UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FIRST STUDENT, INC., a division of
FIRST GROUP AMERICA,

Respondent, Case 07-CA-092212

and

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION (USW)
and its LOCAL UNION 9036,

Charging Unions.

REPLY TO RESPONDENT FIRST STUDENT'S ANSWERING BRIEF TO CHARGING UNIONS' EXCEPTIONS

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First Student offers "trees"—out-of-context "qualifiers," word-parsing, and an incomplete account of the salient events. First Student ignores the "forest" *i.e.*, what really happened as proven in the undisputed record, and that ALJ Carissimi erred.[1]

I. WHAT REALLY HAPPENED BASED ON THE CREDITED AND UNDISPUTED RECORD EVIDENCE: FIRST STUDENT BREACHED ITS "PERFECTLY CLEAR SUCCESSOR" OBLIGATIONS

First Student got the $9.5 million Saginaw School District bus contract by promising unit employees they would seamlessly "transition" from public employment to First Student; that their wages would remain the same; and that other terms would be negotiated with the union. First Student promised stability, continuity, and union representation. First Student assured the employees they needn't worry, to relieve their "anxiety." First Student did so because the District insisted that the "transition" preserve the employees' wages, do the employees no "harm," and treat the employees like "family."

One day after First Student got the $9.5 million contract, it dropped the "other shoe," announcing for the first time drastic unilateral changes, including reduced wages. In human terms, First Student misled the employees for ten months, used them to get the bus contract, promised them stability, continuity, and negotiations, and then broke those promises. In legal terms, First Student incurred "perfectly clear successor" bargaining obligations, and breached those obligations in violation of Sections 8(a)(1) and (5).

[1] In our exceptions brief, we confine our analysis to the facts credited by the ALJ and to undisputed testimony and evidence. We do this to remove the ALJ's credibility findings from the equation. We show that based on the facts admitted by First Student, and eschewing evidence not credited by the ALJ, First Student violated the Act as a matter of law by **(1)** breaching its "perfectly clear successor" obligations and **(2)** seeking to coerce USW's ULP charge withdrawal. See our exceptions and, *e.g.*, our main brief at 3, 15-17. Accordingly, First Student's treatments of disputed facts and issues not raised are superfluous, unresponsive to our exceptions, and should be disregarded.

A. As First Student acknowledges, the "perfectly clear successor" doctrine is rooted in *NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. 272 (1972) and *Spruce Up Corp.*, 209 NLRB 194 (1974), *enf'd* 529 F.2d 516 (4th Cir. 1975), and has been applied in myriad circumstances over the 40-plus years since *Burns*. We address the law in our main brief. First Student summarizes: the Board "has effectively held that a [perfectly clear] 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." (FS brief at 36).

Under *Spruce Up* and its progeny, the test is *objective*: what the employer *said*, and its reasonable meaning, governs; *not* what the employer "intended" in its secret heart. Indeed, an employer incurs "perfectly clear successor" obligations by misleading prospective employees **(1)** "actively"; *or* **(2)** by "tacit inference"; *or* **(3)** by omission, where it "failed to clearly announce its intent to establish a new set of conditions." See *Spruce Up*, 209 NLRB at 195.

Here, by every objective measure, First Student actively *and* by tacit inference *and* by omission misled the unit employees and their union, from July 2011 until May 17, 2012. First Student said what it needed to say to relieve the employees' anxiety and to pretend to meet the School Board's "family"/"no harm" requirements. The day after First Student got the $9.5 million contract, however, it reneged on its promises. On that day First Student revealed its up-to-then secret plan to diminish wages and unilaterally impose other drastic changes. If these circumstances do not constitute a "perfectly clear successor" violation, it is difficult to imagine any employer in the future being held accountable for misleading employees.

B. First Student "interviewed" for the bus contract in July 2011. First Student representative Kinsley made promises to School District officials and USW representative

DeVore. Kinsley, as the ALJ found at 8-9, assured that First Student:

> "would hire the bargaining unit employees if they met" First Student's "hiring criteria," *i.e.*, "an application, an interview, a background check, a drug screen, and some other tests";
>
> "would maintain the current wages and planned to raise wages in the future"; and
>
> had the "intention to hire a majority" of the unit employees if they met First Student's hiring criteria; "would recognize the Union if it hired 51 percent or more"; and that "at other [public school] locations" First Student "hired 80 to 90 percent of the existing unit."

