UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FIRST STUDENT, INC., a division of FIRST GROUP AMERICA, Respondent, and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (USW) and its LOCAL UNION 9036, Charging Unions.	Case 07-CA-092212

ANSWERING BRIEF TO RESPONDENT FIRST STUDENT, INC., A DIVISION OF FIRST GROUP AMERICA'S EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE, ON BEHALF OF CHARGING PARTY UNITED STEEL, PAPER & FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (USW), AFL-CIO·CLC, AND ITS LOCAL UNION 9036

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

I. UNDER THE ALJ'S INCORRECT CONCLUSION THAT FIRST STUDENT WAS A SUCCESSOR BUT NOT A "PERFECTLY CLEAR" SUCCESSOR, FIRST STUDENT'S BARGAINING OBLIGATION ATTACHED ON AUGUST 17, 2012, AND FIRST STUDENT UNLAWFULLY DELAYED BARGAINING FOR TWO MONTHS THEREAFTER. 1

A. It is the Employer's Responsibility to Know When it Has Hired a Substantial and Representative Complement of Employees. 1

B. First Student Unlawfully Delayed Bargaining After its Bargaining Obligation Attached. 4

II. FIRST STUDENT'S MAY 2012 ANNOUNCEMENT THAT IT INTENDED TO CHANGE CERTAIN WORKING CONDITIONS DID NOT PRIVILEGE IT TO UNILATERALLY CHANGE OTHER WORKING CONDITIONS IN AUGUST AND SEPTEMBER 2012, AFTER ITS BARGAINING OBLIGATION ATTACHED. 8

III. THE GENERAL COUNSEL CARRIED HIS BURDEN OF ESTABLISHING THAT THE DIFFERENCES BETWEEN THE DISTRICT'S AND FIRST STUDENT'S ATTENDANCE POLICIES WERE MATERIAL, SUBSTANTIAL, AND SIGNIFICANT, AND THE ALJ PROPERLY CONSIDERED THE ENTIRETY OF THE UNDISPUTED EVIDENCE IN SO CONCLUDING. 11

A. The ALJ Properly Looked to the CBA's Sick Leave and Leave of Absence Provisions in Determining Whether First Student's Attendance Policy Constituted a Material, Substantial, and Significant Change to the Bargaining Unit's Conditions of Employment. 11

1. Sick leave. 11
2. Leaves of absence. 12

B. First Student Failed to Rebut the General Counsel's *Prima Facie* Case that the Differences Between the District's and First Student's Attendance Policies Are Material, Substantial, and Significant. 13

IV. FIRST STUDENT'S EXCEPTIONS TO THE ALJ'S GRANTING OF MOTIONS TO AMEND THE COMPLAINT MISSTATE THE EVIDENCE AND ARE MERITLESS. 16

Exception 1 17

Exception 2 19

Exception 3 22

Exception 4 25

Exception 5 26

Exception 6 27

Exception 7 28

Exception 8 28

Exception 9 29

CONCLUSION 31

TABLE OF AUTHORITIES

CASES

Advanced Metal Technologies, Inc., 09-CA-083508, 2013 WL 5970942 (Nov. 8, 2013) 8

Alcoa, Inc., 352 NLRB 1222 (2008) 14

Aliante Station Casino & Hotel, Boulder Station, Inc., 358 NLRB No. 153 (Sept. 28, 2012) 21

Am. Geriatric Enters., 235 NLRB 1532 (1978) 20

AMC Air Conditioning Co., 232 NLRB 283 (1977) 21

American Medical Response, 335 NLRB 1176 (2001) 22

Antonino's Rest., 246 NLRB 833 (1979) 7

Banknote Corp. of America, 315 NLRB 1041 (1994) 29

Barclay Caterers, 308 NLRB 1025 (1992) 6

Barrington Plaza & Tragniew, Inc., 185 NLRB 962 (1970), enfd. 470 F.2d 669 (9th Cir. 1972) 27

BASF-Wyandotte Corp., 276 NLRB 498 (1985) 24

Bath Iron Works Corp., 302 NLRB 898 (1991) 14

Bio-Med. of Puerto Rico, 269 NLRB 827 (1984) 26

C.T. Taylor Co., Inc., 342 NLRB 997 (2004) 20

Carney Hosp., 350 NLRB 627 (2007) 28

Castle Hill Health Care Ctr., 355 NLRB 1156 (2010) 27

Cora Realty Co., 340 NLRB 366 (2003) 9

Dorsey Trailers, Inc., 327 NLRB 835 (1999), enfd. in relevant part 233 F.3d 831 (4th Cir. 2000) 14

Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987) 2, 3

Fresno Bee, 339 NLRB 1214 (2003) 14, 15

Fruehauf Trailer Servs., Inc., 335 NLRB 393 (2001) 6

Gagnon Plating & Mfg. Co., 103 NLRB 263 (1953) 7

Grand Rapids Die Casting Corp. v. NLRB, 831 F.2d 112 (8th Cir. 1987), enfg. 279 NLRB 662 (1986) 21

Graphic Commc'ns Conference, 359 NLRB No. 22 (2012) 20

Green Const., 271 NLRB 1503 (1984) 19

Hydrolines, Inc., 305 NLRB 416 (1991) 3

Latino Express, Inc., 358 NLRB No. 94 (2012) 19

Lipman Bros., Inc., 164 NLRB 850 (1967) 30

Mail Contractors, 346 NLRB 164 (2005) 22, 23

Marriott Mgmt. Servs., Inc., 318 NLRB 144 (1995) 29

Morris Healthcare & Rehab. Ctr., LLC, 348 NLRB 1360 (2006) 30

Nickles Bakery, 296 NLRB 927 (1989) 28

NLRB v. Indiana & Michigan Elec. Co., 318 U.S. 9 (1943) 27

NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938 21

Old Town Shoe Corp., 91 NLRB 240 (1950) 30

Pan America Grain Co., 351 NLRB 1412 (2007) 14, 15

Parkview Manor, 321 NLRB 477 (1996) 24

Pergament United Sales, 296 NLRB 333 (1989) 21

Potter's Med. Ctr., 289 NLRB 201 (1988) 5, 6

Pratt Indus., Inc., 358 NLRB No. 52 (June 5, 2012) 14

Ranch-Way, Inc., 203 NLRB 911 (1973) 8, 9

Raymond Convalescent Hosp., Inc., 216 NLRB 494 (1975) 26, 27

Recycle America, 308 NLRB 50 (1992) 28

Ryder/ATE, Inc., 331 NLRB 889 (2000) 13

Specialty Envelope Co., 313 NLRB 94 (1993) 20

Stagehands Referral Serv., LLC, 347 NLRB 1167 (2006) 19

Swedish Hosp. Med. Ctr., 232 NLRB 16 (1977) 14

Tree-Free Fiber Co., 328 NLRB 389 (1999) 24

W. Point Pepperell, Inc., 200 NLRB 1031 (1972)..... 30

Wackenhut Corp., 194 NLRB 302 (1971) 20

WCUE Radio, Inc., 209 NLRB 181, 188 (1974) 7

Windstream Corp., 352 NLRB 510 (2008)..... 27

STATUTES

National Labor Relations Act (NLRA) Section 8(a) 9, 13, 14, 15, 19, 21, 31

I. UNDER THE ALJ'S INCORRECT CONCLUSION THAT FIRST STUDENT WAS A SUCCESSOR BUT NOT A "PERFECTLY CLEAR" SUCCESSOR, FIRST STUDENT'S BARGAINING OBLIGATION ATTACHED ON AUGUST 17, 2012, AND FIRST STUDENT UNLAWFULLY DELAYED BARGAINING FOR TWO MONTHS THEREAFTER.[1]

A. It is the Employer's Responsibility to Know When it Has Hired a Substantial and Representative Complement of Employees.

