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

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| **FIRST STUDENT, INC., A DIVISION OF FIRST GROUP AMERICA,** | : | |
| **Respondent,** | : | |
| **and** | : | **Case 07-CA-092212** |
| **LOCAL 9036, UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (USW), AFL-CIO,** | : | |
| **Charging Party,** | : | |
| **and** | : | |
| **SAGINAW SCHOOL DISTRICT,** | : | |
| **Party in Interest.** | : | |

# RESPONDENT FIRST STUDENT, INC.'S ANSWERING BRIEF TO THE EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION OF THE USW AND LOCAL 9036

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**RESPONDENT FIRST STUDENT, INC.'S ANSWERING BRIEF TO THE EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION OF THE USW AND LOCAL 9036**

## I. INTRODUCTION

### A. Statement Of The Case

This case involves perfectly clear successor-based and bargaining-related claims stemming from the Saginaw, Michigan School District's outsourcing of student transportation services to First Student, beginning with the 2012-13 school year.[1] On December 13, 2013, the

[1] As used in this brief, "USW" means the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union; "Local 9036" means Charging Party USW Local 9036; "Local 8410" means USW Local 8410; "Unions" means the USW and Local 9036; "union" means the unit employees' putative representative; "First Student" or the "Company" means Respondent First Student, Inc.; "District" means the Saginaw, Michigan School District; "General Counsel" means Counsel for the Acting General Counsel; "ALJ" means Administrative Law Judge Mark Carissimi; and "ALJD" means the ALJ's decision and recommended order. References to the transcript

ALJ issued a decision finding that First Student is not a perfectly clear successor and dismissing, based upon that finding, claims that the Company violated the Act by unilaterally establishing initial terms and conditions of employment for its bus drivers and monitors and bypassing the employees' union representative in announcing the terms on May 17, 2012. The ALJ also dismissed a claim that the Company, after acknowledging its duty as a successor to recognize the union, unlawfully conditioned bargaining on the withdrawal of an unfair labor practice charge Local 9036 filed on September 21, 2012. On the other claims alleged in the Complaint – one alleging the Company unilaterally implemented an attendance policy in breach of its bargaining obligation and the other alleging the Company unlawfully delayed bargaining – the ALJ found that the General Counsel carried his burden of proving violations.

On February 10, 2014, the USW and Local 9036 filed exceptions to the findings upon which the ALJ based his dismissal of the perfectly clear successor-based unilateral change and direct dealing claims, and his dismissal of the claim the Company unlawfully conditioned bargaining on the withdrawal of the charge filed by Local 9036.[2] First Student also filed

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of the hearing are abbreviated, "Tr. ___"; references to the General Counsel's exhibits are abbreviated, "GCX __"; references to the Company's exhibits are abbreviated, "REX __"; and references to Local 9036's exhibits are abbreviated, "UEX __."

[2] In their Exceptions and Brief in Support of the Exceptions, the USW and Local 9036 changed the name of the charging party in the caption of the case from Local 9036 to the USW and "its Local 9036." In the opening sentence of their Exceptions, they call the USW the charging party. They also refer in that sentence to "its Local 9036," but do not specify in what capacity Local 9036 is involved in the case. (Unions' Exceptions p.1). In footnote one of their Brief in Support of the Exceptions, they say "USW" refers to "Charging Party, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC," and "local union" means Local 9036. (Unions' Exceptions Brief p.1, n.1). They do not offer an explanation for changing the name of the charging party from Local 9036 to the USW. Their unilaterally doing it does not undo that Local 9036 filed the charge (as "United Steelworkers Local 9036, using Local 9036's business address), that the General Counsel named Local 9036 as the charging party in the complaint, and that the ALJ referred to and treated Local 9036 as the charging party in the ALJD. (GCX 1; ALJD pp. 1, 7). The USW never moved to change the caption or even to intervene in the case. First Student's Exceptions cover the legal effect of the wrong union's having filed the charge, and the General Counsel's failure to prove who the unit employees' Section 9(a) representative was at relevant times. Because the General Counsel never

exceptions that day to the ALJ's findings that the Company unlawfully implemented its attendance policy and delayed bargaining, as well as other aspects of the ALJD. This brief answers the exceptions filed by the USW and Local 9036.[3] It demonstrates that none of their exceptions withstand scrutiny.

### B. The Reasons The Unions' Exceptions Lack Merit

In support of the claim that First Student is a perfectly clear successor, the General Counsel contended below that, on several occasions in a nearly ten month period ending on May 16, 2012, the date the District's Board of Education voted to approve the District's entering into a transportation services agreement with First Student, representatives of the Company made a combination of statements that caused First Student to become a perfectly clear successor. The General Counsel's theory, which the Unions pressed as well, was that the statements resulted in First Student's becoming a perfectly clear successor because they promised the employees jobs in a way that misled the employees there would be no changes in their terms and conditions of employment or that failed to put them on notice there would be changes.

The statements the Company allegedly made were that it would hire the District's employees, pay them at the same hourly rate as the District, and recognize the District employees' union representative. Statements of that nature were allegedly made: (1) in late July 2011, by First Student Business Development Manager Dan Kinsley, when the District interviewed First Student on the Company's response to the District's request for proposals ("RFP") to provide student transportation services (Tr. 175-77, 354-56, 375-78, 398-99, 451-53); (2) on March 2, 2012, by Kinsley and Area General Manager Doug Meek, at a pre-contract

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proved the identity of the employees' 9(a) representative, the Company has not, in referring to their representative, capitalized the word union in its exceptions or briefs, which it normally would do to signify a bargaining unit's union representative.

[3] The General Counsel did not file any exceptions to the ALJD.

meeting with District employees that the District arranged after the Company submitted a new proposal in response to a request the District made after cancelling the RFP (Tr. 318-24, 336-38, 346-48, 382-83, 400-02, 417-22, 436, 458-60); and (3) at the Board of Education meeting on May 16, 2012, by Kinsley, in response to questions from Board members (Tr. 45-52, 85, 179-82, 212, 267, 384-86, 402-03, 462-65, 480-81). Statements that the Company would hire the District's employees and recognize the union were also allegedly made by Kinsley after the Board of Education meeting on May 16, 2012, in a brief conversation he had with USW Staff Representative Tonya DeVore and a small group of District employees (Tr. 54-55, 185-86, 268, 403-04, 466, 483-84).

The only questions of fact the evidence on these alleged statements raise are whether: (1) the statements that First Student would hire the District's employees were made with the qualification that the Company would offer jobs to District employees who satisfied its hiring criteria; and (2) the statements that First Student would recognize the union were made with the qualification that it would do so if the Company hired a majority of the District's employees. The ALJ answered those questions in the affirmative, crediting the testimony of Kinsley and Meek, and neutral witnesses Dr. Kelley Peatross, the Assistant Superintendent of Schools for the District, and Robert Bradley, the District's former Facilities Manager, that the qualifications were included each time the statements were made. (ALJD pp.8-14) The Unions have not excepted to the ALJ's credibility determinations, leaving only at issue the conclusions he drew from the facts he found. (Unions' Exceptions Brief p.3).

The ALJ concluded that the statements indicated First Student was willing to hire a majority of the District employees and to recognize and bargain with the union if it did so, but were not enough to make First Student a perfectly clear successor. In arriving at that conclusion,

he found that the statements were offset by other statements the Company made in the same period, in particular at the March 2, 2012, meeting, which put the employees on notice that the Company was not going to adopt the District's collective bargaining agreement (the "District CBA") and that new terms of employment were going to be implemented. The statements he found sent that message, and thus insulated the Company from becoming a perfectly clear successor, included ones that: (1) if the Company recognized the union, a new contract would be negotiated; (2) the Company did not know how many hours employees would work; and (3) subjects like paid time off, vacation pay and sick pay would be subject to negotiations. (ALJD p.23).

Applying the test outlined by the Board in *Spruce Up,"* 209 NLRB 194, 195 (1974), *enforced,* 529 F.2d 516 (4th Cir. 1975), the ALJ then found that, having previously put the employees on notice that changes would be forthcoming, the Company "clearly and unequivocally announced new terms of employment" at the meeting with the District's employees on May 17, 2012, and that it did so "simultaneously with offering employees an application to apply for work under these terms" and "substantially before it commenced operations." (ALJD p.24). He concluded that at that meeting, First Student was "privileged to unilaterally establish its initial terms and conditions of employment," and that, as such, the Company did not violate Sections 8(a)(1) and (5) in announcing them at that time and in bypassing the union in doing so. (ALJD p.27). None of the Unions' arguments call these findings and conclusions into question.

The Unions' first argument, that the District employees reasonably expected they would be retained because First Student's hiring requirements are similar to those of the District, is based upon assumptions derived from speculation, not evidence. The conclusion the Unions

draw also does not logically follow. That two employers may have similar hiring requirements does not mean that they will apply them in the same fashion or that an employee who satisfied them once will be able to do so again. And even if the Unions' assumptions were correct, they would not be of any legal consequence.[4] Perfectly clear successor status does not turn upon similarities between the predecessor's and successor's hiring practices.

The Unions' next argument, that First Student made perfectly clear successor-triggering statements at the interview with the District in July 2011, the meeting with the employees on March 2, 2012, and at the Board of Education meeting on May 16, 2012, is short-circuited by their equivocation on which of those dates the Company allegedly became a perfectly clear successor. The equivocation betrays the lack of support their position finds in the law.