Kinsley's assurances communicated, in context and by every objective measure, that First Student promised stability, continuity, and union representation. Indeed, the "hiring criteria" listed by First Student—virtually identical to the criteria used by the School District, and in part required by the Department of Transportation—were criteria which *every unit employee already met*. Unit bus driver Bryant—who had personal knowledge of both employers' criteria, and who satisfied both—testified without contradiction that First Student's listing communicated that all unit employees would "transition" to First Student because First Student's hiring criteria were a "formality" and "nothing new." Similarly, union representation was "never an issue" because First Student always tied the 51 percent rule to the company's 80-90 percent experience, to *assure* employees of stability, continuity, and union representation. (See T.51, 152-153).

First Student's assurances are shown, too, in the School District's summary charts, admitted as GCX 3 and CPX 2. The ALJ found the charts to be of "minimal value" as "not complete statements" of what Kinsley said at the July 2011 "interview," covered in testimony. (ALJ at 9). Nevertheless, the charts show what Kinsley objectively and effectively communicated: <u>in GCX 3:</u> that First Student "will recognize [the] union" and "will maintain current wages," that unit members "would retain their seniority" and have "comparable" benefits, and that "all qualified current staff will be hired"; <u>and in CPX 2:</u> that "all qualified current staff will be hired," that "the union will be recognized," and that First Student "will

maintain current wages" and "comparable" benefits. Whether incomplete or not, these *contemporaneous* charts—prepared and relied on by the "neutral" School District (ALJ at 13 and n.5; T.356-358, 363, 369-373) and relied on by employees and the union (T.34, 208-209)—prove objectively the tone, tenor, and content of First Student's promises. Whatever words Kinsley reconstructed at the hearing two years after-the-fact, when he was vying for the bus contract Kinsley communicated *assurances* of stability and continuity and union representation.[2]

The District charts were contemporaneous, widely distributed, and if "not complete," were not so incomplete that they prompted any "correction" from First Student. In fact, First Student did not "correct" the charts because they showed First Student's adherence to the District requirements: a contractor who would "transition" the District employees to the private sector without "harm," and who would fairly treat the employees as did the District because, as Peatross explained: "these were our employees and they're part of our family." (T.369).

C. First Student repeated its assurances at its March 2, 2012 workplace meeting with the unit employees. As the ALJ found (at 10-12), there Kinsley and First Student general manager and "primary spokesman" Meek assured:

> that the unit employees "would be subject to a preemployment drug screen" and "the necessary background checks" and First Student "would offer employment to existing employees who met [these] criteria";

[2] GCX 3 and CPX 2 are *the only contemporaneous documents* reflecting First Student's assurances, admitted under Fed.R.Evid. 803(6) and (8) and 807 and as 801(d)(2) admissions. The ALJ's conclusions come from July 2013 testimony recalling events that occurred mostly between July 2011 and May 2012. The testimony, however, does not reproduce exact words. Accordingly, First Student's word-parsing is not grounded on actual words, but on First Student's partisan witnesses' reconstruction, recollection, and paraphrasing. Moreover, any chart "incompleteness" is not material. For example, Meek and Kinsley testified they told employees about the 51 percent rule *and*—to "relieve" employee "anxiety"—*assured* "more than once" that First Student was "union friendly" and "typically" hired "over 80, 85, 90 percent." (T.420, 423, 427, 433, 436, 452, 474-475, 484). Thus, as Bryant testified, First Student led the employees to believe that union continuity was "never an issue."

> that "the employees would bring their [union] representation with them and a new contract would be negotiated" if First Student "hired 51 percent of the existing work force," and that First Student "typically hired 80 to 90 percent of the existing work force"; and
>
> that "paid time off, vacation pay and sick pay" and other working conditions would be "subject to negotiations" and First Student "would bargain in good faith regarding new terms and conditions of employment."

Again, First Student communicated *not* "qualifiers," but *assurances* of stability, continuity, and union representation. Objectively, First Student communicated: **(1)** that all employees who met its "criteria"—a mere "formality"—would be hired; **(2)** that the union would be recognized if First Student hired 51 percent, also a formality as First Student "typically" hired 80 or 90 percent; and **(3)** that any changes in working conditions would be set in union negotiations. Indeed, First Student made these statements for the precise purpose of assuring employees that there would be continuity, stability, and collective bargaining. Meek *admitted* that he "more than once" made these assurances—listing the virtually-identical hiring criteria and coupling the 51-percent rule with the 80-90 percent expectation—to "relieve" the employees' "anxiety." (T.427, 433, 435-436).

