

Nos. 07-1316, 07-1383

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

FIVE STAR TRANSPORTATION, INC.,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

and

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1459,

Intervenor.

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Five Star Transportation, Inc. (“Five Star”), to review an Order of the National Labor Relations Board (“the Board”) issued against Five Star, and on the cross-application of the Board for

enforcement of its Order. The United Food and Commercial Workers Union, Local 1459 (“the Union”), has intervened in support of the Board.¹

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act (“the Act”), 29 U.S.C. §§ 151, 160(a). The Board’s Decision and Order (A 12-37)² issued on January 22, 2007, and is reported at 349 NLRB No. 8. The Board’s Order is final with respect to all parties under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). The Court has jurisdiction over this proceeding pursuant to Section 10(e) of the Act, as the unfair labor practices occurred within this judicial circuit.

Five Star filed its petition for review on February 20, 2007. The Board cross-applied for enforcement of its Order on March 3, 2007. The petition and the cross-application were timely because the Act places no time limit on filing actions to review or enforce Board orders.

STATEMENT OF THE CASE

Acting on charges filed by the Union, the Board’s General Counsel issued a complaint alleging, of relevance here, that Five Star violated Section 8(a)(1) of the

¹ The Union filed a petition for review seeking to challenge the Board’s dismissal of several unfair-labor-practice charges (Case No. 07-1383). The Union later filed a motion to voluntarily dismiss its petition, which this Court granted on May 22, 2007.

² Record references are to the Joint Appendix (“A”). When a reference contains a semicolon, references preceding the semicolon are to findings of the Board, and references following the semicolon are to the supporting evidence.

Act, 29 U.S.C. § 158(a)(1), by refusing to hire 11 bus drivers because they had engaged in concerted, protected activity. (A 4-8.) After a 3-day hearing, a Board administrative law judge issued a recommended decision and order finding that Five Star violated the Act by refusing to hire 9 of the 11 drivers and recommending dismissal of the charges with respect to 2 drivers. (A 25-37.) The judge further found that Five Star independently violated Section 8(a)(1) by telling several drivers that they would not be hired because of their protected activity. (A 32.)

The Board, agreeing with the judge in part, found that Five Star violated the Act by refusing to hire six of the driver-applicants. (A 12, 17-18.) The Board further found that Five Star independently violated the Act when it told three of the six driver-applicants that they would not be hired on account of their protected activity. (A 12.) Concluding that the remaining five drivers did not engage in protected activity, the Board dismissed the charges as to them. (A 14-17.) Five Star's petition for review, and the Board's cross-application for enforcement, followed.

STATEMENT OF THE ISSUES

1. Given that Five Star refused to hire six applicants because they wrote letters to the School District, does substantial evidence support the Board's finding that the refusal to hire violated Section 8(a)(1) of the Act because the letters constituted concerted, protected activity?

2. Is the Board entitled to summary enforcement of its finding, uncontested on appeal, that Five Star violated Section 8(a)(1) of the Act by telling three applicants that they would not be hired because they had written letters to the Belchertown School District?

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Belchertown School District Opens Bidding on its 2003-2006 Bus-Services Contract, and Five Star Submits the Lowest Bid

The Belchertown, Massachusetts, School District contracts with private-sector companies to provide bus transportation for its students. The bus-services contract comes up for bidding every 3 years. In 2000, the School District awarded the 2000-2003 contract to a company called First Student, Inc. After securing that contract, First Student voluntarily recognized the United Food and Commercial Workers Union, Local 1459 ("the Union") as the representative of its bus drivers and executed a series of collective-bargaining agreements with the Union that governed wages and work rules and provided a range of fringe benefits for the drivers. (A 12, 26; A 74, 387-412, 413-38.)

The 2003-2006 bus-services contract came up for bidding at the beginning of 2003. Early in January 2003, the School District held a preliminary meeting with the companies seeking to bid on the contract. Among the prospective bidders

was Teresa Lecrenski, the president of Five Star, a non-union company operating in the Springfield, Massachusetts area. The Union's vice-president, Daniel Clifford, also attended the meeting. During the meeting, the School District distributed bid specifications to all prospective bidders. (A 12, 26; A 69-70.) Of relevance here, the bid specifications required that if a new vendor won the contract, the new vendor would grant to the drivers working for the incumbent vendor "first consideration for employment." (A 12, 27; A 288.)

After the meeting, Clifford wrote to all of the prospective bidders, including Five Star, stating that the Union represents the Belchertown school-bus drivers and that it wished to continue representing the drivers, regardless of which company won the contract. (A 71.)

On January 16, 2003, the School District held a "bid opening" meeting at which it received bids from companies seeking the contract. Both Lecrenski and Clifford attended the meeting. Five Star turned in the lowest bid, which was significantly lower than the cost of the then-current contract with First Student. (A 12, 26-27; A 39, 75-76.)