From a factual perspective, the statements Kinsley made at the interview in July 2011, were directed to the District's representatives and addressed only subjects that the District required every bidder to address. Similarly, at the Board meeting on May 16, 2012, Kinsley's statements were directed to, and made in response to questions from, the Board members, and addressed the same subjects. (Tr. 452-67). At the meeting on March 2, 2012, meanwhile, Meek, although getting a part of the test wrong, essentially only informed the employees what it means to be a successor under the Supreme Court's decision in *NLRB v. Burns Int'l Security Services,* 406 U.S. 272 (1975). The way Meek said it was that, if the Company hired 50% plus one of the

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[4] The Unions twist a quote from the administrative law judge's decision in *Prime Equip.,* 330 NLRB 815, 818 (2000) to argue that, when it is not foreseeable that a successor's hiring plans would affect a union's majority status, a successor cannot escape its initial bargaining obligation. (Unions' Exceptions Brief p. 19). That is not the law and that is not what the case says. The Unions' reliance upon what the judge said is also misplaced because, in affirming the judge's findings, the Board said that "[w]e find no need to rely upon the judge's suggestion that the Respondent was a 'perfectly clear' successor...." 330 NLRB at 815 n.2.

The Unions also improperly refer to a Memorandum issued by the Division of Advice in *Central Parking Sys., Inc.,* Case 21-CA-37718. It is well established that Advice Memoranda do not constitute Board law and have never been accepted as legal authority. *See Geske & Sons,* 317 NLRB 28, 56 (1995).

District's employees, the employees would bring their union representation but not their contract, adding, when asked, that at that point various subjects would be subject to negotiation. (Tr. 418-22).

The significance of these facts from a legal perspective is three-fold. First, all the statements were made before the transportation services agreement between the District and First Student was executed and, with the exception of those made after the meeting, before the Board of Education voted on May 16, 2012, to approve the agreement.[5] Because a successor cannot become a perfectly clear successor before it has entered into an agreement to acquire or assume its predecessor's business, the statements had no legal effect on the Company's right to establish initial terms and conditions of employment.

Second, the statements Kinsley made at the July 2011 interview with the District, and the May 16, 2012, Board of Education meeting cannot be used to support a finding that First Student is a perfectly clear successor because they were not directed to the District employees or their union representative. They were directed to the District's representatives and members of the Board. (Tr. 45-52, 175-77, 179-82, 212, 267,354-56, 375-78, 384-86, 398-99, 402-03, 462-65, 451-53, 480-81). Perfectly clears successor status turns upon information communicated to and intended for the predecessor's employees, not the predecessor.

Third, Meek's description at the meeting on March 2, 2012, of the Company's obligations if it hired a majority of the employees not only did not make the Company a perfectly clear successor, but under existing law it protected the Company, as the ALJ found, from being deemed one. The description essentially informed the employees of the legal effect of the Company's becoming a *Burns* successor. The Board has never held that providing a

[5] In their brief, the Unions do not mention the statements made after the Board meeting in arguing that, "at the very latest, First Student's perfectly clear successor bargaining obligation had attached by [the date of the meeting]." (Unions' Exceptions Brief p. 24)

predecessor's employees such information caused an aspiring successor to become a perfectly clear successor. On the contrary, telling the predecessor's employees that recognition is conditioned on the union's maintaining its majority status and that their labor agreement will not follow them if the condition is satisfied signals to the employees, as the Board has held, that there are going to be changes in their terms and conditions of employment if they are offered positions.

The Unions also miss the mark in arguing that, because he also said the Company would be adopting the District's routing system, Meek's statement at the March 2, 2012, meeting that the Company did not know how many hours employees would work cannot be construed as portending the establishment of new employment terms. Their argument is based upon a contention for which there is no evidence in the record; namely, that "employees never knew exactly how many hours they would work before the school year began." (Unions' Exceptions Brief p. 32). Based as it is upon that made-up fact, the Unions' argument that changes under the system were part of the status quo cannot stand.

Finally, the Unions misread the ALJD in arguing at length that 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 successor." (Unions' Exceptions Brief pp. 33-34). While the ALJ remarked that the Company announced "new terms of employment substantially before it commenced operations," it is not accurate to say he based his holding on that finding. (ALJD p. 24). His statement must be read together with his earlier finding that the Company had previously placed the employees on notice that it was not adopting the District CBA and would be implementing new working conditions. (ALJD p. 23).

Even if First Student could be deemed to be a perfectly clear successor, which the facts

show it cannot be, the General Counsel's unilateral change claim on the changes the Company allegedly implemented on May 17, 2012, and his direct dealing claim on the Company's meeting with the District's employees on that date, would still fail, both as pleaded and on the facts.[6] The General Counsel's claims are flawed because the Company did not employ the employees on May 17, 2012 – they remained employees of the District until school ended in June 2012. It was not until two months later, in August 2012, after submitting applications and satisfying the Company's hiring requirements, that a majority of them were hired by First Student. (Tr. 155; REX 12). On May 17, 2012, the Company could not have implemented changes to the wages, hours and working conditions of employees it did not yet employ and it likewise could not have bypassed those employees' union representative. It had no relationship with either at that time. (GCX 1(c); REX 12).

The General Counsel's unilateral change claim would also fail to the extent that the General Counsel failed to present evidence that the changes the Company is alleged to have made were material, substantial and significant. His witnesses' testimony that the employment terms the Company implemented were "different" from those in the District CBA is not enough to satisfy his burden of proving that the changes involved subjects over which the Company would have had a duty to bargain if it were a perfectly clear successor.

Turning to the claim that First Student unlawfully conditioned bargaining on the union's withdrawing the unfair labor practice charge Local 9036 filed on September 21, 2012, the ALJ

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[6] Although the Unions have excepted to the ALJ's failure to find that the Company unlawfully implemented the terms it announced at the May 17, 2012, meeting and illegally bypassed the union, they do not address those exceptions in their Brief. That suggests they are of the view that, if the Board reverses the ALJ and finds that First Student is a perfectly clear successor, it must also find that the Company violated the Act in implementing the terms and bypassing the union. A finding that First Student is a perfectly clear successor, however, would not automatically mean that the Company committed those alleged violations. The Company maintains that, putting to the side the question whether it is a perfectly clear successor, the General Counsel failed to prove it violated the Act.

correctly found that the condition represented a nonmandatory subject of bargaining and that the Company did not violate the Act because it did not insist upon the condition to impasse. The facts on which he relied are undisputed and the legal principle he cited is well settled. The cases on which the Unions rely in arguing that he erred are factually dissimilar and, as such, inapposite.

## II. STATEMENT OF FACTS

### A. Timeline Of Relevant Events

In mid-June 2011, First Student received an RFP from the District seeking a proposal to replace the District as the transportation services provider for the District's students. The Company submitted its response to the RFP in July 2011. In late July, the Company was interviewed by the District, as were two other companies that had submitted proposals. (Tr. 375-77, 450-53). On October 12, 2011, the Board of Education voted to approve the District's entering into a transportation services contract with First Student. Less than a month later, the Superintendent of Schools for the District withdrew the RFP, ending the process. (Tr. 378-80, 454-55; REX 7).

In January 2012, the District and First Student revisited entering into a transportation services contract. On February 3, 2012, the Company submitted a revised proposal. (Tr. 381-82; 455-57; GCX 20). Over the next three months, the District and First Student negotiated over contract terms, reaching an agreement in principle on the terms in May 2012. (Tr. 382; 457-58, 461). In the meantime, the District arranged for representatives of First Student to meet with the District's employees on March 2, 2012, to provide them with information on the Company and answer any questions they had. (Tr. 382-84, 400-02, 417-22, 458-60).

On May 16, 2012, the Board of Education voted to approve the District's entering into a contract with First Student, effective July 1, 2012. The Superintendent of Schools signed the

contract on behalf of the District on May 24, 2012. First Student's President signed the contract on June 1, 2012. (Tr. 384-86, 402-03, 462-65; GCX 17).

On May 17, 2012, Company representatives met with the District's employees to review the Company's hiring process, outline terms and conditions under which they would work if hired, and answer questions. Thereafter, District employees, along with external candidates, submitted applications for employment and went through the hiring process. (Tr. 423-25, 501-10; GCX 5). First Student extended its first two offers of employment to former District employees on June 27, 2012, and the majority of its offers to former District employees on August 1, 2012. (REX 6). As of August 17, 2012, the Company had hired a majority of the employees it needed. By August 27, 2012, the first day of work for employees, the Company had retained just short of a full complement of employees, a majority of whom had previously been employed in comparable positions by the District. (Tr. 388, 515-16; REX 12).

On May 18, 2012, the union sent its first bargaining demand to the Company, which was followed three months later by two others, one on August 29, 2012, and one on August 30, 2012. On September 21, 2012, the Company acknowledged that it was under an obligation to bargain with the union, and less than a month later, on October 17, 2012, the Company and union had their first bargaining session. (GCX 11, 14-16).

### B. Facts Relating To The Perfectly Clear Successor Claim

The facts relevant to the General Counsel's claim that First Student is a perfectly clear successor come from: (1) the District's interview of First Student in late July 2011; (2) First Student's meeting with the District's employees on March 2, 2012; and (3) the Board of Education meeting on May 16, 2012.

#### 1. The District's Interview Of First Student In Late July 2011

In late July 2011, the District conducted separate, one hour interviews with the

companies that submitted proposals in response to the transportation services RFP it issued in June 2011. Three companies submitted proposals: First Student, Dean Transportation and MTS. The interviews were held at District's administration building, in the room where the Board of Education meets. They were conducted by a committee made up of representatives of the District that included Peatross, Phoebe Wood (the District's Chief Financial Officer), Dan LaPan (the District's Director of Facilities), and Bradley. Peatross also invited USW Staff Representative Devore to sit-in on the interviews. (Tr. 354-56, 371, 375-78, 398-99). Peatross and DeVore testified at the hearing on behalf of the General Counsel regarding the interviews. Bradley and Kinsley addressed the subject in their testimony on behalf of the Company.