D. First Student repeated its assurances at the May 16, 2012 School Board meeting, attended by union officials, unit employees, and the public. First Student representative Kinsley again assured (as the ALJ found at 12-13) that:

> First Student "would offer all of the employees a position as long as they completed the process involving the background checks, the physical examination, and drug screens," a process "much like" that of the District;
>
> First Student "would hire current district employees at the same rate of pay" and the "employees would maintain their current wages," and First Student "intended to maintain the wages for the current work force";
>
> First Student "would recognize the Union" and "would recognize the Union upon hiring 51 percent of the employees"; and
>
> First Student "did not say what terms and conditions [if any] would change" when the District employees "became" First Student employees because "that was not a question [Kinsley] was asked."

Immediately after the School Board awarded the $9.5 million contract to First Student, as the ALJ found at 14, Kinsley again assured USW and unit employees that First Student's "goal was to hire as many employees as it could," that "wages would be maintained," and that the unit employees "shouldn't have anything to worry about in coming to work for" First Student. The next day, however, company officials met with the unit employees in the workplace, welcomed them "to First Student," and—for the first time—announced drastic unilateral changes in working conditions, including wage reductions.

E. What really happened is that First Student actively, tacitly, and by omission misled employees into believing there would be continuity and stability, and that any changes were "subject to negotiations" with the union. First Student made these promises over 10 months, from July 2011 to May 2012. What really happened is that First Student incurred "perfectly clear successor" obligations, got the $9.5 million contract, and then told the misled employees, like the Saturday Night Live character: "never mind." This is wrong as a matter of law. It offends *Burns* and *Spruce Up* and their progeny which, reduced to their essence, hold that once a prospective employer expresses its plan to retain the majority of its predecessor's employees, the employer becomes a "perfectly clear successor" and terms of employment are then—in First Student's own words—"subject to negotiations."

II. FIRST STUDENT QUIBBLES ABOUT SELECTED "TREES" AND IGNORES THE "FOREST"

A. First Student quibbles that its repeated assurances can have no legal significance because they were "intended" to assure the School District, not the unit employees. This is not so factually, and it is without legal merit.

First, First Student made the assurances *directly to employees* at the March 2012 meeting. It did so, Meek *admitted,* to relieve *the employees'* "anxiety." **Second**, First Student

also made the assurances at the July 2011 "interview" in which USW representative DeVore participated *and* at the May 16, 2012 School Board meeting attended by DeVore, unit employees, and the public. First Student did not say its public assurances were for School District "ears only," or warn that *only* the School District could believe the assurances. First Student cannot now unring this bell. **Third**, First Student, at any time before the May 2012 vote, could have said clearly that it intended unilateral changes. But First Student said no such thing, "clearly" or otherwise. Rather, First Student assured the employees that any changes were "subject to negotiations." First Student first revealed its unilateral changes the day *after* it got the desired $9.5 million contract. What went on in First Student's secret heart is subjective; what *governs* is objective: what First Student said and did not say. What First Student said communicated promises of stability, continuity, and union representation. As First Student did not warn it planned unilateral changes, what First Student secretly "intended" is immaterial. **Fourth**, First Student got the bus contract by intentionally relieving the "anxiety" of *both* the District and the employees, assuring them of continuity, stability, and union representation. Indeed, like Captain Renault in *Casablanca*, it is only now—when called to account at the Board—that First Student professes to be "shocked, shocked" that the School District and its employee "family" *believed* First Student's repeated "anxiety"-relieving assurances.

B. First Student quibbles that it could not have "perfectly clear successor" obligations because its assurances came before what First Student posits as "magic" dates: before it signed the bus contract; before it provided applications; before it hired a majority. If this were so, there would be no "perfectly clear successor" doctrine. As First Student would have it, an employer could falsely promise unit employees anything and everything, and then belatedly weasel out of its obligations during one of the supposed "magic" window periods by

saying "never mind." The Board, however, as First Student admits, finds that the bargaining obligation "attaches" when the prospective employer "misleads the employees or their union that there will be no changes *or* that fails to put them on notice that changes are forthcoming." (FS brief at 36, emphasis added). Here, First Student's obligation "attached" when it misled employees with its assurances—in July 2011, in March 2012, and on May 16, 2012.