First Student's suggestion that its duty to bargain should be linked to the subjective knowledge of its representative is spurious, legally and factually. First Student cites no authority to support its position that its bargaining obligations should have been delayed until August 27, 2012, because of "the absence of evidence that First Student knew the union had reached majority status as of [August 17]." (R. Br. 25). The company's brief suggests that it possessed an incredible lack of knowledge about its operations in Saginaw. It suggests that First Student did not know, on August 17, "how many employees it would employ when it began operations [ten

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

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

The brief cites First Student's exceptions to the decision of the ALJ as "R. Exc." and First Student's brief in support of its exceptions as "R. Br." The brief cites the General Counsel's post-hearing brief as "GC PH Br."

The brief refers to witnesses by their last names. The witnesses mentioned in the brief are: Daniel Kinsley, First Student representative; Tonya DeVore, USW representative; Audrey Adams, First Student attorney; John Kiraly, First Student representative; Kristen Huening, First Student attorney; Raymond Walther, First Student attorney; Clint Bryant, bargaining unit representative; Millie Stidhum-Stewart, bargaining unit member; Michelle Ezell, bargaining unit member.

days later]." (R. Br. 24). It suggests that First Student had no idea "whether those employees would be former District employees." (R. Br. 24-25). Whether or not First Student possessed knowledge of these thing is irrelevant.[2]

Under long-established principles of the *Fall River* successor doctrine, at the "particular moment" First Student hired a substantial and representative complement of employees and more than half of those employees were former school district employees, its duty to bargain attached. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 52 (1987). First Student admits this in its brief:

> [The union] made a demand for recognition and bargaining on May 18, 2012 . . . . By August 17, 2012, the Company had hired a majority of the employees that it employed when it commenced operation on August 27, 2012, and those employees all had previously been employed by the District.

(R. Br. 24). Those admissions are sufficient to establish that First Student's bargaining obligation attached—at the latest—on August 17.

First Student's knowledge of whether "the union had reached majority status" is irrelevant and the General Counsel did not—contrary to the Company's assertion—need to proffer evidence of that knowledge. (*See* R. Br. 25). A successor's subjective knowledge is not

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[2] There is ample evidence to establish that First Student knew that it was hiring from a pool of the school district's employees. For example, company representative Kinsley testified:

> COUNSEL FOR THE GENERAL COUNSEL: Was it—isn't it true that it was First Student's intention to hire the majority of [school district] workers if the employees met the hiring protocols?
>
> KINSLEY: That was our intention and that was our goal, yes. (Tr. 474:23-475:1).

First Student also gave an employment application to every bargaining unit member who attended the mandatory meeting on May 17. (ALJ 15:30-32; Tr. 504:4-9). First Student required the bargaining unit members to submit their applications by May 23, and then "interviewed each of the people who applied for the job." (Tr. 504:1-9; 511:24-512:1); s*ee Fall River*, 482 U.S. at 45-46 ("Although [the successor] hired the employees through advertisements, it often relied on recommendations from supervisors, themselves formerly employed by [the predecessor], and intended the advertisements to reach the former [predecessor's] work force."). First Student knew who it was hiring.

one of the *Fall River* factors used to determine when a successor's bargaining obligation attaches. Because, under *Fall River*, "the union has a rebuttable presumption of majority status, [and] this status continues despite the change in employers," the burden was on First Student to recognize and bargain with the union as soon as it hired a substantial and representative complement of employees and more than half of them had been employed by the district. *Id.* at 41; *Hydrolines, Inc.*, 305 NLRB 416, 420 (1991) (when union made bargaining demand of successor employer, burden shifted to successor to seek clarification of that demand).

In *Fall River*, the successor protested the "substantial and representative complement" standard using the same arguments that First Student raises here. It contended that "the Board's 'representative complement' rule is unreasonable, given that it . . . places significant burdens upon the successor, which is unsure whether and when the bargaining obligation will arise." *Id.* at 49. The Supreme Court rejected this contention, and held,

> [T]he successor is in the best position to follow a rule the criteria of which are straightforward. The employer generally will know with tolerable certainty when all its job classifications have been filled or substantially filled, when it has hired a majority of the employees it intends to hire, and when it has begun normal production.

Id. at 50. Here, the ALJ's finding that First Student ignored the union's repeated attempts to discuss hiring, union recognition, and bargaining in the months between the union's initial demand and the date First Student's obligation attached illuminates the rationale supporting the *Fall River* decision. (ALJ 28:12-15 ("[First Student attorney] Adams and DeVore agreed to wait until after July 4 to again discuss the Union's request for recognition and bargaining. After July 4 DeVore made several phone calls to Adams but Adams never returned the calls.").

Given this lack of transparency, no one—and certainly not the union—could have known the exact date on which the bargaining obligation attached, except for First Student. The burden of knowing when its bargaining duty arose rested with the company, which is the "largest

provider of school transportation services" in the country, with concomitant collective bargaining experience. (ALJ 8:20-21; Tr. 484:5-10 (First Student testimony that the company is "union friendly" and has a master agreement with the International Brotherhood of Teamsters)).

B. First Student Unlawfully Delayed Bargaining After its Bargaining Obligation Attached.

According to the ALJ's conclusion that First Student was only an "ordinary" successor to the school district, and did not have the obligations of a "perfectly clear" successor, First Student's bargaining obligation attached on August 17, when it had hired a substantial and representative complement of employees and a majority of those employees had been employed by the district. *Supra*, Section I(A). First Student contests the August 17 finding, but asserts that even if its bargaining obligation did attach on that date, its delay in bargaining was not unreasonable.

The company relies on several excuses for the two-month delay before the parties met for bargaining on October 17. None of the excuses are meritorious. First Student objects to the ALJ's review of evidence about the company's treatment of the union's early requests for recognition and bargaining; the union made its first formal request in May. (R. Br. 30). The company's conduct during the summer months, therefore, is relevant to its inaction on August 17, the date the union's continuing demand became immediately effective. *Supra*, Section I(A). During those summer months, First Student acknowledged receiving the union's demand for recognition and bargaining, an admission that supports the conclusion that the delay in responding to the demand after August 17 was unreasonable. (ALJ 28:7-12).

Further, the ALJ's description of First Student's reaction to the demand as "cavalier" depended almost entirely on its actions after August 17. The ALJ concluded that First Student "treated the outstanding request to bargaining in a cavalier fashion" because:

> Adams never responded to DeVore's repeated calls after July 1. Kiraly never responded to DeVore's request [made on August 29]. Huening, after initially not responding for 2 weeks, essentially told DeVore that negotiations were not her job [in mid-September] and passed on Walther's name to DeVore. Walther initially wanted to have the Union wait for Adams to return from her maternity leave in November. When DeVore requested that negotiations start sooner, Walther [in late September] then sought to have the Union withdraw its pending unfair labor practice charge before finally agreeing to bargain the week of October 15.

(ALJ 29:17-23). With the exception of Adams's failure to return DeVore's calls, every action noted above took place after August 17, when the ALJ concluded First Student's bargaining obligation attached.

The company's remaining objections to the ALJ's finding on this point are a tangle of excuses that shift the focus to the company's individual representatives in an effort to shift the focus away from First Student itself. The Board rejects such myopia.