Peatross testified that the purpose of the interviews was for each company to present its proposal to the District. In presenting their proposals, the companies addressed, among other things, terms to which the District had asked all bidders to agree as a condition of "partnering" with the District. Those terms included: giving priority in hiring to the District's employees; paying those employees the same wage rate as the District; and providing them with health insurance benefits comparable to those the District offered. Peatross testified that, at the First Student interview, Kinsley was the main spokesperson for the Company and presented the Company's proposal. She did not remember if DaVore attended the First Student interview. She also could not recall if Kinsley said anything about wages or the hiring of employees during the interview; however, signaling that she assumed he did, she added that those were subjects the district required every company that presented to address. (Tr. 354-56, 369, 371, 375-78).

DeVore, who indicated that she attended the First Student and Dean Transportation interviews, testified that, during the First Student interview, Kinsley said the Company would hire District employees who met its hiring requirements, and described those requirement as

consisting of having a CDL and passing a drug screen, a physical exam and a background check. (Tr. 175-77) Bradley, who attended all three meetings, indicated that each of the companies, consistent with what the RFP required, made such a commitment. (Tr. 399). Kinsley also acknowledged that he said during the interview that First Student would hire existing employees who satisfied its hiring requirements. (Tr. 459).

DeVore also testified that Kinsley said the Company would maintain the existing wage rate and offer the employees comparable health insurance, again consistent with what the District required. (Tr. 175-77). Bradley was not asked about either subject and Kinsley was only asked about wages. Kinsley testified that what he said about wages was that the Company would pay existing employees whom it hired initially at the same rate as the District paid them, and that it planned to increase the rate in the future. (Tr. 453).

The major point of disagreement in the testimony was on how Kinsley responded to the question whether First Student would recognize the union. DeVore, who testified she asked the question, was alone in stating that Kinsley answered the question in the affirmative, without any qualification. (Tr. 177). Peatross, Bradley and Kinsley were in agreement that Kinsley responded that the Company would recognize the union only if it hired a majority of the District's employees. (Tr. 377, 399, 452). The ALJ credited their testimony. (ALJD p.9).

### 2. The March 2, 2012, Meeting With The District's Employees

After First Student submitted its revised proposal to the District on February 3, 2012, and the Board of Education gave approval to the District's entering into negotiations with First Student for a contract, Dr. Peatross arranged for representatives of First Student to meet with the District's employees. The meeting was held on March 2, 2012, in the break room of the District's transportation facility. All of the District's drivers and monitors were invited to the meeting. They were joined by Peatross and Bradley. Kinsley and Meek attended the meeting on

behalf of First Student. (Tr. 382, 400, 417, 458).

The purpose of the meeting was to discuss with the employees the transition process and any questions or concerns they had regarding it. The meeting lasted around an hour, and began with Peatross introducing Kinsley and Meek. Kinsley then made a brief statement and Meek followed with an overview of the Company and its operations, the Company's experience in Michigan, and the hiring process the employees would be required to complete if the Company were awarded a contract. Following the presentation, there was a question and answer session. (Tr. 359, 382, 400, 418-19), 458-59).

Six witnesses testified about statements that were made at the meeting regarding whether the Company intended to offer the employees positions, whether it would recognize the union, and what the terms and conditions of employment would be if it entered into a contract with the District. Bus Monitor Millie Stidhum-Stewart, Bus Driver Michelle Ezell, and Peatross testified on behalf of the General Counsel. Bradley, Meek, and Kinsley testified on behalf of the Company. The ALJ found Meek's account of the meeting to be the most reliable and credited it. He also found that it was corroborated in important respects by the testimony of Peatross, Bradley and Kinsley. He did not credit the testimony of Stidhum-Stewart and Ezell to the extent that it conflicted with Meek's testimony. (ALJD p.12).

Peatross testified that she took the opportunity at the meeting to inform the employees of the District's position on "partnering" with First Student. She described the District's position as being that First Student would: maintain the existing wage rate; provide comparable benefits; hire as many current employees as it could as long as they satisfied the Company's hiring requirements; and recognize the union if it hired 50% plus one of the current employees. She also recalled employees asking questions about pay and benefits and one of the Company's

representatives responding that the pay would remain the same and health insurance benefits would be comparable. (Tr. 359-62).

Peatross also testified that, like her, Meek informed the employees that the Company would recognize the union if it hired 50% plus one of the current employees. She added that she also recalled him responding to some questions by saying that the matter to which the question related would be subject to negotiations. (Tr. 382-84). Meek and Kinsley gave similar testimony.

Meek testified that, in responding to employees' questions, he said on more than one occasion that the Company would recognize the union if it hired 51% of the current workforce, explaining that, in that event, the employees would bring their union representation but not their contract. He also confirmed that he responded to a variety of questions by saying that the matter would be subject to negotiations. (Tr. 418-22). The way Kinsley described what Meek said about the Company's recognizing the union was that, if the Company hired 51% or more of the current workforce, it would recognize the union and bargain with it under new terms and conditions. The questions to which he recalled Meek saying the matter would be subject to negotiation dealt with paid time-off, vacation time, sick pay and the like. (Tr. 459-60).

In response to a question about hours of work, Peatross testified that she recalled someone from the Company saying that the routes would have to be reviewed in order to determine the number of hours that would be provided. (Tr. 383). Bradley corroborated her testimony. He testified that Meek responded to the question by saying that the Company would not know what hours would be available until it determined the routes. (Tr. 401). Meek also confirmed that he responded to the question essentially that way. (Tr. 421).

Bradley testified that one of the biggest concerns the employees expressed at the meeting

was whether the District CBA would "transfer" to First Student. He recalled Peatross answering the question by explaining that they were District employees at that time and that, if the District signed a contract with First Student, the union would have to negotiate a new contract with First Student. (Tr. 400-02). Kinsley also recalled an exchange like that. He testified that, in response to a question from one of the monitors, Peatross told the group that, if the District entered into a contract with First Student, the District CBA would be null and void. (Tr. 460). Similarly, Meek recalled Peatross' saying that, if the District and First Student entered into a contract, First Student would be a new employer and, as such, the employees would work under the Company's work rules if they were hired. (Tr. 422).

In addition to these other topics, Meek and Kinsley also testified that Meek reviewed with the employees the Company's hiring process, including all the requirements that would have to be satisfied to receive an offer. He also reviewed the elements of the Company's training program. (Tr. 419, 422, 459).

### 3. The May 16, 2012, Board Of Education Meeting

After representatives of First Student and the District agreed on the terms of a transportation services contract in the first half of May 2012, arrangements were made for the Board of Education to vote at a public meeting on May 16, 2012, on whether to approve the District's entering into the contract. Dr. Peatross contacted Kinsley to advise him that the contract had been placed on the Board's agenda and to invite him to the meeting. She also advised DeVore that the contract was on the agenda. Kinsley and DeVore both attended the meeting, as did six or so of the District's transportation employees. (Tr. 179, 384, 461).

Although Kinsley was not scheduled to speak at the Board meeting and had no plans do to so, he was invited during the meeting to the podium to answer a question that one of the Board members had posed to Dr. Jenkins. In all, he spent 15-20 minutes at the podium, during which

time he answered Board members' questions while the Board members and Drs. Jenkins and Peatross discussed the contract. The Board then voted to approve the District's entering into the transportation services contract with the Company, with an effective date of July 1, 2012. (Tr. 384-85, 402, 462-63). Five witnesses testified regarding the remarks Kinsley made to the Board that evening. Bryant, DeVore and Peatross testified on behalf of the General Counsel. Bradley and Kinsley testified on behalf of the Company. The ALJ credited the testimony of Kinsley, Peatross and Bradley to the extent that it conflicted with that of DeVore and Bryant. (ALJD p.13).

According to Bryant, Kinsley was called to the podium by Bradley upon Bradley's being asked by Superintendent Jenkins to respond to a question from Board Member Rudy Jenkins about the wages First Student was going to pay. Bryant testified that, in response to the question, Kinsley said employees would maintain their current wages. As Bryant remembered it, Kinsley was then asked by Board Member Alexis Thomas if First Student intended to hire the District's transportation employees. Bryant testified that Kinsley responded that the Company would hire them if they passed a background check, a physical exam, and a drug screen. He indicated that, after that, DeVore interrupted the meeting to ask if the Company would recognize the union. His memory was that Board Member Maddy Thompson then asked that question and Kinsley responded that the Company would recognize the union. (Tr. 45-50).

DeVore testified that the "school board" invited Kinsley to the podium when members of the Board asked Superintendent Jenkins and Facilities Manager Bradley questions they could not answer. According to her, one question Kinsley was asked related to hiring and he responded that the Company would hire any current employees who met the Company's hiring requirements, which he went on to describe. DeVore testified that Kinsley also said wages

would remain the same. She added that he repeated the phrase "everything will be the same" several times during the meeting. On cross-examination, however, she acknowledged that she did not mention that in her affidavit. DeVore also did not testify, and she agreed that she did not mention in her affidavit, that Kinsley was asked if the Company would recognize the union and responded that it would. The only remarks she testified she made at the meeting concerned a proposal the union had made to the Board offering to agree to concessions to the District CBA as a way for the District to continue providing transportation services, instead of outsourcing them to the Company. She indicated that during the public comment portion of the meeting she urged the Board to consider the union's proposal before deciding whether to approve a contract with First Student. (Tr. 179-185, 267-68; REX 3).