First Student is like the child who seeks to evade his promises because he made them with fingers crossed behind his back. If this works for First Student, it is difficult to think of any situation in which an employer could not evade its obligations by "correcting" its disingenuous promises immediately *after* the employer has reaped the benefits of making the broken promises. First Student incurred "perfectly clear successor" obligations, did so to relieve employee "anxiety" and secure the $9.5 million bus contract, and then breached its obligations.

C. First Student intentionally created the expectation of continuity by repeatedly assuring that it would hire the unit employees based on the same criteria used by the School District, that it would maintain their wages, and that any changes were "subject to negotiations." As the Board recognizes, "the applicability of the 'perfectly clear' successor doctrine largely 'rests in the hands of the successor.'" *Road & Rail Servs., Inc.*, 348 NLRB 1160, 1161, n.9 (2006). First Student repeatedly assured employees of continuity and stability and, as in *Road & Rail*, "gave no indication that it intended to invoke a right to unilaterally establish initial terms and conditions of employment"; rather, as in *Road & Rail*, First Student "made clear that it intended to negotiate any such changes with the Union." At 1161. The ALJ erred.

III. FIRST STUDENT ILLEGALLY CONDITIONED RECOGNITION AND BARGAINING ON WITHDRAWAL OF A UNION ULP CHARGE, AND GOT AWAY WITH IT

First Student staff labor lawyer Walther twice—on October 1 and 3, 2012—conditioned a "recognition letter" and bargaining on withdrawal of USW's pending ULP charge. Walther

wrote that if USW was "not willing" to "drop" the ULP charge, First Student would not begin negotiations on October 15, but would delay "until the Board concludes its investigation." (ALJ at 19-20). In short, Walther demanded that USW waive one right—the ULP charge—to secure other rights—recognition and timely bargaining.

USW representative DeVore protested the illegal condition. Walther rescinded the illegal condition, apologized for "confusion," and backed down on October 5. (ALJ at 20). At the hearing, however, Walther was unapologetic and not confused: he testified he did not "insist to impasse" that USW withdraw the ULP charge and that his condition was "not a mistake." (T.568). First Student, like the ALJ, excuses Walther's conduct with facile lack of concern, essentially concluding "no harm, no foul." This excuse, however, nullifies the Section 7 right of unfettered access to the Board and enables unscrupulous employers to coerce and bully employees and unions with impunity.

First Student, and the ALJ decision, promote horrible policy. First Student's coercive condition came to the Board's attention only because DeVore was knowledgeable, resolute, and refused to be bullied into trading one NLRA right for others. If the "no harm, no foul" policy prevails, however, others less knowledgeable than DeVore will be coerced by employers into trading one right for another, a "devil's bargain." If the Board does not protect employees from all coercion, even if ineffective, coercion will multiply. Indeed, effective coercion will be invisible to the Board, because the bullied victims will be silent, having been coerced into trading away their rights to Board access. If the Board permits First Student to evade all consequences, the Board will encourage other employers to try to coerce illegal trade-offs knowing that if they encounter protest they can, like Walther, escape with a "never mind," professing temporary "confusion" (if not irresistible impulse).

Here, as Walther testified, his effort to coerce DeVore was "not a mistake." If First Student is not held to account, other employers will follow First Student's template, understanding **(1)** that coercion may be effective *and* **(2)** that failed coercion has no price. A rational and unscrupulous employer will try coercion, and either succeed or fail without penalty, either way diluting fundamental Section 7 rights. If there is *any* NLRA right that the Board should zealously enforce, it is the right to file ULP charges unfettered by employer interference, bullying, and coercion. When First Student sought to coerce USW into waiving the protected right to press ULP charges as a trade-off for recognition and bargaining rights, First Student violated 8(a)(1) and (5). The ALJ erred.

CONCLUSION

For these reasons, and the reasons detailed in our February 10, 2014 exceptions and brief, we ask that the Board modify ALJ Carissimi's decision, and hold that First Student violated Sections 8(a)(1) and (5) by **(1)** disregarding its "perfectly clear successor" bargaining obligations and **(2)** conditioning recognition and bargaining on withdrawal of a ULP charge. We ask the Board to direct appropriate remedies, including those necessary to "make whole" unit employees for their losses incurred due to First Student's illegal conduct.

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March 10, 2014

CERTIFICATE OF SERVICE

This is to certify that a copy of the "Reply to Respondent First Student's Answering Brief to Charging Unions' Exceptions" was served via electronic mail this 10th day of March, 2014 upon:

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