In *Potter's Medical Center*, the employer took the same position that First Student does here: challenged bargaining delays were reasonable. *Potter's Med. Ctr.*, 289 NLRB 201 (1988). The employer pointed to several facts to support its argument: that the union's negotiator had never proposed a particular date for negotiations; that one of the employer's negotiators had "prearranged" obligations during the time bargaining was delayed; and that another negotiator was contemplating leaving his position with the employer during that time. *Id.* at 209. Similarly, here, First Student's excuses rest on the individual circumstances of its representatives: Adams

was on maternity leave. Huening "was not the right person." (R. Br. 31).[3] Walther "was out of town." (R. Br. 31).

In *Potter's*, the Board affirmed a clear statement of law that warrants rejection of First Student's excuses:

> The Respondent was the party to negotiations with the [union]. Weaver [who had prearranged obligations] and Miller [who was contemplating resignation] were but its agents. Respondent, not its agents, had the obligation to bargain and an obligation to furnish bargaining representatives who would devote their time to prompt and continuous negotiations.

Id. The Board explained that the union's failure to propose "a specific date . . . is of no moment," because the employer "plainly knew the [union] was eager to meet and requesting to meet and bargain as soon as possible." *Id.* Here, the union had been "earnestly" pursuing its right to bargain—whether or not that right had matured—for five months before its first meeting with the company.

First Student attempts to support its position with the assertion that the union's representative "never proposed any dates for negotiations," but the Board explained in *Potter's* that the employer's "failure to furnish a date or range of dates" in response to the union's repeated requests to bargain is what "effectively halt[s] any negotiations." (R. Br. 32); *id.* Further, in that case, that the union "did not continuously protest the delay, and elected instead to persevere in trying to extract some meeting dates provides no excuse" for the employer's conduct. *Id.* The same is true here. Faced with an entirely unresponsive entity, the union

[3] First Student's suggestion that Huening's specialization as an "EEOC attorney" excused her two-week failure to respond to the union's written request for bargaining is baseless. (R. Br. 21, 31); *see Fruehauf Trailer Servs., Inc.*, 335 NLRB 393 (2001) (holding that even though the employer's negotiators were incapable of responding to bargaining demands, that defense "'boil[s] down to a 'busy negotiator' defense,' which the Board has consistently rejected." (quoting *Barclay Caterers*, 308 NLRB 1025, 1035-1037 (1992)). Huening's ostensible inability to respond to the union is the equivalent of a "busy negotiator defense" and cannot excuse First Student's institutional delay.

representative chose to "persevere" in extracting any meeting date and on achieving any commitment from First Student to recognize, bargain, or even meet the union.

Finally, the company errs when it asserts that "two-month delays in scheduling negotiations are not unusual." (R. Br. at 33). The proper question is not the regularity with which such delays occur, but whether First Student unlawfully delayed bargaining with the union from—at the latest—August 17, when its bargaining obligation attached, to October 17, when the parties were first in the same place for the purpose of negotiations.[4] Further, the ALJ's finding that the delay lasted for no longer than two months does not mean that the delay is lawful. *See Antonino's Rest*., 246 NLRB 833, 842 (1979) (finding "illegal refusal to bargain" when employer "only agreed to the Union's bargaining request after a delay of 2 months and after the Union had filed its unfair labor charge"); *WCUE Radio, Inc.*, 209 NLRB 181, 188 (1974) (almost two-month delay is unlawful because employer had "no justifiable reason" for the delay; violation found despite a "slow start, attributable in part to the Union"); *Gagnon Plating & Mfg. Co.*, 103 NLRB 263, 262 fn.2, 266 (1953) (two-month delay from January 8 telephone contact to March 11 meeting unlawful).

[4] First Student asserts that there was "no doubt" that on the day Walther first called DeVore—September 21—the company "at that point had agreed to recognize and bargain with the union." (R. Br. 31). That "agreement" would have come as a surprise to the union, which filed a ULP charge the same day, alleging that the company had unlawfully refused to bargain. (ALJ 19:24-27). First Student's assertion is also belied by Walther's subsequent offer to "send [the union] a recognition letter," and to "start negotiations" in October only if the union withdrew the ULP charge. (ALJ 19:42-45).

II. FIRST STUDENT'S MAY 2012 ANNOUNCEMENT THAT IT INTENDED TO CHANGE CERTAIN WORKING CONDITIONS DID NOT PRIVILEGE IT TO UNILATERALLY CHANGE OTHER WORKING CONDITIONS IN AUGUST AND SEPTEMBER 2012, AFTER ITS BARGAINING OBLIGATION ATTACHED.

In its brief, First Student argues that it "erased" the status quo when it announced certain changes to working conditions on May 17, 2012, and distributed an employee handbook later in the summer. (R. Br. 26 ("[The] terms the Company announced on May 17, 2012, and those contained in its Employee Handbook and offer letters, erased the District CBA-based status quo and replaced it with a new one based exclusively on Company policies and procedures"). First Student's "erasure of the status quo" argument has been soundly rejected by the Board. In *Advanced Metal Technologies*, for example, the Board adopted an ALJ decision holding that an "ordinary" successor had made an "untenable" suggestion that

> implementation of terms and condition of employment after the attachment [of] a bargaining obligation may be insulated from the duty to bargain by characterizing them as the completion of its—pre-bargaining obligation—right to establish 'initial' terms and conditions.

Advanced Metal Technologies, Inc., 09-CA-083508, 2013 WL 5970942 (Nov. 8, 2013).[5] The argument based on this theory failed because it

> misse[d] the point. The issue is not whether an implemented term and condition of employment may be characterized as a 'change' to existing terms and conditions or as simply a new 'establishment' of an initial term and condition. Rather, the issue is whether a bargaining obligation exists at the time of the implementation.

Id. Earlier, in *Ranch-Way*, when a successor had announced only a change to wage rates prior to the attachment of its bargaining obligation, the Board held that the successor's changes to seniority, vacation, and health benefits after the bargaining obligation attached were unlawful. *Ranch-Way, Inc.*, 203 NLRB 911, 913 (1973). *Also see Cora Realty Co.*, 340 NLRB 366, 367

[5] Adopted in the absence of exceptions.

(2003) (when successor took over the business, it only announced schedule changes; after employees started work for the successor, the "successor's actions in reducing the employees' wage rates and in discontinuing the employees' fringe benefits—actions that did not become known to the employees for some time—therefore constituted changes from the initial terms and conditions set by the [successor]").

The question of whether a successor has violated 8(a)(5) asks if a policy is "*establish[ed]* or change[d]" after a bargaining obligation attaches, not merely whether an existing policy was changed. *Id.* (emphasis added). Specifically, in *Ranch-Way*, the Board explained that,

> When [the successor's representative] interviewed the [predecessor's] employees for possible employment with Respondent, he discussed only wage rates with them. He did not discuss fringe benefits, either those in effect at [the predecessor] or those that Respondent might establish. Fringe benefits cannot therefore be considered as having been included in the initial terms on which Respondent agreed to hire the [predecessor's] employees. About 2 weeks after Respondent had completed the hiring of its work force, and its obligation to bargain with the Union had accrued, Respondent called a meeting of employees and informed them *for the first time* of the seniority, vacation, and health benefits it would extend to employees. This was done without notice to or negotiation with the Union which was then the majority representative of the employees. We find that, by instituting these fringe benefits for employees without bargaining with the Union, Respondent violated Section 8(a)(5) and (1) of the Act.

Id. Here, First Student established an attendance policy *for the first time* on August 27 and slightly revised it on September 4. (GCX 10; RX 13). The fact that the policy was unilaterally established after August 17, after the bargaining obligation attached, and that it was established in the absence of notice to or consultation with the union, demonstrates that the ALJ correctly concluded that First Student violated 8(a)(5).