Peatross testified that, when Kinsley was at the podium, he only spoke when asked a question by the members of the Board. She recalled him saying, in response to a question about First Student's hiring plans, that the Company would offer positions to existing employees who satisfied its hiring requirements, and touching upon what those requirements were. She recalled him being asked about wages and responding that the Company would offer the same rate of pay to the District's employees as the District paid them. Lastly, when asked if the Company would recognize the union, she recalled Kinsley stating that the it would do so upon hiring 51% of the employees. (Tr. 384-86).

Like Peatross, Bradley testified that, when asked by a Board member about First Student's hiring plans, Kinsley responded that it would offer positions to existing employees as long as they satisfied the Company's hiring requirements. He likewise testified that, when asked if the Company would recognize the union, Kinsley said that it would do so if it hired 51% of the current workforce. (Tr. 402-03).

Lastly, Kinsley recalled being asked if the Company would recognize the union, and responding that it would do so if it hired 51% of the District's employees. He recalled being asked about the Company's hiring plans, and responding that it would hire current employees who met the Company's hiring requirements. And he recalled being asked about the wages the Company would pay District employees whom it hired, and responding that it would pay them at the same rate as the District. He denied saying that everything would remain the same. (Tr. 462-65, 467).

Following the meeting, Kinsley had a brief conversation with DeVore and several of the District's transportation employees regarding whether the Company would recognize the union and the Company's hiring process. Bryant and DeVore testified about the conversation on behalf of the General Counsel. Bradley and Kinsley testified about it on behalf of the Company. To the extent there was a conflict in their testimony, the ALJ credited the testimony of Bradley and Kinsley over that of Bryant and Devore.[7] (ALJD p.14).

According to Bryant, after the meeting, DeVore and around five other employees and he gathered in the courtyard of the District building and, while there, they were approached by Kinsley. Bryant testified that upon reaching them, Kinsley put his arm around one of the employees and said, "Don't worry, everything will be fine." He added that, after Kinsley said that, DeVore asked Kinsley if the Company would recognize the union and Kinsley responded, "Yes, welcome to First Student." (Tr. 54-55).

DeVore testified that the gathering took place "outside the board building" and included Bryant and four other employees. She said that when Kinsley walked out of the building, he approached them and told them "don't worry," "everything will be okay," "this is going to be

[7] The ALJD mistakenly refers to the testimony of "Bryant and Kirby" as being credited. The paragraph in which that reference appears makes it clear that the ALJ meant to say "Bradley and Kinsley." (ALJD p.14).

smooth," and "you have nothing to worry about." She added that he also said "everything will be the same"; however, she had to admit again on cross-examination that she did not mention that or anything like it in her affidavit. Lastly, she testified that she asked Kinsley if the Company would recognize the union and he replied that it would. (Tr. 185-86, 268).

Bradley remembered the exchange differently. He testified that, after the meeting, Kinsley and he walked out of the building together, and as they were walking, they walked past DeVore, who was meeting with some employees. He said that, as they walked past, DeVore remarked to Kinsley that the Company would be required to recognize the union if it hired 50% plus one, not 51%, of the current workforce, and that he should know that. He added that Kinsley did not respond, and that he continued walking. (Tr. 403-04).

Kinsley too recalled leaving the meeting with Bradley and walking with him toward their cars when they came across DeVore and a few employees. He likewise testified that, as Bradley and he walked past them, DeVore remarked that the Company would be required to recognize the union if it hired 50% plus one, not 51%, of the existing workforce. He recalled replying that she was right. He also recalled saying to the employees who were there that, if they met the Company's hiring criteria, their wages would be maintained and they should not have to worry about working for the Company. He again denied saying that everything would remain the same. (Tr. 465-67)

### C. Facts Relating To the Unilateral Change And Direct Dealing Claims

#### 1. The May 17, 2012, Meeting With The District's Employees

On May 17, 2012, representatives from First Student met with the District's transportation employees to introduce them to the Company, review the Company's hiring process, outline terms and conditions under which they would work if hired, and answer questions. In attendance on behalf of the Company were Meek, Kellerman, Kinsley, Char

Campbell, a new human resources manager, and John Kiraly, whom the Company had hired to serve as the location manager. Peatross and Bradley were also in attendance. The meeting was held in the District's transportation facility and lasted around an hour. (Tr. 423-24, 500-01).

The meeting opened with introductions and brief comments by Peatross and Bradley. Meek then gave an overview of the Company and its management structure, including who was at the meeting and who the employees might be seeing. After he concluded his remarks, he turned the floor over to Kellerman, who discussed in some detail the Company's hiring process, the Company's training program, and terms and conditions under which the employees would work if hired by the Company. He facilitated his discussion, as Meek did his, with a memo they distributed to the employees outlining questions and answers on the topics about which they spoke. (Tr. 423-25, 500-10; GCX 5).

On the hiring process, the memo: (1) stated that all current District drivers and monitors who successfully passed the Company's hiring criteria would be offered employment with the Company; (2) outlined the criteria; (3) indicated that an employee would not be hired and officially considered a First Student employee until the employee successfully passed all hiring requirements and was extended a formal job offer; (4) noted each employee would be interviewed; and (5) stated the employees would be provided a packet containing pre-employment forms that had to be completed and returned by May 23, 2012, for an employee, if hired, to maintain the employee's current rate of pay and seniority for route selection purposes. As the memo indicated, employment applications and other pre-employment forms were distributed to the employees at the meeting. (GCX 5).

On the subject of wages, the memo: (1) reiterated that employees who turned in an employment application by May 23, 2012, and were hired would maintain their current rate of

pay for all transportation duties; (2) indicated that they would be paid a "B" hourly rate for non-student transportation duties; and (3) set out the hours they would be guaranteed each shift. (GCX 5).

On the subject of benefits, the memo: (1) stated that all First Student drivers and monitors are considered part-time and, as such, the Company's benefit programs are tailored to a part-time workforce; (2) listed the health-related plans offered by the Company; (3) stated that current District employees who enrolled in the medical insurance plan would receive a company contribution of 80% toward employee-only coverage; and (4) listed other benefits offered by the Company. (GCX 5).

On the subject of training, the memo: (1) stated that all Company drivers and monitors were required to complete the Company's training program; (2) noted that District drivers who applied and had a CDL would be required to participate in First Student's orientation and classroom training and to pass a behind-the-wheel evaluation; and (3) indicated how much employees who completed the training program and were hired would be paid for training. (GCX 5).

Kellerman covered each of these items in his presentation and fielded questions from the employees regarding them and other matters. One of the questions he received was whether the Company would recognize the union. He testified that, in responding to the question, he noted that the Company has a freedom of association policy under which it takes a position of neutrality on union organizing, and added that the Company gets along well in union and non-union situations. He also indicated that he said, if the employees had an existing union and the Company hired 50% plus one of them, the union could request voluntary recognition. (Tr. 503).

Bryant and Stidhum-Stewart testified about the meeting on behalf of the General

Counsel. Bryant testified in summary fashion regarding items contained in the memo that he considered to be different from the terms under which he worked as a District employee. While acknowledging on direct-examination that he did not receive an offer letter until August 1, 2012, and on cross-examination that he remained an employee of the District through the end of the school year in June 2012, he testified that someone from First Student said the changes outlined in the memo were going into effect that day. He also testified about some of the questions that were asked and other things that were said at the meeting. That led on cross-examination for it to be disclosed that, in his Board affidavit, Bryant said that, during the meeting, "Kellerman said we would be at-will employees," and that, "based upon what Kellerman said about holidays and sick days, they could change from what we got from the district." (Tr. 56-64, 111-17).

Stidhum-Stewart also testified in summary fashion about differences between the terms contained in the memo and those under which she worked as a District employee. Unlike Bryant, however, she said that the employees were told during the meeting that the changes would go into effect the next school year. (Tr. 324-27).

### D. Facts Relating To The Claim The Company Unlawfully Conditioned Bargaining On The Union's Withdrawal Of Its First Charge

On May 18, 2012, Devore sent Kinsley a letter, with a copy to Meek, expressing that the USW desired to enter into negotiations with the Company for a first contract. DeVore did not receive a response from Kinsley to the letter. A few days after sending the letter, she spoke to Meek regarding it. Meek told her that he had nothing to talk to her about and directed her to contact Audrey Adams, a senior labor relations attorney for the Company. (Tr. 190-93, 426; GCX 11-12).

Sometime in the first half of June 2012, Adams received a telephone call from DeVore in which DeVore asked her if the Company planned to recognize and bargain with the union.

Adams replied that she understood the Company was still in the process of hiring employees, and that she did not know at that point if it would be legally obligated to recognize the union. She added that she understood the Company's contract with the District was scheduled to go into effect in July and that she would not know anything concrete until after it went into effect. DeVore then asked if she could call back after July 1, 2012, to see where the Company was in the hiring process. Adams replied that she could. (Tr. 193-94, 281-87, 551-52).

Following the conversation, DeVore sent Adams an email on June 13, 2012, transmitting a copy of the District CBA and stating that she would call Adams sometime after July 4. (Tr. 195, GCX 13). After July 4, DeVore tried to reach Adams on the telephone several times up until the third week of July. When she did not hear back from Adams, she assumed that Adams was waiting until the union had majority status. (Tr. 196-97, 288). Adams recalled seeing DeVore's number come up on her caller ID. She did not return the calls because she understood the Company was still in the hiring process and therefore she had nothing to tell DeVore. (Tr. 553).