B. The Union and the Drivers React to Five Star's Bid with a Concerted Letter-Writing Campaign

In light of Five Star's bid, Clifford wrote to the School District on January 21, expressing concern that Five Star's bid was so low that it was questionable whether it would be able to maintain the drivers' then-current wage and benefit

levels and provide safe and effective service should it win the contract. Clifford's letter requested that, "[i]n order to create a level playing field," all prospective bidders should be required "to factor into their bid model the wages and benefits of the current labor agreement." (A 12-13, 26; A 75-76, 439.) With his letter, Clifford enclosed a draft resolution for the School Board that would require any successor contractor to offer employment to the existing drivers "at a level of wages and benefits no less than provided by the predecessor." (A 12-13, 26; A 440.)

Also on January 21, Clifford faxed a letter to Lecrenski, requesting her guarantee that Five Star would voluntarily recognize the Union as the drivers' bargaining representative, continue the Union's members' employment with full seniority, and meet with the Union to negotiate a successor collective-bargaining agreement. (A 13, 26; A 41, 338.) In closing, Clifford's letter stated: "If we do not hear back from you promptly on these issues, we will infer that you do not intend to cooperate in these reasonable demands on behalf of our members and if you are awarded the contract, we will exercise all of our legal options as aggressively as a labor union could be expected to protect the hard-won benefits of its members." (A 13, 26; A 338.) Lecrenski did not respond to the letter. (A 13, 27; A 45.)

On January 31, 2003, Clifford held a meeting with a group of drivers to discuss the Union's and drivers' concerns about the implications of Five Star's bid for the drivers' wages, benefits, and working conditions. (A 77-78, 93-94, 108.) Two former Five Star employees spoke at the meeting about their experiences working for Five Star. One stated that she had been fired upon returning to work after recovering from an injury. The other recounted her experience with Five Star's failure to remedy breakdowns and other mechanical problems in a timely manner. (A 13, 26; A 108-09.) Clifford distributed newspaper articles documenting a number of safety problems at Five Star, including an incident in which multiple bus breakdowns left students stranded in winter, Five Star's hiring of a convicted sex offender who did not hold a valid license to drive a school bus, and another incident in which a Five Star driver drove a school bus after consuming alcohol. (A 13; A 80, 92, 94-95, 443-54.)

Clifford encouraged the drivers to write to the School District to express their concerns about Five Star's bid and furnished the drivers with the names and addresses of the relevant officials. (A 13, 27; A 85-86, 91, 167-68.) Clifford also supplied the drivers with a sample letter. The sample letter noted that Five Star was a non-union company and questioned whether Five Star would, if it secured the contract, continue to employ the drivers at their current wage and benefit levels. The sample letter included a request that the School District re-bid the

contract with the requirement that all bidders commit to honoring the terms and conditions of employment provided in the then-current collective-bargaining agreement. (A 12, 27; A 77-78, 96, 441.)

Fifteen drivers wrote to the School District between February 3 and February 8, 2003. (A 13, 27; A 148-70.) The letters varied somewhat in content and in tone, but with two exceptions, they articulated the drivers' concerns as to whether, in the event that Five Star won the contract, it would continue to employ the drivers, maintain current wage and benefit levels, and provide a safe working environment for the drivers as well as their charges. (A 13, 27; A 148-62; 165-70.)³ Several of the letters included a request, modeled on Clifford's sample letter, that the School District re-open bidding on the contract, with each bidder being required to honor the drivers' current wage and benefits. (A 28; A 96, 158, 160, 168.) A handful of the letters went beyond raising these employment-related concerns by detailing the incidents reported in the newspaper articles that Clifford had distributed during the January meeting and by criticizing the operation and

³ The two exceptions were letters that raised concerns about the safety of the town's schoolchildren but did not raise any of the drivers' employment-related concerns. (A 157, 163-64.) For that reason, the Board dismissed the unfair-labor-practice charges relating to those letters (see pp. 11-12, below), and the propriety of those dismissals is not at issue in this appeal.

management of Five Star in provocative terms. (A 3, 27; A 148-49, 150-51, 152-54.)⁴

In early February, in the midst of the drivers' letter-writing campaign, Clifford followed up his earlier letter to Lecrenski by faxing her a union-recognition agreement. Again, Lecrenski did not respond. (A 12, 27; A 42, 45.)

After the drivers sent their letters, Clifford, joined by seven or eight drivers, met with the Superintendent of Schools, Richard Pazasis. Clifford and the drivers aired their concerns about Five Star. Pazasis assured them that the School District would fully investigate their concerns before making any final decision on the contract. Superintendent Pazasis then alerted Lecrenski that he had received e-mails and letters from current drivers about Five Star's safety record, maintenance history, and treatment of employees. Lecrenski requested copies of the correspondence. (A 13, 28-29; A 45-47, 82.)