Even assuming that First Student was not a perfectly clear successor, it was not privileged to unilaterally implement an attendance policy on August 27 or a slightly revised policy on September 4. The only working conditions that First Student announced on May 17 related to "hiring," "pay rates," "seniority," "training," "benefits," and an internal dispute

resolution process. (ALJ 14:44-16:23; GCX 5, 1-3). Similarly, the entirety of the "Tardiness and Absences Policy" contained in the employee handbook reads:

> First Student is contractually obligated to provide on-time delivery of students. Therefore, when an employee is absent or late, it causes considerable difficulty in completing bus schedules on time. If you find it necessary to be late or absent, you must notify your supervisor directly as early as possible. Except for emergency situations, notification should be NO later than the night BEFORE your route. You should indicate the reason for being late or absent. If you know you are going to be late or absent for more than one trip or run, please report that fact. If not stated, it will be assumed the call covers one trip or run only. Habitual tardiness or absence will be cause for disciplinary action.

(GCX 6, at 36 (emphasis in original)).[6] This vague policy, and the handbook itself, might have "informed the employees that they would be covered by First Student policies," as the company asserts in its brief, but it did not excuse the company's implementation of a new, far more specific attendance policy after its bargaining obligation attached. (R. Br. 28).

The August 27 policy, as revised on September 4, contained provisions related to medical certification, "chargeable" and "non-chargeable" absences, a progressive disciplinary policy, and a separate disciplinary policy applicable to "no call/no show" absences. (GCX 10; RX 13). None of those rules had been announced during the May 17 meeting or included in the employee handbook. Indeed, by its own terms, the policy distributed on August 27 was not effective until September 1, demonstrating indisputably that First Student implemented the policy after its bargaining obligation had attached. (GCX 10, at 1). The implementation was unlawful, and the ALJ's holding in this respect was correct. (ALJ 27:11-28:3).

[6] The company claims it issued handbooks to "most [employees] in mid-June 2012." (R. Br. 26). There is no evidence in the record to support that claim. Kellerman, the company's witness, testified that he did not remember if First Student "specifically talked about" the handbook on May 17, and that while it "may have mentioned that we would be passing out the handbooks during training," First Student "didn't go through the handbook specifically." (Tr. 510:12-15).

III. THE GENERAL COUNSEL CARRIED HIS BURDEN OF ESTABLISHING THAT THE DIFFERENCES BETWEEN THE DISTRICT'S AND FIRST STUDENT'S ATTENDANCE POLICIES WERE MATERIAL, SUBSTANTIAL, AND SIGNIFICANT, AND THE ALJ PROPERLY CONSIDERED THE ENTIRETY OF THE UNDISPUTED EVIDENCE IN SO CONCLUDING.

A. The ALJ Properly Looked to the CBA's Sick Leave and Leave of Absence Provisions in Determining Whether First Student's Attendance Policy Constituted a Material, Substantial, and Significant Change to the Bargaining Unit's Conditions of Employment.

The ALJ properly found that the attendance policy First Student imposed differed in material, substantial, and significant ways from the status quo policy. First Student objects to this finding because of its "misplaced" reliance on certain articles of the union's CBA with the school district. (R. Br. at 29; *see* Tr. 71:8-12 (undisputed testimony that the school district "had a written attendance policy," in "the contract")). Specifically, First Student objects to the ALJ's reference to the sick leave and leave of absence provisions. First Student asserts that these provisions "deal with matters that are not addressed in the Company's attendance policy." (R. Br. 29). First Student is wrong.

1. Sick leave.

The CBA provided "sick leave," which was defined as an absence from work "for personal illness or disability." (GCX 2, at 17). Employees with less than 10 years' seniority had 10 days of sick leave annually. In 2012, the final year of the contract, employees with more than 10 years' seniority had 11 days of sick leave annually. Employees with more than 15 years' seniority had 12 days of sick leave annually. (GCX 2, at 18).

By contrast, under First Student's policy, absences as a result of personal illness or disability—the conditions that the CBA classified as "sick leave"—are considered "chargeable

absences," a category that includes "any absence." (RX 13, at 2 (emphasis in original)).[7] Chargeable absences are subject to a progressive disciplinary policy, under which only two sick days result in "verbal counseling," which is documented in an employee's disciplinary record. (RX 13, at 2). More than eight chargeable absences results in termination of employment. (RX 13, at 2).

After First Student implemented its new attendance policy, if an employee with less than 10 years' seniority took the CBA-permitted 10 days of sick leave, on non-consecutive days[8] within a 12-month period, she would be fired.[9]

2. Leaves of absence.

The CBA section titled "Leaves of Absence" included provisions applicable to unpaid personal leave, paid personal business days, unpaid health leave, union convention leave, union representative leave, and jury duty. (GCX 2, at 21-24).

Under the CBA, employees were entitled to two paid absences annually for "urgent, necessary, legal, business, household or family matters." (GCX 2, at 21). First Student's attendance policy does not entitle employees to any pay for such absences, and after it implemented the policy, an employee who was absent for two days because of urgent personal business would (i) receive no wage for those days; and (ii) be subject to "verbal counseling," which would be documented in her disciplinary record. (RX 13, at 1-2).[10]

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[7] "Non-chargeable" absences are absences as a result of jury or military duty, bereavement "as defined by FS policy," workers' compensation, or FMLA-certified leave. (RX 13, at 2).

[8] First Student's attendance policy provides that up to three *consecutive* absences "for the same documented illness" would equal one chargeable absence. (RX 13, at 2).

[9] Increased severity of and heightened standards for discipline are material, substantial, and significant changes to working conditions. *See* Section III(B), *infra*.

[10] Changing whether certain absences are paid or would subject employees to discipline is material, substantial, and significant. *See* Section III(B), *infra*.

Under the CBA, employees performing jury duty were entitled to "be paid the difference between what he/she receives from the Court as daily jury duty fees and what he/she would have earned from his/her employment." (GCX 2, at 23). First Student's attendance policy does not entitle employees to any pay for such absences. *Id.*

Under the CBA, the bargaining unit as a whole was entitled to 20 days of absences "to attend educational classes or conventions conducted by the Union." (GCX 2, at 22). After First Student implemented its policy, if an employee went to a four-day union convention she would be issued a written warning, which would become part of her disciplinary record. (RX 13, at 2).

It is disingenuous for First Student to claim that a policy that covers "<u>any</u> absence," including absences requiring "medical certification" and for "jury duty," does not "deal with" sick leave, jury duty, or other leaves of absence as defined in the CBA. (RX 13, at 2; R. Br. 29). First Student's new attendance policy unlawfully changed the prevailing working conditions as formalized in the CBA.

B. First Student Failed to Rebut the General Counsel's *Prima Facie* Case that the Differences Between the District's and First Student's Attendance Policies Are Material, Substantial, and Significant.

First Student accuses the ALJ of engaging in "cursory" analysis of whether the attendance policy changes were material. However, the Board often relies on a small number of differences when determining whether a new policy imposes material changes, when the differences it does examine are sufficiently material, standing alone, to support a 8(a)(5) finding. For example, the Board found material, substantial, and significant changes based on the implementation of an attendance policy that was "stricter," based on the judge's sole example that "tardiness is assessed points under the new plan. An automatic discharge occurs when an employee is assessed 20 points within any 12-month period or 10 points within any 90-day period." *Ryder/ATE, Inc.*, 331 NLRB 889, 891 (2000); *also see Swedish Hosp. Med. Ctr.*, 232

NLRB 16, 21-22 (1977) (unilateral grant of two "days off" with pay violates 8(a)(5)). If the evidence shows that a material change occurred, the General Counsel has satisfied his burden.