On August 29, 2012, DeVore sent Kiraly a letter advising him that she understood the Company had hired a majority of the District's transportation employees and stating that those employees had been represented by the USW while employed by the District. The letter went on to request that the Company recognize the USW as the employees' bargaining representative and enter into negotiations with the union for a first contract. The next day, August 30, 2012, DeVore sent an identical letter to Kristen Huening, an in-house attorney for First Student whose name DeVore obtained from Kiraly. Sometime in the next two weeks, DeVore had a telephone conversation with Huening, who informed DeVore that she was an EEOC attorney and that DeVore should contact First Student Labor Attorney Raymond Walther. (Tr. 198-201; GCX 14-

15).

Following her conversation with Huening, DeVore sent Walther an email on September 18, 2012, asking him to contact her. Later that day, Walther sent DeVore an email advising her that he was in Georgia in contract negotiations and would call her upon his return. On September 21, 2012, Walther sent DeVore an email indicating that he had left her a voice mail message stating that he would be her contact while Adams was on maternity leave but that Adams would be handling negotiations. (GCX 16).

DeVore replied to the email four days later, on September 25, 2012, advising Walther that she would like to begin negotiations before November, when Adams was scheduled to return from maternity leave, and inquiring if that was possible. Later that same day, Walther sent DeVore an email indicating that he was booked into November and that it made the most sense to start negotiations when Adams returned. (GCX 16).

Six days later, on October 1, 2012, DeVore replied, stating the union would be willing to wait until November if the Company maintained the terms and conditions the District previously had in place. Later that day, Walther emailed DeVore, stating that the Company had no obligation to assume the terms and conditions contained in the District CBA. He added that he understood the union had filed an unfair labor practice charge on that issue and that he would be submitting a response to the Region. That same day, Walther sent DeVore a second email indicating that he had some time open in October and, if the union still wished to begin negotiations that month and was willing to withdraw its charge, he would send her a recognition letter and schedule dates with her for negotiations. He closed the email by saying, if the union was not willing to withdraw the charge, the Company would not be able to begin negotiations until the Region concluded its investigation. (GCX 16).

Having not received a response to his emails, Walther left DeVore a voice mail message and sent her an email on October 3, 2012, asking her to let him know if the union intended to begin negotiations on October 15, 2012, and drop its charge. Two days later, on October 5, 2012, DeVore replied, expressing disappointment that the Company was conditioning bargaining on the union's withdrawal of its charge, and asserting that the Company had an obligation to bargain once it had hired a substantial and representative complement of its workforce, of which more than half came from the District. She closed by saying that the union would meet with the Company during the week of October 15 if the Company rescinded its demand that the union withdraw its charge. Later that day, Walther sent DeVore an email indicating that the Company was agreeable to beginning negotiations regardless of whether the union dropped its charge and expressing that he saw no point in the charge because the Company had never refused to bargain with the union. (GCX 16).

In subsequent emails, Devore and Walther scheduled the parties first two bargaining sessions for October 17 and 18, 2012. They then met on those dates.

As Walther explained at the hearing, the reason he informed DeVore the Company would agree to schedule negotiations if the union withdrew its charge was that he was under the impression the union had only filed the charge to bring the Company to the negotiating table. In a side-bar discussion during the first round of negotiations, DeVore told him that she too thought the reason the charge had been filed was to put pressure on the Company to agree to negotiate. (Tr. 560-66).

## III. ARGUMENT

### A. The ALJ's Finding That The General Counsel Failed To Prove First Student Is A Perfectly Clear Successor And His Dismissal Of The Unilateral Change And Direct Dealing Claims Must Be Affirmed

The common thread among the allegations of the Complaint in which the perfectly clear

successor-based unilateral change and direct dealing claims appear is that they are premised upon an unstated claim that First Student's bargaining obligation arose sometime before May 17, 2012, i.e., sometime over two weeks before it had a fully executed contract with the District, six weeks before it extended its first offers of employment, 13 weeks before it had hired a majority of its employees and 14 weeks before it commenced operations. Paragraph 10 of the Complaint contains the only allegation from which such a claim could conceivably be derived. Missing the date of the meeting by a day, it alleges that, at a Board of Education meeting on May 15, 2012, Kinsley, speaking as an agent of the Company, gave assurances that First Student would recognize the union and that it would hire unit employees who met its hiring requirements without any changes to their wages. (GCX 1(c)). Although the General Counsel relied upon them below, the Complaint does not mention the statements allegedly made by Kinsley at the interview with the District in late July 2011, or Meek at the meeting with the District's employees on March 2, 2012.

The Complaint, thus, does not expressly allege that First Student became a perfectly clear successor prior to May 17, 2012 and, as such, it is missing the linchpin for the General Counsel's unilateral change and direct dealing claims.[8] While that defect alone should be enough to reject the General Counsel's perfectly clear successor-based claims, putting it to the side, the General

[8] First Student argued below that, not only was the Complaint missing that claim, but any attempt by the General Counsel to read it into the Complaint had to fail because it would contradict what the Complaint said. Paragraph 9, in its original form, alleged that the union had been the employees' exclusive collective bargaining representative since about June 1, 2012, the date First Student's President executed the Company's contract with the District. First Student contended that, if a claim that the Company is a perfectly clear successor were to be read into the Complaint, that was the allegation from which it had to be derived because it alleged the date on which the Company's bargaining duty purportedly attached. *See Dupont Dow Elastomers,* 332 NLRB 1071, 1074 (2000), enf'd. 296 F.3d 495 (6th Cir. 2002) (bargaining obligation attached when employer became a perfectly clear successor); *Pioneer Concrete of America,* 327 NLRB 311, 313 (1998) (bargaining obligation attaches at time employer found to have become a perfectly clear successor). That defect in the Complaint, however, was removed when the ALJ granted the General Counsel's post-hearing motion to amend Paragraph 9. As amended, Paragraph 9 does not allege a date on which the union became the employees' exclusive collective bargaining representative as employees of First Student.

Counsel failed to prove that First Student became a perfectly clear successor on any of the dates from which he had to choose.

### 1. The Perfectly Clear Successor Caveat And The Board's Longstanding Interpretation Of It

The perfectly clear successor caveat is derived from the Supreme Court's decision in *NLRB v. Burns Int'l Security Services*, 406 U.S. 272 (1972). *Burns* established the principle that a successor which continues its predecessor's business substantially unchanged, and a majority of whose workforce consists of union-represented employees of the predecessor, inherits a duty to recognize and bargain with the employees' union representative but, absent an agreement to do so, is not obligated to accept its predecessor's labor agreement with the union. Before the duty to recognize and bargain with a union arises, a successor is not constrained from unilaterally establishing the terms under which it offers employment to prospective employees. As the Supreme Court said in making this point:

> Although Burns had an obligation to bargain with the union concerning wages and other conditions of employment when the union requested it to do so, this case is not like a § 8 (a)(5) violation where an employer unilaterally changes a condition of employment without consulting a bargaining representative. It is difficult to understand how Burns could be said to have *changed* unilaterally any pre-existing term or condition of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit and, prior to July 1, no outstanding terms and conditions of employment from which a change could be inferred. The terms on which Burns hired employees for service after July 1 may have differed from the terms extended by Wackenhut and required by the collective-bargaining contract, but it does not follow that Burns changed *its* terms and conditions of employment when it specified the initial basis on which employees were hired on July 1.

406 U.S. at 294 (emphasis in original).

Stating this point differently, prior to the time that its bargaining obligation attaches, a successor has the right to determine initial terms of employment. The perfectly clear caveat comes from the Supreme Court's discussion of that right in *Burns*:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by § 9(a) of the Act, 29 U.S.C. § 159(a).

406 U.S. at 294-295.

In *Spruce Up Corp.,* 209 NLRB 194, (1974), *enforced,* 529 F.2d 516 (4th Cir. 1975), the Board addressed the circumstances under which the perfectly clear caveat applies, interpreting the caveat in a way that remains the applicable legal standard today. The Board began with an assessment of what the Court meant when it said that the caveat would apply to a successor that "plans to retain all of the employees in the unit," saying:

> When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer "plans to retain all of the employees in the unit," as that phrase was intended by the Supreme Court. The possibility that the old employees may not enter into an employment relationship with the new employer is a real one, as illustrated by the present facts. Many of the former employees here did not desire to be employed by the new employer under the terms set by him – a fact which will often be operative, and which any new employer must realistically anticipate. Since that is so, it is surely not "perfectly clear" to either the employer or to us that he can "plan to retain all of the employees in the unit" under such a set of facts.

209 NLRB at 195. Acknowledging that the "precise meaning and application of the Court's caveat is not easy to discern," the Board next identified two policy considerations that demonstrated that interpreting the caveat to apply to a successor that makes a pre-hire announcement of new terms would be contrary to the purposes of the Act and, in particular, discourage continuity in employment relationships:

> [A]n employer desirous of availing himself of the *Burns* right to set initial terms would . . . have to refrain from commenting favorably at all upon employment

> prospects of old employees for fear he would thereby forfeit his right to unilaterally set initial terms, a right to which the Supreme court attaches great importance in *Burns*. And indeed, the more cautious employer would probably be well advised not to offer employment to at least some of the old work force under such a decisional precedent.

