining unit employees as alleged in complaint paragraphs 13 and 21; and (c) insisting on withdrawal of a ULP charge as a condition of recognizing and bargaining with the Charging Party union as alleged in complaint paragraphs 18 and 21. The Charging Party union respectfully requests the NLRB to direct additional appropriate remedies, including, but not limited to, posting an appropriate notice, ceasing and desisting from future violations of the Act, and requiring Respondent, upon union request, to rescind its unilateral changes, restore the prior terms and conditions of employment, make the employees whole for all of the losses that they have suffered as a result of these unilateral changes or their effects.

Respectfully submitted,

February 10, 2014

/s/ Emma R. Rebhorn
Emma Rebhorn
Assistant General Counsel
United Steelworkers International Union
Five Gateway Center
Pittsburgh, PA 15222
412-562-2562
erebhorn@usw.org

Stuart M. Israel
Legghio & Israel, P.C.
306 S. Washington, Suite 600
Royal Oak, MI 48067
28-398-5900
israel@legghioisrael.com

Counsel for the Charging Party Union

CERTIFICATE OF SERVICE

This is to certify that a true copy of the BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE ON BEHALF OF CHARGING PARTY UNITED STEEL, PAPER & FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (USW), AFL-CIO•CLC, AND ITS LOCAL UNION 9036 was served via electronic mail this 10th day of February, 2014 upon:

Jennifer Y. Brazeal
National Labor Relations Board, Region 7
477 Michigan Avenue, Room 300
Detroit, MI 48226

David A. Kadela
Littler Mendelson, P.C.
21 East State Street, 16th Floor
Columbus, OH 43215-4228

/s/ Emma R. Rebhorn
Emma R. Rebhorn

Dated: February 10, 2014