Here, for expediency and efficiency, the General Counsel introduced two documents—the CBA and the company's attendance policy—that speak for themselves, and asked the ALJ to evaluate whether and how they differed. He did so. Nothing "more was required from the General Counsel," as First Student now claims, because the documents satisfied the General Counsel's *prima facie* case and First Student failed to rebut the presumption they created. (R. Br. at 28).

First Student's brief ignores the applicable evidentiary analysis, which the Board explained in *Pan America Grain*:

> The General Counsel bears the burden, of course, to prove a violation of Sec. 8(a)(5). The General Counsel meets that burden, as he did in this case, "when he shows that the employer made a material and substantial change in a term of employment without negotiating with the union." *Fresno Bee*, 339 NLRB 1214, 1214 (2003). At that point, the burden shifts to the employer "to show that the unilateral change was in some way privileged." *Id*.

Pan America Grain Co., 351 NLRB 1412, 1415 fn.9 (2007).

The following points of fact and law establish that the General Counsel met his burden here:

- A CBA governed terms and conditions of employment prior to First Student's assuming control of transportation services. (GCX 2).
- The CBA contains policies relating to attendance and discipline. (GCX 2, at 17-20, 21-24).
- First Student's policy contains provisions relating to attendance and discipline. (RX 13).
- Attendance and discipline are mandatory subjects of bargaining. *Pratt Indus., Inc.*, 358 NLRB No. 52 (June 5, 2012) (citing *Bath Iron Works Corp.*, 302 NLRB 898, 902 (1991)); *Alcoa, Inc.*, 352 NLRB 1222, 1223 (2008) (citing, inter alia, *Dorsey Trailers, Inc.*, 327 NLRB 835, 852 fn. 26 (1999), enfd. in relevant part 233 F.3d 831 (4th Cir. 2000)).

- First Student admits that its bargaining obligation attached by August 27; the ALJ found it attached by August 17. (R. Br. at 23-25; ALJ 18:11-18).
- First Student "distributed" the policy on August 27, and then distributed a slightly revised policy on September 4. (Tr. 27:16-23).
- First Student neither notified the union of, nor bargained with, the union about the attendance policy. (Tr. 522:2-8).

Once the General Counsel successfully moved the CBA and attendance policy documents into evidence, the documents spoke for themselves. (GCX 2; RX 13). Because the documents, on their faces, showed material changes with respect to the sick leave and leave of absence policies, *supra*, the General Counsel established a *prima facie* violation of 8(a)(5). *Fresno Bee*, 339 NLRB at 1214. At that time, the burden shifted to First Student to produce evidence that could rebut that presumption and show that it was "in some way privileged" to implement its policy unilaterally. *Pan America Grain*, 351 NLRB at 1415.

In its brief, First Student suggests that its implementation of the attendance policy was "in some way privileged" because the "General Counsel did not introduce any evidence comparing the District's application of [the CBA article 'Hours and Days of Work'] to the Company's application of the provisions of its attendance policy." (R. Br. at 29). However, as *Pan America Grain* and *Fresno Bee* explain, it was First Student's burden to produce evidence to rebut the presumption established by the documents the General Counsel introduced, and which could demonstrate the policies did not materially differ. At trial, First Student did not elicit evidence "comparing the application" of the policies, nor did it attempt to introduce documentary evidence about the policies' application. First Student failed to rebut the General Counsel's *prima facie* case that First Student's unilateral implementation of the attendance policy violated 8(a)(5).

IV. FIRST STUDENT'S EXCEPTIONS TO THE ALJ'S GRANTING OF MOTIONS TO AMEND THE COMPLAINT MISSTATE THE EVIDENCE AND ARE MERITLESS.

The amendment issue is a meritless distraction. First Student never suffered confusion about with whom it should bargain and it never objected to the wording of the complaint until days before the hearing. First Student never sought to excuse its failure to timely bargain with a claim that it did not know with whom to bargain. Kinsley met DeVore, the USW representative, in July 2011, when she attended a contracting meeting as a representative of the employees. DeVore also spoke on behalf of the bargaining unit after the May 16, 2012 school board meeting. Bryant introduced himself as unit president to First Student representative Kellerman on May 17, and Kellerman and Kiraly treated Bryant as a bargaining representative when they negotiated a new seniority scheme with him the following month.

First Student introduced no evidence that it had any doubt about the identity of the bargaining representative, and indeed has never expressed such a doubt—even in its exceptions to the ALJ's decision. First Student bargained with the USW and its Local Union 8410 without complaint, and later did so with the USW and its Local Union 9036, when the unit transferred to that local. First Student signed tentative agreements with the union when the unit was affiliated with 8410, and when it was affiliated with 9036.

Most importantly, *First Student admits that it had a duty to bargain with USW* as of August 2012, when the unit was still affiliated with Local Union 8410. First Student disputes the exact date on which that obligation attached, but its claim that it was confused by the local union number listed on the charge form is not credible. First Student never sought clarification from the Region while the union's charge was being investigated. And following the unit's affiliation with Local 9036 in June 2013, First Student never sought clarification from USW or the employees about the change or the identity of the unit's representative.

First Student met and bargained with USW and the unit when the unit was affiliated with Local 8410 and when it was affiliated with Local 9036. It has since—by its own admission—entered into a collective bargaining agreement with USW, on behalf of Local 9036, Unit 1. First Student's claimed "confusion" is spurious and a waste of the Board's time.

Exception 1

First Student incorrectly asserts that the complaint, as amended at the hearing, alleges that the school district only recognized Local 8410, and not USW, as the unit's bargaining representative. (R. Exc. ¶¶ 2, 3). The transcript shows otherwise. Complaint paragraph 8(a) was amended at hearing after the following exchange:

> JUDGE CARISSIMI: Before we proceed with the questioning, I believe you wanted to address paragraph 8 of the complaint, Ms. Brazeal? . . . [F]irst, let's deal with paragraph 8(a). . . . Right now, that paragraph says that from February of 1981 through June 2012, the Saginaw School District has recognized the Charging Union. The Charging Union in this case is Local 9036. That doesn't seem to be factually correct. I have a contract that says Local 8410. Do you intend to amend paragraph 8(a) to say that between February of 1981 and June 1st of 2012, the district recognized Local 8410, the United Steelworkers, as the collective bargaining representative?
>
> MS. BRAZEAL: I would like to say from about February 19, 1981 through about June 1st, 2012, the Saginaw School District recognized Local 8410, United Steelworkers Union, as the collective bargaining representatives of the following employees.

> JUDGE CARISSIMI: Okay. I'm going to permit that amendment because it seems consistent with the evidence.[11]

(Tr. 78:4-5, 11-25-79:1). After an extended discussion, First Student admitted that, "to the extent [the CBA between the school district and the union] says the recognition was embodied in a contract that was effective from August 27, 2010 to August 31, 2012, we would admit that the school district was a party to a contract with Local 8410 . . . and deny the rest." (Tr. 82:22-25-83:1, 3).