*Id.* The Board then announced a legal standard that has stood the test of time:

> We believe the caveat in *Burns*, therefore, should be restricted to 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 ... has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

*Id.*

### 2. First Student Cannot Be Found To Be A Perfectly Clear Successor Based Upon Statements It Allegedly Made Before It Entered Into A Contract With The District

By its terms, application of perfectly clear successor test adopted in *Spruce Up* turns upon a successor's first becoming a successor. In other words, a successor cannot become a perfectly clear successor until sometime after it enters into a contract to assume or acquire the business conducted by its predecessor. This principle is reflected in the Board's decision in *Fremont Ford,* 289 NLRB 1290 (1988). In that case, the Board, rejecting an alternative theory of liability upon which the administrative law judge relied, determined that the respondent, a car dealership, could not be found to be a successor before it had a written agreement to acquire the dealership. 289 NLRB at 1293-94. The Board likewise found that a demand for recognition the union made before the respondent was either legally or functionally operational did not trigger an obligation on the part of the respondent to bargain with the union. 289 NLRB at 1295. Those findings, however, did not save the respondent from being held to be a perfectly clear successor. The Board found that statements the respondent made to the union and employees after it entered into an agreement to purchase the dealership, but before it commenced operations, brought it

within the exception. 289 NLRB at 1297.

This principle is also reflected in the Board's earlier decision in *Spitzer Akron, Inc.*, 219 NLRB 20, 22 (1975), enf'd. 540 F.2d 841 (6th Cir. 1976), cert. den. 429 U.S. 1040 (1977), a case also involving the acquisition of a car dealership. There, before the respondent entered into an agreement to purchase the assets of the dealership, the respondent's owner made a statement to one of the predecessor's employees that he wanted "every man to stay on the job and we will carry on as usual." 219 NLRB at 22. After that, on the same day that the respondent entered into an agreement to purchase the assets, the respondent's owner gave various assurances to the predecessor's employees that they would be retained. The Board held that those assurances, not the statement that the owner made before the agreement was executed, sufficed to make the respondent a perfectly clear successor and that it became one as of the time they were made. 219 NLRB 23.

The Board engaged in a similar analysis in *Hilton Environmental,* 320 NLRB 437 (1995). In that case, the respondent was awarded a food service contract at an army base, replacing a contractor whose employees had union representation. The Board held the respondent became a perfectly clear successor subsequent to its being awarded the contract, but before commencing operations, based upon assurances it gave the predecessor's employees, the day after soliciting them to apply for positions, that they would all have jobs. In arriving at that result, the Board noted that the respondent had engaged in a course of dealing with the predecessor's employees that led them to believe it would retain them, including requesting letters of intent from them before it was awarded the contract indicating that they would work for it.

*Morris Healthcare & Rehab Center, LLC,* 348 NLRB 1360 (2006) is also instructive. There, the respondent, a nursing home operator, which assumed operation of a nursing home

from a county board, was held to be a perfectly clear successor at the time it hired the county board's employees. The respondent hired the employees during the week after it entered into a transfer agreement with the board. 348 NLRB at 1367. At the time it hired them, the respondent did not inform the employees what their wages, benefits or other terms and conditions of employment would be. While some were told what their wages would be during that week, most did not learn of the terms the respondent had set until orientation sessions held at the end of the week, after the union had made a demand for bargaining and it was clear the union had retained its majority status. What makes the case noteworthy is that before the respondent entered into an agreement with the county board, the respondent's CEO made statements at a public board meeting and on a radio program to the effect that he "wanted a smooth transition and planned to rehire most of the nursing home's staff, except for a few with absenteeism problems." 348 NLRB at 1362-63). While the administrative law judge recounted those facts in his decision, which was affirmed by the Board, he did not base his finding that the respondent was a perfectly clear successor on them. That is clear from his finding that the respondent acquired that status when, after taking applications from them and interviewing them, it hired the employees without informing them of the terms and conditions under which they would work. 348 NLRB at 1363-64, 1367.

These cases teach that a successor's pre-contract communications with its predecessor's employees or their union representative may be considered as corroborating evidence of a plan by the successor to retain the employees without any changes to their terms and conditions of employment, but are legally insufficient, standing alone, to establish that a successor is a perfectly clear successor. Here, what happened in October 2011 demonstrates why this is the law – the Board of Education voted to approve the District's entering into a contract with First

Student, but before a contract was executed, the Superintendent decided not to enter into one. (Tr. 378-80, 454-55; REX 7). There is no reason that the Superintendent could not have done that again in May 2012. Until the District and First Student executed a contract, either side could have backed out. In other words, it was not perfectly clear until that happened that First Student would become the District's transportation provider and be hiring anyone.

What is required in every case to make out a perfectly clear successor claim is evidence that, after entering into a contract to acquire or assume its predecessor's business, the successor communicates information to its predecessor's employees or their union representative, prior to or at the time it hires the employees, that leads them to believe that it is not going to make any changes to terms and conditions of employment. No evidence of that nature exists in this case. The General Counsel, thus, failed to prove that First Student is a perfectly clear successor.

### 3. First Student Cannot Be Found To Be A Perfectly Clear Successor Based Upon Information That the Company Communicated To And Intended For The District And Board Of Education

In every case in which the *Spruce Up* test has been applied, the outcome has been dictated by the nature and timing of the successor's communications with the predecessor's employees or their union representative. *Spruce Up* is the lead case in which a successor was held not to be a perfectly clear successor based upon its having communicated new or different employment terms at the time it made known its intention to offer the predecessor's employees jobs. Other cases in which a similar fact pattern resulted in a holding that an employer was not a perfectly clear successor include:

- *Ridgewell's, Inc.,* 334 NLRB 37 (2001), enf'd. 38 Fed. Appx. 29 (D.C. Cir. 2002) (successor's announcement of intent to employ predecessor's employees as independent contractors found to put the employees on notice that initial employment terms would be different, leading to holding that successor's unilateral establishment of new terms prior to commencing operations was lawful);

- *Resco Products, Inc.,* 331 NLRB 1546 (2000) (successor that informed predecessor's employees that to work for it the employees would have to waive claims for accrued vacation, and that they would, in return, receive increased pension benefits, held not to be a perfectly clear successor and to have had the right unilaterally to set initial employment terms);

- *Bekins Moving & Storage,* 330 NLRB 761 (2000) (successor that conditioned hiring of predecessor's employees on their acceptance of new employment terms held not to be a perfectly clear successor);

- *Pioneer Concrete of Arkansas, Inc.,* 327 NLRB 333 (1998) (successor that informed predecessor's employees of changes in working conditions before hiring them held not to be a perfectly clear successor);

- *Planned Building Services, Inc.,* 318 NLRB 1049 (1995) (successor that informed predecessor's employees that it would pay them the same wages as the predecessor, but that their benefits would not be the same, was not a perfectly clear successor and had the right to set initial terms of employment);

- *Banknote Corp. of America,* 315 NLRB 1041 (1994), enf'd. 84 F.3d 637 (2d Cir. 1996) (successor's letter to predecessor's employees' union representatives informing them of intent to attempt to hire employees from predecessor's workforce, but stating it was not committing to recognize unions or be bound by the predecessor's labor agreements, found to put employees on notice successor would be making changes in employment terms, leading to holding that successor was not a perfectly clear successor and bargaining obligation did not attach until it hired the employees);

- *Boeing Co.,* 214 NLRB 541 (1974), enf'd. 595 F.2d 664 (D.C. Cir. 1978) (successor that expressed intent from outset to hire predecessor's employees at lower wages and benefits than they received under predecessor's labor agreement held not to be a perfectly clear successor);

- *Henry M. Hald High School Assn.,* 213 NLRB 415 (1974) (successor that gave assurances to predecessor's employees that it would employ them, but added that the terms under which it would do so had not yet been established, held not be a perfectly clear successor and to have had right to later establish initial employment terms); and

- *Jerry's Finer Foods,* 210 NLRB 52 (1974) (successor that offered predecessor's employees employment on terms less advantageous than those of predecessor held not to be a perfectly clear successor).

Conversely, the Board has held perfectly clear successor status to have been established where it has found that a successor, prior to hiring its workforce, either: (1) misled the predecessor's employees or their union that it would employ the employees under the same

employment terms as the predecessor; or (2) communicated an intent to retain the predecessor's employees, without mentioning it planned to establish new employment terms. Among the cases in which that result was reached are:

- *Grenada Stamping & Assembly,* 351 NLRB 1152 (2007), enf'd. 322 Fed. Appx. 404 (5th Cir. 2009), *cert. den.,* 130 S. Ct. 493 (2009) (successor that communicated to predecessor's employees that all of them would be retained, without mentioning intent to establish any new employment terms, held to be a perfectly clear successor);

- *Rosdev Hospitality,* 349 NLRB 202 (2007) (successor that did not inform predecessor's employees, prior to hiring them, that it intended to make any changes to their employment terms held to be a perfectly clear successor and to have unlawfully changed practice followed by predecessor);

- *Morris Healthcare & Rehabilitation Center,* 348 NLRB 1360 (2006) (successor became a perfectly clear successor when it informed predecessor's employees that they had been hired but did not inform them of any changes in employment terms);

- *Elf Autochem North America,* 339 NLRB 796 (2003) (successor held to have become a perfectly clear successor when its agents informed predecessor's employees that successor would employ them, recognize their past service, pay them equivalent wages and provide them with a benefits package comparable to that of the predecessor, where the successor also later informed the employees' union representative that it would maintain existing terms and conditions of employment, including those contained in the predecessor's labor agreement with the union);

- *Dupont Dow Elastomers,* 332 NLRB 1071 (2000), enf'd. 296 F.3d 495 (6th Cir. 2002) (successor that informed predecessor's employees' union representatives that it intended to offer employment to all of the employees under terms that it would announce on future date did not become a perfectly clear successor at that time but became one on the date that it announced the terms);

- *Hilton Environmental,* 320 NLRB 437 (1995) (successor's informing predecessor's employees that it intended to hire all of them found to establish that successor planned to retain employees without changing their terms of employment, resulting in successor's being held to be a perfectly clear successor);

- *Canteen Co.,* 317 NLRB 1052 (1995), enf'd. 103 F.3d 1355 (7th Cir. 1996) (when before hiring employees the successor communicated to predecessor's employees' union representative that it wanted the employees to serve a probationary period, the successor communicated to the union it planned to retain the predecessor's employees, resulting in its becoming at that moment a perfectly clear successor);

- *Fremont Ford Sales,* 289 NLRB 1290 (1988) (successor's statement to predecessor's

employees' union representative that it had doubts about the retention of only a few of the predecessor's employees, and assurances it gave to several of the predecessor's employees that they would be retained without changes to their working conditions, resulted in the successor's becoming a perfectly clear successor); and

- *Spitzer Akron, Inc.*, 219 NLRB 20, 22 (1975), enf'd. 540 F.2d 841 (6th Cir. 1976), *cert. den.*, 429 U.S. 1040 (1977) (successor whose owner informed employee of predecessor that he wanted all of predecessor's employees to remain on the job and that they would carry on as usual held to be a perfectly clear successor.