The recognition clause of the 2010-12 CBA between the school district and the union reads:

> THIS AGREEMENT made and entered into on August, 2010, by and between the Board of Education of the City of Saginaw (hereinafter referred to as the "Board" or the "Employer") and the United Steelworkers, AFL-CIO-CLC, on behalf of Local 8410-01, (hereinafter referred to as the "Union").
>
> ARTICLE I
> Recognition
> A. Recognition
> The Board recognizes the Union, to the extent required by Act 176 of the [Michigan] Public Acts of 1939, as amended, and Act 336 of the Public Acts of

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[11] The General Counsel subsequently amended the same paragraph of the complaint to include the following allegations:

> ¶ 8(b): This recognition had been embodied in a series of collective bargaining agreements with the Saginaw School District, the most recent of which by its terms was have to been effective from August 27, 2010 to August 31, 2012.
>
> ¶ 8(c): From about February 19, 1981 through about June 2013, the United Steelworkers Int'l Union (USW) designated Local 8410, a USW affiliate to represent the unit of employees described above in paragraph 8(a), along with USW.
>
> ¶ 8(d): Since about June 2013, USW designated Local 9036, another USW local affiliate to represent the unit of employees described in paragraph 8(a), along with USW, for organizational purposes.
>
> ¶ 8(e): From about 1981 to date, USW has been the bargaining representative of the unit of employees described in paragraph 8(a) for collective bargaining purposes.

(GC PH Br., at fn.2).

> 194 7, as amended, as the sole and exclusive collective bargaining representative, for all full-time and regular part-time employees in the unit certified by the Michigan Employment Relations Commission in Case No. R81 B-77 and described below, employed by the Board.

(GCX 2, at 2).

The ALJ permitted the amendment in full over First Student's objection. (Tr. 79:11-12).

Exception 2

First Student incorrectly asserts that the ALJ erred when he permitted the General Counsel to amend complaint paragraph 9 to allege the following:

> From about February 19, 1981 through June 2013, Local 8410, a USW affiliate, and USW were the exclusive collective bargaining representatives of the Unit employed by Respondent. Since June 2013, Local 9036, a USW affiliate, and USW were the exclusive collective bargaining representatives of the Unit employed by Respondent.
>
> During the relevant time periods described in [the preceding] paragraph 9(b), USW, Local 8410, and Local 9036, based on Section 9(a) of the Act, have been the exclusive collective bargaining representative of the Unit employed by Respondent.

(GC PH Br. at 3-4, fn.2). However, the ALJ's ruling was proper, because it satisfied the three-prong test with which the Board evaluates complaint amendments. In *Stagehands Referral Service*, the Board listed the factors: "(1) whether there was surprise or lack of notice, (2) whether the General Counsel offered a valid excuse for its delay in moving to amend, and (3) whether the matter was fully litigated." *Stagehands Referral Serv., LLC*, 347 NLRB 1167, 1171 (2006). The Board is also concerned with whether the amendment would prejudice the respondent. *See Green Const.*, 271 NLRB 1503, 1503 (1984).

Amendments are properly denied when they allege additional ULPs; here, the General Counsel's amendments did *not* add to or alter First Student's exposure to liability. *Latino Express, Inc.*, 358 NLRB No. 94, *1 fn.2 (2012) (denying amendment because amendment would "allege additional Sec. 8(a)(1) violations"); *Graphic Commc'ns Conference*, 359 NLRB

No. 22, *3 (2012) (denying amendment because it claimed respondent had committed "another alleged unfair labor practice"). The ALJ properly granted these amendments because they did not allege that First Student engaged in any unlawful conduct other than that alleged in the original complaint. Just as "amendments to identify the correct employer may be made even after a complaint issues so long as there is no prejudice," so may amendments to identify the correct union. *C.T. Taylor Co., Inc.*, 342 NLRB 997, 1000 (2004) (citing *Specialty Envelope Co.*, 313 NLRB 94, 94 (1993); *Am. Geriatric Enters.*, 235 NLRB 1532, 1534-1536 (1978)); *also see Wackenhut Corp.*, 194 NLRB 302, 302 fn.1 (1971) (permitting amendment of pleadings to include local union affiliated with international union that was the original charging party because incorrect name was a "technical deficiency").

First Student proposes that the identity of the bargaining unit's representative "was not fully litigated at the hearing." (R. Exc. ¶2). This is false. More than 50 pages of transcript contain direct- and cross-examination testimony of union witnesses regarding the identity of the bargaining unit representative and, specifically, when and why USW transferred the bargaining unit from Local 8410 to Local 9036. (Tr. 30:13-31:11, 87:22-100:9, 133:17-140:25, 150:4-19 (testimony of unit president Bryant); 160:17-172:7, 226:25-249:10 (testimony of USW representative DeVore); 311:25-314:22 (testimony of bargaining unit member Stidhum-Stewart); 345:6-11 (testimony of bargaining unit member Ezell)).

First Student also claims it was surprised by the amendment indicating when the USW transitioned the bargaining unit from Local 8410 to Local 9036, but does not explain why it would be surprised by the amendment of one complaint paragraph which, as the ALJ held, "merely made [it] consistent" with the complaint paragraph amended at the hearing. (ALJ 4:24-

26). The ALJ himself noted that it was First Student's amended answer to the complaint that precipitated the complaint's amendment. (Tr. 83-18-21).

First Student was fully equipped to respond timely to the complaint when it included an incorrect local union number, and alleged that the unit was affiliated with its current local union—9036—earlier than the actual date. But First Student waited until five days before trial to amend its answer and object to the incorrect local union designation. At the very least, testimony at trial about the transition from one local to another put First Student on notice of the facts as alleged in the amendment.[12]

Finally, no prejudice attached because the challenged amendments were granted post-trial. First Student presented no testimony from any witnesses alleging that the company was confused about the identity of the employees' bargaining representative, and now presents no legal argument that the USW-affiliated local union of which the bargaining unit was a part was materially significant to the dispositive issues in this case. (GCX 1(m)).

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[12] *See Aliante Station Casino & Hotel, Boulder Station, Inc.*, 358 NLRB No. 153, 80 fn.120 (Sept. 28, 2012) (permitting post-trial amendment alleging that employer not only "promised increased wages (as originally charged), but also promised unspecified benefits," because "the essence of the allegation (an unlawful promise of benefits) remains unchanged and was fully litigated," when employer cross-examined union witness "about her testimony that managers promised wage increases and that everything would be fixed"); *id.* at 117, fn.172 (also permitting post-trial amendment alleging that two supervisors intimidated voters, rather than one representative alone, "as originally alleged," because a union witness gave testimony at hearing accusing both supervisors, and "the addition of [the second supervisor] does not come as a surprise given the testimony that [the union witness] offered"); *Pergament United Sales*, 296 NLRB 333, 347 fn.8 (1989) (citing cases permitting amendments where "all parties to the proceeding knew from the outset that the thing complained of was discrimination," and "from the record" concluding that the employer "understood the issue and was afforded full opportunity to justify the action of its officers as innocent rather than discriminatory;" where the "company was on notice of the ultimate issue in this case, and that issue was fully litigated;" and where the " respondent's primary testimony and initial position covered the 8(a)(1) issue" raised in the amendment) (citing *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 349-350 (1938); *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112 (8th Cir. 1987), enfg. 279 NLRB 662 (1986); and *AMC Air Conditioning Co.*, 232 NLRB 283, 283 fn. 10 (1977)).

Exception 3

First Student incorrectly asserts that the ALJ should not have found that USW and its Local 8410 were joint representatives of the bargaining unit when First Student committed the unfair labor practices at issue in this case. First Student attempts to create confusion where undisputed testimony about the nature of the union establishes that no confusion existed. (R. Exc. at ¶ 3). When determining the identity of a bargaining representative, the Board relies on evidence about the entity's involvement in representing the bargaining unit, and values substance over form. For example, in *American Medical Response*, the Board found that although a recognition agreement named only an international union, one of its local unions was a joint representative where the local union was also a party to the relevant CBA; the local maintained and enforced that CBA; employees' dues deduction authorization cards identified the local union as the bargaining representative, and both the local and international unions participated in negotiations. 335 NLRB 1176, 1178-1179 (2001).