Although criticized for it and some courts of appeal have strongly disagreed,[9] the Board has found perfectly clear successor status on facts like those in these cases even where the successor subsequently, but before or at the time it extended offers of employment, made known its intent to establish new terms.

The Board, thus, has effectively held that a successor's bargaining obligation attaches when it communicates plans to offer its predecessor's employees jobs in a way that misleads the employees or their union that there will be no changes or that fails to put them on notice that changes are forthcoming. The communication, however, must come from the successor. If a representative of the predecessor, or some other third party that is not authorized to act on behalf of the successor, is responsible for the communication, it is not binding upon the successor and

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[9] See, e.g., *Nazareth Regional High School v. NLRB*, 549 F.2d 873 (2d Cir. 1977); *Canteen Co.*, 317 NLRB at 1055 (Members Stephens and Cohen dissenting). The Unions incorrectly state that the court in *Nazareth Regional High School* enforced the Board's finding that respondent was a perfectly clear successor. It did not. In rejecting the Board's finding, the court said:

> The important consideration in determining whether it is perfectly clear that a successor intends to retain all of the employees is whether they have all been promised re-employment on the existing terms. Because Nazareth never at any time led the lay faculty to believe that they would be retained at the existing terms, it was free to fix the initial terms of employment and was not under a duty to bargain with [the union] until ... it became clear that a majority of Nazareth's lay faculty had been employed at the school by [its predecessor] during the previous year. A successor-employer's right to set the initial terms of employment may not be rendered nugatory solely on the basis of an expression of intention to rehire the predecessor's employees....

549 F.2d at 881-82.

therefore cannot form the basis for a perfectly clear successor finding. See *Bekins Moving & Storage,* 330 NLRB 761 (2000) (assurances given to predecessor's employees by their manager, who was later hired by successor, that successor would retain them held not to be binding upon successor and therefore insufficient to support a finding that the successor became a perfectly clear successor based upon the assurances). The communication must not only come from the successor, but it must be directed to and intended for the predecessor's employees or their union representative. First Student is unaware of any case in which the Board has based a finding that a successor is a perfectly clear successor upon information the successor communicated to, and intended for, the predecessor or someone other than the predecessor's employees or their union representative.

For these reasons, First Student cannot be deemed to be a perfectly clear successor based upon the information Kinsley communicated to the District in late July 2011, when the District interviewed the Company, and the information he communicated at the Board of Education meeting on May 16, 2012, when Board voted to approve the District's entering into a contract with First Student. The District scheduled the interview and established the agenda. The record shows that, in the discussion of employment matters, the District was only interested in hearing if the Company was willing to meet the conditions it had set for "partnering" with it. Besides wages and health insurance benefits, the District did not inquire about and Kinsley did not discuss other terms and conditions under which the Company would hire its employees. (Tr. 367-69, 452-53). Like the District during the interview, the Board of Education controlled the agenda for the May 16, 2012, Board meeting. Kinsley was not scheduled and had no plans to speak at the meeting. All of the comments he made were in response to questions from and directed to the Board members. Other than wages, the Board members did not inquire about and

Kinsley did not discuss any terms and conditions under which the Company would hire its employees. (Tr. 384-86, 402-03, 462-63). The statements Kinsley made to the District and Board of Education on these occasions are irrelevant to the question whether First Student is a perfectly clear successor.

#### 4. Statements Made By First Student At The July 2011 Meeting With The District And The March 2, 2012, Meeting With The District's Employees Preclude A Finding That The Company Is A Perfectly Clear Successor

Repeating a remark made by the Supreme Court in *Fall River Dyeing Corp. v. NLRB,* 482 U.S. 27, 41, and repeated by the court of appeals in *Canteen Corp. v. NLRB,* 103 F.3d at 1364-65), the Board has remarked on several occasions that application of the perfectly clear successor doctrine rests largely "in the hands of the successor." *See e.g., Road & Rail Services, Inc.,* 348 NLRB 1160, 1161 n. 9 (2006).[10] That is another way of saying that perfectly clear successor status turns upon information the successor communicates to the predecessor's employees or their union representative. A successor, thus, may insulate itself from being found to be a perfectly clear successor by communicating information to those employees or their union, before or when it first expresses plans to hire the employees, that places them on notice of its intent to establish its own terms and conditions of employment. The preceding section cites a number of cases in which the Board found that a successor had successfully done that.

The case that is closest to being directly on point is *Banknote Corp. of America,* 315 NLRB 1041 (1994), enf'd. 84 F.3d 637 (2d Cir. 1996). In that case, over three months after

[10] The Unions argue that all the elements present in *Road & Rail Services* are present in this case. (Unions' Exceptions Brief p. 31. They are mistaken. The respondent in *Road & Rail Services* agreed to recognize and bargain with the predecessor employees' union representative for a collective bargaining agreement before hiring any employees. Here, as noted previously, First Student followed the teachings of *Burns* in its communications, indicating that it would recognize and bargain with the union if it hired a majority of the District employees, but that it would not adopt the District CBA. The conditional nature of the Company's statements distinguish this case from *Road & Rail Services.*

entering into an agreement to purchase a production facility, the respondent sent a letter to 11 unions that represented the employees of the predecessor, informing them that it "intended to attempt to hire its initial work force from the employees currently working at the [facility], but that it was not making a commitment to recognize the Unions or be bound by their collective-bargaining agreements with [the predecessor.]" 315 NLRB at 1041. In rejecting the General Counsel's claim that the respondent was a perfectly clear successor, the Board found that the letter "effectively announced that [the respondent] would be instituting new terms and conditions of employment." 315 NLRB at 1043 The respondent, thus, was able to avoid perfectly clear successor status by informing the unions that it was not adopting the predecessor's labor agreements. Squaring that statement with the respondent's statement that it intended to attempt to hire its work force from among the existing employees, the Board simply said, "[S]imultaneous with its stated intention to retain the predecessor's employees, the Respondent announced new terms and conditions of employment." Id. It added, signaling that the initial communication need not spell out the new terms, that "Subsequently, specific anticipated changes were communicated to the Unions..." Id.

In *Marriott Management Services, Inc.,* 318 NLRB 144 (1995), the Board arrived at the same result in a case involving a verbal statement by the successor to the predecessor's employees' union representative that, "although the Respondent would recognize [the union], it would not adopt the extant collective-bargaining agreement." Quoting *Spruce Up,* it found that the respondent "clearly announced its intent to establish a new set of conditions prior to inviting former employees to accept employment." Id. quoting *Spruce Up,* 209 NLRB at 195.

The cases teach that a successor can avoid perfectly clear successor status by simply communicating an intent to make changes, even if at the same time it expresses plans to offer the

predecessor's employees positions. Here, at the First Student interview in late July, 2011, Kinsley stated that the Company would only recognize the union if it hired a majority of the District's employees. (Tr. 377, 399, 452). Like a statement that a successor is not going to adopt its predecessor's labor agreement, a statement that a successor will only recognize a union if it hires a majority of the predecessor's employees signifies that it is not perfectly clear that the successor is going to retain a majority of those employees. It also means that a determination whether the successor has a bargaining obligation will not be able to be made until the successor hires a substantial and representative complement of employees.

While Kinsley's statement at the interview should be enough to insulate the Company from being deemed to be a perfectly clear successor, there can be no question that the statements Meek made at the meeting with the District employees on March 2, 2012 had that effect. The evidence shows that he made statements akin to those made in writing in *Banknote* and verbally in *Marriott Services.* The statements were that, if the Company hired a majority of the District's employees, the employees would bring their union representation but not their contract, and that various subjects raised by the employees involved the types of things that would be subject to negotiation.[11] (Tr. 418-22). The evidence also establishes that he told the employees that the Company would not know how many hours would be available for the employees to work until it determined what the routes would be. (Tr. 383, 401, 421). As found by the ALJ, that information also signaled that new terms would be forthcoming if First Student were awarded a contract by the District. And although not attributable to the Company, any doubt the employees

[11] Meeks testimony, which the ALJ credited, was corroborated by Kinsley, whose testimony the ALJ also credited generally. Kinsley testified that he recalled Meek's saying, if the Company hired 51% or more of the employees, the Company would recognize and bargain with the union under new terms and conditions of employment. (Tr. 459-60). Peatross, another witness whom the ALJ credited generally, recalled Meek's saying that the Company would recognize the union if it hired 50% plus one of the employees and that various matters about which employees asked would be subject to negotiation. (Tr. 382-84).

had that the First Student would be implementing its own employment terms (of which there should have been none) was removed by Peatross when she indicated that the District CBA would terminate if the District contracted with First Student, i.e., the District CBA would be "null and void," and either a new contract would have to be negotiated or the employees would work under First Student policies. (Tr. 400-02, 422, 460).

After the March 2, 2012 meeting, the employees knew that the District's contracting out transportation services to First Student would mean that, if they were offered a position by the Company, it would come with new terms and conditions. DeVore had to know that as well. That she did provides the most logical explanation on why the union, after the meeting, prepared a concessionary contract proposal for the Board of Education to consider in lieu of contracting with First Student. (REX 3).

In these circumstances, First Student insulated itself from being deemed to be a perfectly clear successor. Because the Company therefore cannot be found to be a perfectly clear successor, the ALJ correctly held that the General Counsel failed to prove his unilateral change, and direct dealing claims. His dismissal of the claims must be affirmed

### B. The General Counsel's Unilateral Change And Direct Dealing Claims Fail As Pleaded And On the Facts.

The General Counsel's unilateral change and direct dealing claims also cannot stand, either as pleaded or on the facts. The path to that conclusion is a short one.

The unilateral change claim is based upon the allegations made in Paragraph 13 of the Complaint. That paragraph alleges that on May 17, 2012, First Student "implemented" changes to 14 separate terms and conditions of employment. The direct dealing claim is based upon the allegations made in Paragraph 16. That paragraph alleges that Kellerman and Meek, as agents of the Company, bypassed the union and dealt directly with the employees on May 17, 2012, by

informing them of terms and conditions under which they would work as employees of the Company. The evidence on what occurred at the meeting on May 17, 2012, is undisputed and no dispute exists that no one from the union was present at the meeting that day when Kellerman and Meek announced the terms under which employees who met the Company's hiring criteria would be offered jobs.

The Complaint, however, alleges in Paragraph 11 that the Company did not enter into a contract with the District until about June 1, 2012, and in Paragraph 12 that it began hiring employees on about July 1, 2012. And the evidence shows that the transportation services agreement was not fully executed until June 1, 2012, and the Company did not begin extending offers of employment until well after that date. In these circumstances, suffice it to say that, without a contract and without any employees, the Company could neither implement any changes on May 17, 2012, nor bypass the union. *See Fremont Ford,* 289 NLRB at 1294-95.

### C. The General Counsel Failed To Prove That All The Alleged Unilateral Changes Were Material, Substantial And Significant

It is well-settled that an employer that is under an obligation to recognize and bargain with a union violates Sections 8(a)(1) and (5) if it unilaterally implements a change to a mandatory subject of bargaining that has a "material, substantial, and significant" impact on the terms and conditions under which bargaining unit employees work. *Crittenton Hospital,* 342 NLRB 686 (2004); *Flambeau Airmold Corp.,* 334 NLRB 165, 165 (2001), citing *Alamo Cement Co.,* 281 NLRB 737, 738 (1986); *Bath Iron Works Corp.,* 302 NLRB 898, 901 (1991). The General Counsel has the burden of proving that an alleged change has been made and that it had the requisite effect on bargaining unit employees. *North Star Steel Company,* 347 NLRB 1364, 1367 (2006); *Crittenton Hospital,* 342 NLRB 686 (2004).

Here, putting to the side the evidence showing that First Student did not have a

bargaining obligation when they were allegedly made, the General Counsel failed to prove that most, if not all, of the alleged unilateral changes the Company made had a material, significant and substantial effect on employees. He devoted neither the time nor the attention necessary to establish that each alleged change was made, and that its implementation had the requisite effect. To illustrate, while the Company does not dispute that implementing a "B" rate for non-driving work could have a material, significant and substantial effect on employees, the General Counsel did not present any evidence of the actual effect it had on employees' earnings. The same is true with respect to the claim that the Company changed employees' hours of work. There was evidence that the Company guarantees fewer hours than the District did and that the change had an effect on an employee's earnings, but no proof beyond that to establish that hours of work for the bargaining unit changed in a material, significant and substantial way.

The General Counsel also failed to introduce evidence that the changes to health insurance benefits had the requisite effect. The evidence shows that the Company implemented a comparable plan for employees who participated in the District's health insurance plan, as the District wanted. No evidence was presented, as would normally be expected, that the change in carriers adversely affected any employees' coverage or out-of-pocket expenses. There likewise is little to go on to assess if the differences between other employee benefits the employees had as District employees and those they have as First Student employees are meaningful. The same is true of other alleged changes, including those relating to: work rules for personal conduct; rules for operating school buses; performance awards; the employee discount program; and driver performance standards and performance reviews.

With respect to these matters, the General Counsel seemed content introducing the District CBA and the Company's Handbook and leaving it to the ALJ to identify differences that

are legally significant. More was required from the General Counsel to prove his claims. His burden was to specifically identify each change the Company allegedly made, how it was different from what the District had in effect, that it was actually implemented, and that it had the requisite effect on employees.

In summary, for the additional reason that the General Counsel failed to prove the alleged changes the Company made had a material, significant and substantial effect on the employees, the General Counsel's unilateral change claims must be dismissed.

### D. The ALJ's Finding That The Company Did Not Unlawfully Insist That The Union, As A Condition Of Bargaining, Withdraw Its Initial Unfair Labor Practice Charge Must Be Affirmed

Paragraph 18 of the Complaint alleges that, on October 1 and 3, 2012, the Company "insisted as a condition of meeting and engaging in collective bargaining with the Charging Union, that the Charging Union withdraw a charge filed in Case 07-CA-089760." The facts relating to this claim are undisputed and found in the emails that makeup GCX 16.

The emails show that in one of his October 1, 2012, emails to DeVore, Walther stated that the Company would agree to schedule negotiations if the union was willing to withdraw its charge, noting that if the union was unwilling to drop the charge, the Company would not be able to begin negotiations until the Region concluded its investigation. In his email to her on October 3, 2012, Walther simply asked DeVore to let him know what the union's position was on his request. Two days later, on October 5, 2012, after receiving an email from DeVore objecting to the Company's conditioning bargaining on the union's withdrawing its charge, Walther replied with an email dropping the condition. He apologized for the confusion and indicated that he would be "happy to begin negotiations on 10/15 regardless of whether you withdraw the charge." As Walther explained, the confusion to which he referred in his email stemmed from his belief, which DeVore later told him she shared, that the union had filed the charge to put pressure on the

Company to agree to negotiate. (Tr. 561-66).

It is a violation of Sections 8(a)(1) and (5) for an employer to condition bargaining or acceptance of a collective-bargaining agreement upon a union's acceptance of a non-mandatory subject of bargaining. *NLRB v. Borg Warner Corp.,* 356 U.S. 342 (1958). Insistence upon withdrawal of an unfair labor practice charge is a non-mandatory subject of bargaining. *Hilton's Environmental, Inc.,* 320 NLRB 437 (1995). Simply including a non-mandatory subject of bargaining in a proposal, however, is not a violation as long as a party does not insist upon acceptance of the proposal to the point of impasse. *Pleasantville Nursing Home,* 335 NLRB 961, 964 (2001). *See also, Carlson Porsche Audi, Inc.,* 266 NLRB 141, 149-50 (1983) (cited in ALJD); *Patrick & Company,* 248 NLRB 393 n.5 (1980) (cited in ALJD)

Applying these principles here, the ALJ properly concluded that the Company did not violate the Act by taking the short-lived position that it would agree to schedule dates for bargaining sessions with the union if the union withdrew its charge. Because the Company did not insist to the point of impasse that the union withdraw its charge, he was right that its conduct was permissible.

The propositions of law on which the ALJ relied are so well settled as to alone demonstrate that the Unions' arguments fall well short of calling the ALJ's conclusion into question. *Laredo Packing Co.,* 254 NLRB 1, 18 (1981), the first case the Unions cite, is instructive. There, the administrative law judge relied upon the same legal principles as the ALJ here, noting that the respondent was entitled to propose as a condition to signing a collective-bargaining agreement that the union, among other things, withdraw unfair labor practice charges, "but could not legally insist upon their acceptance 'in the face of a clear and express refusal by the Union to bargain about the [nonmandatory subjects].'" *Id.,* quoting, *Union Carbide Corp.,*

165 NLRB 254, 255 (1967), enfd. *sub nom.,* 405 F.2d 1111 (D.C. Cir. 1968). He found a violation because the respondent continued to press a nonmandatory subject of bargaining for three months, despite the union's repeated requests that the respondent drop the matter. In contrast, the Company here withdrew the condition it proposed immediately upon the union's objecting to it. That fact is what distinguishes this case from those in which violations have been found. The ALJ's dismissal of this claim must be affirmed.

## IV. CONCLUSION

For all of the foregoing reasons, First Student respectfully requests that the Board adopt the ALJ's findings that the General Counsel failed to prove his claims that the Company is a perfectly clear successor, that it unlawfully implemented the employment terms it announced on May 17, 2012, that it unlawfully bypassed the union in announcing the those terms to the District employees that day, and that it unlawfully conditioned bargaining on the union's withdrawal of the charge filed by Local 9036 on September 21, 2012. The Company further requests that the Board adopt the ALJ's recommended order dismissing each of those claims.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February 2014, I e-filed the foregoing Post-Hearing Brief on the NLRB's E-Filing system and served a copy of it by electronic mail upon:

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