The Board does not discount collective bargaining agreements, negotiated and drafted by non-lawyers, simply because of minor inconsistencies within the documents. Nor does the Board rely blindly on phrases cherry-picked from the contract when, taken as a whole, the contract sends a consistent message. In *Mail Contractors*, the Board considered a dispute about whether the American Postal Workers Union (APWU) had ceded representation of a certain bargaining unit to its Des Moines local union. 346 NLRB 164, 167 (2005).

In that case, the applicable contract contained language analogous to the language in the CBA here. The preamble defined "Union" as "the American Postal Workers Union, Des Moines Iowa Area Local, APWU." *Id.* The first article, titled "recognition," read, "[t]he Employer recognizes the Union as the exclusive bargaining agent for [the bargaining unit]." The Board construed several terms of the unions' agreement with the employer. The Board explained,

> [T]he cover page identifies only the APWU as the contracting union. The APWU and the [local union] are separately identified in the preamble. The full name of the APWU precedes that of the [local union] and the name of the [local union] includes its APWU affiliation. A fair reading of the preamble is that it identifies both the national APWU and the [local union] as parties to the contract. The record does not show that there was any discussion of the naming of both labor organizations in the preamble. The evidence is insufficient to establish that . . . it was agreed that the [local union] would be substituted for the APWU. Rather, the weight of the evidence is that at the initial bargaining meeting the APWU and the [local union] were recognized as the joint representatives of the [bargaining] unit.

Id. The Board concluded that the language in the contract, considered in light of the local and international being present at bargaining sessions, demonstrated that APWU and the local union were either joint representatives, or that APWU had designated the local union as its servicing agent. The label was irrelevant, because whether a local is recognized as a joint representative or whether its international designates it as a servicing representative, the international union retains its Section 9(a) status and the local union gains that status. *Id.*

First Student claims that the identity of the bargaining representative here was unclear in part because of the cover sheet of the contract, ignoring the obviously equal or greater significance of the signatories to the agreement and the article of the agreement titled "recognition." Here, the CBA between the school district and the union supports joint representative status. The CBA defines "Union" as "the United Steelworkers Union, AFL-CIO-CLC, on behalf of Local 8410-01." (GCX 2, at 2). The article titled "recognition"—the first article of the contract—provides that the school board "recognizes the Union, to the extent [required by state law], as the sole and exclusive collective bargaining representative" for unit employees." (GCX 2, at 2).

When a successor employer is confused about the relationship between an international and its local unions, or about their potential status as joint representatives, the successor must seek clarification upon receipt of a bargaining demand. This issue came before the Board in

Tree-Free Fiber. Tree-Free Fiber Co., 328 NLRB 389 (1999). In that case, the Board found that a successor unlawfully refused to bargain, noting that "the judge's factual analysis of the relationship between the International and the two Locals with regard to the representation of the predecessor's bargaining unit employees establishes that they are joint collective-bargaining representatives." *Tree-Free Fiber*, 328 NLRB at 389 fn.4 (citing *BASF-Wyandotte Corp.*, 276 NLRB 498, 504-505 (1985)).

The ALJ explained that the recognition clause in the labor contract with the predecessor employer stated that the predecessor recognized "the signatory Locals as the sole collective bargaining agent for its employees in the work which properly comes under its jurisdiction." *Id.* at 397. However, he continued his analysis of the representational status of the international union, and examined other language in the contract—both the preamble and the grievance procedure referred to the international—and the parties' bargaining history—the international had always participated in negotiations. *Id.* at 397-398. Based on the totality of circumstances, the ALJ reasoned, a demand for recognition signed solely by the international union established the successor's bargaining obligation.

The ALJ concluded that the international and its two local unions were joint representatives. The Board elaborated by affirming that "it is settled law that one of the labor organizations sharing joint representation rights may act on behalf of the others," and most importantly to the instant case, that if the successor "perceived any ambiguity in the request to bargain, it was obliged to seek clarification [and] . . . requested no such clarification in this case." *Id.* at 389 fn.4 (citing *Parkview Manor*, 321 NLRB 477, 477 fn.2 (1996) (rejecting employer's claim that a local union had not made an effective bargaining demand because the employer

"made no attempt to clarify the ambiguity and ascertain the relationship" between the local union and the district council to which it belonged).

Similarly, during the months in which it avoided bargaining with the union here, First Student never sought clarification of what it now claims was the "cloud[ed] issue" of the bargaining unit's representative. (R. Exc. ¶ 3). Having failed to do so, First Student cannot now credibly claim "confusion," much less error.

And, as explained above, First Student misrepresents the content of the complaint's amended paragraph 8(a). *See supra*, Section IV(1). The complaint was amended during the hearing to allege that "the Saginaw School District recognized Local 8410, United Steelworkers Union, as the collective bargaining representatives . . . ." (Tr. 78:11-25).

Exception 4

First Student objects to the ALJ's correct conclusion that USW and Local 9036 have been joint representatives of the bargaining unit since June 2013, when USW completed the transition of the bargaining unit from the jurisdiction of Local 8410 to that of Local 9036. The basis for First Student's fourth exception is the objection that the ALJ "erred because of the lack of evidence demonstrating either that "DeVore was acting as a joint representative of the employees" or as an agent of one of the local unions during the transition period. (R. Exc. ¶ 4). Of course, DeVore always was identified as an employee and agent of USW, assigned to represent the unit of school bus drivers and monitors that is the center of this case.

What First Student means by "joint representative" is unclear. What DeVore's involvement in the transition proves is the continuity of USW's representation. DeVore is employed by USW to assist bargaining units with tasks that require institutional support or experience, like arbitration, contract negotiation, and local union affiliations. The Board holds,

> the determinative factor in establishing agency status is not authorization or ratification of the agent's acts by the principal, but rather the nature of the agency. A principal is responsible for its agents' conduct if such action is done in furtherance of the principal's interest and is within the general scope of authority attributed to the agent, even if the principal did not authorize the particular act. In other words, it is enough if the principal empowered the agent to represent the principal within the general area in which the agent has acted.

Bio-Med. of Puerto Rico, 269 NLRB 827, 828 (1984). In transitioning the locals; pinning First Student down; demanding recognition and bargaining; and eventually leading the parties' October bargaining session, DeVore furthered USW's interest and acted within the scope of her USW authority, and made this crystal clear to First Student.

Exception 5

First Student's fifth exception is based on its complaint that the General Counsel "failed to prove who the employees' [Section] 9(a) representative was at any relevant time." (R. Exc. ¶ 5). This misstates the applicable evidentiary standard. The General Counsel introduced the union's CBA with the school district, First Student's admitted predecessor employer, and the undisputed and credited testimony of DeVore about USW's management of the bargaining unit's representation. If First Student had doubt about the identity of the employees' representative, it had a duty to raise that doubt, and prove it did so.

In *Raymond Convalescent Hospital*, the Board explained,

> [It] is presumed that a union retained its majority status in the unit established by the collective bargaining agreement, even after the expiration of that agreement. This presumption is normally rebuttable . . . by competent evidence that the union no longer commands a majority, and even without such an affirmative showing an employer may withhold further bargaining in reliance upon a reasonably based doubt as to the continuing majority.

Raymond Convalescent Hosp., Inc., 216 NLRB 494, 498 (1975). Here, First Student never claimed that it doubted the union's continued majority—not during the summer and fall of 2012 when the union was demanding recognition; not in October 2012 when the first bargaining

session occurred; not during the 2013 hearing; and not in its exceptions. In *Raymond*, the Board relied on *Barrington Plaza*, in which it held,

> Following expiration of the contract, this presumption continues and is not dependent on independent evidence that the bargaining relationship was originally established by a certification or majority card showing. The presumption applies not only to a situation where the employer charged with a refusal to bargain is itself a party to the preexisting contract, but also to a successorship situation such as we have here. The burden of rebutting this presumption rests, of course, on the party who would do so.

Barrington Plaza & Tragniew, Inc., 185 NLRB 962, 963 (1970), enfd. 470 F.2d 669 (9th Cir. 1972). First Student has not rebutted, and never attempted to rebut, the union's presumption of majority support here. Its failure to recognize and bargain with the union promptly remains unexcused and unlawful.

Exception 6

First Student's sixth exception is premised on a misleading statement of Board law and procedure. First Student "submits" that the initial unfair labor practice charge "on its face, established that the term 'Union,' as used in it, means Local 9036." (R. Exc. ¶ 6). However, the text of the charge is not relevant. Any person or organization may file a charge, as the ALJ correctly held. For decades, the Board and the federal courts have been consistent in holding that a "charge is not a proof. It merely sets in motion the machinery of an inquiry. When a Board complaint issues, the question is only the truth of its accusations. The charge does not even serve the purpose of a pleading." *NLRB v. Indiana & Michigan Elec. Co.*, 318 U.S. 9, 17-18 (1943); *also see Castle Hill Health Care Ctr.*, 355 NLRB 1156 (2010) ("With regards to Respondent's argument regarding the Union's asserted lack of standing, as an initial matter, I note that the Board administers public policy and its processes may be invoked by any person who believes such policies have been violated."); *Windstream Corp.*, 352 NLRB 510, 513 (2008). Here, the name of the charging party has no bearing on First Student's unlawful conduct.

Exception 7

First Student objects to the ALJ's conclusion that continuity of representation existed throughout the Section 10(b) period. (R. Exc. ¶ 7). As explained above, if a successor employer is confused about the relationship between an international and its local unions, or about their potential status as joint representatives, the burden is on the employer to seek clarification upon receipt of a bargaining demand. First Student never did so, and the presumption of the union's continuity of representation remains unrebutted. *See supra*, Section IV(3)-(5).

Exception 8

First Student's eighth exception again misunderstands the significance of a charging party's identity. (R. Exc. ¶ 8). When the ALJ permitted the General Counsel to amend complaint paragraph 9 to allege that the union—including Local 8410—was the unit's representative when First Student violated the Act, only the allegations in the complaint were amended. There was no "substitution" of "a different entity as charging party." (R. Exc. ¶ 8).

Indeed, the core allegations of the charge remained unchanged: First Student is the school district's successor and unlawfully avoided its bargaining obligation. The Board has "required that the complaint allegation be related to and arise out of the same situation as the conduct alleged to be unlawful in the underlying charge, although it need not be limited to the specific violations alleged in the charge." *Nickles Bakery*, 296 NLRB 927, 927 (1989). Such a factual relationship can be established when the General Counsel's evidence demonstrates that the two allegations are "part of an overall employer plan to undermine the union activity." *Carney Hosp.*, 350 NLRB 627, 630 (2007) (explaining that allegations are factually related when they occur during the same time period and concern conduct that was part of an overall plan (citing *Recycle America*, 308 NLRB 50, 50 (1992)).

Here, every allegation made throughout the course of this case relates to First Student's unlawful delay of bargaining and recognition following the attachment of its bargaining duty as a successor employer. The ALJ properly found that the amended allegations were warranted and closely related to the allegations in the original complaint and to the underlying ULP charge.

Exception 9

First Student argues that it should bear no responsibility for certain statements for reasons that are unsupported by Board precedent. (R. Exc. ¶ 9). The company claims that it should be exempt from the obligations it incurred through statements made in July 2011 because it made those statements "over ten months before execution of the transportation services contract." (R. Exc. ¶ 9). The time at which First Student and its predecessor executed their contract is irrelevant. First Student acquired responsibility for its statements as a successor employer at the point at which it was anticipated the union would remain the bargaining unit's representative. In *Marriott Management*, the Board held that this rule is applicable in a successorship situation. explaining,

> We recognize that the April and June 1 conversations occurred before the [successor] recognized Local 70 on June 26. Local 70 was the representative of the employees under the predecessor at the time of these conversations, however, and it is clear that both parties anticipated that Local 70 would remain the representative under the [successor]. In these circumstances, we regard the communications to Local 70 as communications with the employees through their representative.

Marriott Mgmt. Servs., Inc., 318 NLRB 144, 144 fn.1 (1995) (citing *Banknote Corp. of America*, 315 NLRB 1041, 1043 (1994)). Here, the statements to which First Student refers contemplated the hiring of as many of the district's transportation employees as possible and, by consequence, their retention of the union as their bargaining representative.

Similarly, the party to whom First Student targeted certain statements is irrelevant to the fact that the statements were made in the presence of the employees' bargaining representative.

The statements that an employer makes in the presence of a bargaining representative have the same impact as they would if the employer made the statements directly to the bargaining unit members themselves. *See W. Point Pepperell, Inc.*, 200 NLRB 1031, 1040 (1972) (unlawful threat of retaliation made to bargaining representative found to coerce employees in their exercise of Section 7 rights); *Lipman Bros., Inc.*, 164 NLRB 850, 850 (1967) ("offers of reinstatement conveyed to employees through the medium of their bargaining representative are valid offers of reinstatement").

Public statements that are directed at no one in particular are also sufficient to bind parties. *Also see Old Town Shoe Corp.*, 91 NLRB 240, 241 (1950) (statement in a newspaper advertisement demonstrated an employer's intent). In *Morris Healthcare*, the Board acknowledged that private employers who are assuming control of a public enterprise will often make statements targeted at the governmental body that will decide whether to enter into a contract with them, or targeted at the public at large. The Board held that Morris Healthcare was obligated to maintain the bargaining unit's working conditions based on the following:

> At the August 22 Grundy County Board meeting, [the successor's CEO] stated the [successor's] intention to rehire the overwhelming number of the nursing home's staff, except for a few with absenteeism problems. As a result, the Grundy County Board approved the transfer of the nursing home and a lease agreement to the [successor] on the condition that the [successor's] hiring process defer to the incumbent staff, including senior management and the medical director. [The successor's CEO] essentially repeated his remarks during an interview on a local radio show and added that there would be a smooth transition, everything would remain the same, and most staff would be rehired, except for a few employees with absenteeism problems.

Morris Healthcare & Rehab. Ctr., LLC, 348 NLRB 1360, 1367 (2006). Given this precedent, the ALJ here correctly concluded that First Student's statements made at meetings with the school district established and reinforced its obligations as a successor employer.

CONCLUSION

First Student's exceptions are without merit. The ALJ's decision, to the extent that it found First Student to be in violation of Sections 8(a)(1) and (5), is fully supported by the record and the law.[13]

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[13] In addition, as we show in our exceptions and briefs, the record and the law warrants findings that First Student also violated Sections 8(a)(1) and (5) by **(1)** disregarding its "perfectly clear successor" obligations and **(2)** conditioning recognition and bargaining on USW withdrawal of its unfair labor practice charge.

CERTIFICATE OF SERVICE

This is to certify that a copy of "Answering Brief To Respondent First Student, Inc., A Division Of First Group America's Exceptions To The Decision And Recommended Order Of The Administrative Law Judge, On Behalf Of Charging Party United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial And Service Workers International Union (USW), AFL-CIO·CLC, And Its Local Union 9036" was served via electronic mail this 10th day of March, 2014 upon:

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