C. The School District Awards the Contract to Five Star, and Five Star Refuses to Hire any Drivers Who Wrote to the School District

On February 24, 2003, the School District held a meeting to announce the winner of the new contract. Clifford and a number of the drivers attended and voiced their concerns about Five Star. Superintendent Pazasis stated that he had

⁴ The Board dismissed the unfair-labor-practice charges relating to driver-applicants who had sent such letters (see pp. 11-12, below), and the propriety of those dismissals is also not at issue in this appeal.

discussed the concerns raised by the drivers with other school districts, but that he was satisfied with what he learned and would award the contract to Five Star. On February 27, the School District and Five Star formalized their contract, and at the same time Superintendent Pazasis provided Lecrenski with copies of the letters written by drivers concerning Five Star. After reading the letters, Lecrenski decided that she would not employ any of the letters' authors. (A 13, 28; A 46-50, 147.)

After the award of the contract, 17 of the First Student drivers applied for employment with Five Star. Of those, 11 had written letters to the School District expressing concerns about Five Star. (A 13, 28; A 57.) Five Star rejected all of the applicants who had written to the School District but offered jobs to all applicants who did not. Lecrenski admitted that the sole reason that she rejected the 11 applicants was that each had written a letter to the School District. (A 13, 28-29; A 58-59.)

In mid-May 2003, applicants Rose, Nadle, and Taylor called Lecrenski to inquire about their applications. In each case, Lecresnki stated that Five Star was not going to consider the driver for employment because of the driver's letter to the School District. (A 12, 32; A 61-62, 98, 100-01, 111, 352-53.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Battista and Members Schaumber and Liebman), affirming the administrative law judge in part, found that Five Star violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by refusing to hire six applicants—Steve Kahn, Suzanne Leclair, Terri Nadle, Caron Rose, Pauline Taylor, and Deborah Wenzel—solely because they had written letters to the School District expressing their employment-related concerns about Five Star's bid to take over the School District's bus-services contract. In reaching that conclusion, the Board found that the letters constituted “concerted activities for the purpose of . . . mutual aid or protection” within the meaning of Section 7 of the Act (29 U.S.C. § 157) and that nothing in the letters amounted to such disparagement of Five Star as would cause the drivers to forfeit the Act's protections. (A 13, 177-78.) The Board further concluded that Five Star independently violated Section 8(a)(1) by telling applicants Rose, Nadle, and Taylor that it would not hire them because of their letters to the School District. (A 12.)

The Board (Chairman Battista and Member Schaumber, with Member Liebman dissenting) concluded that the letters written by the other five applicants were unprotected. The Board, first of all, agreed with the administrative law judge that two of the letters—those by Candy Ocasio and Charles Kupras—did not

involve protected activity because they did not raise any concerns about the drivers' terms and conditions of employment, but only about the safety of the district's schoolchildren. (A 14-15.) In addition, the Board, reversing the judge, concluded that three letters—written by Donald Caouette, Andrea MacDonald, and Patricia Grasso—were unprotected because those letters, while raising the drivers' employment-related concerns, also contained disparaging statements that had no connection to the drivers' legitimate employment-related concerns. Accordingly, the Board dismissed the charges as to those five drivers. (A 15-17.) Member Liebman, dissenting, would have found these five letters protected. (A 18-24.)

The Board's Order directs Five Star to cease and desist from engaging in the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights protected by Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Board's Order requires that Five Star (1) offer Steve Kahn, Suzanne Leclair, Terri Nadle, Caron Rose, Pauline Taylor, and Deborah Wenzel reinstatement to the positions they would have held but for Five Star's unlawful refusal to hire, (2) make Kahn, Leclair, Nadle, Rose, Taylor, and Wenzel whole for any loss of earnings and other benefits resulting from the unlawful refusal to hire, and (3) post a remedial notice. (A 18, 36-37.)

SUMMARY OF ARGUMENT

It is undisputed that Five Star refused to hire Kahn, LeClair, Nadle, Rose, Taylor, and Wenzel solely because they had written to the School District. Thus, the only contested issue here is whether substantial evidence supports the Board's findings (1) that the six applicants' letters were concerted, protected activity, and (2) that nothing in the applicants' letters caused them to lose the Act's protections.

1. The record amply supports the Board's finding that the drivers' letters constituted "concerted activity." It is undisputed that the letters grew out of a meeting between the drivers and union officials in which the drivers discussed their concerns about Five Star's bid and the Union encouraged the drivers to write to the School District to dissuade it from awarding the contract and require the successful bidder to provide the level of wages and benefits provided in the labor contract with the incumbent contractor. Moreover, each letter on its face raised group concerns.

Five Star's contention that the letters were nothing more than individual complaints of employees is a non-starter in light of the undisputed record evidence of the concerted impetus for the letter-writing campaign as well as the common, group concerns articulated on the face of each letter. Equally devoid of merit is Five Star's contention that it had no notice of the concerted nature of the drivers' letter-writing campaign. Notice was supplied by the letters themselves, which

facially evidenced their concerted nature by raising group complaints. In any event, the context in which the letters were sent left no room for doubt as to their concerted nature. The letters were all sent between February 3 and 8, 2003, within 3 weeks of the Union's letter to Lecreski promising that, if she did not signal a willingness to co-operate with the Union, it would aggressively exercise every legal option to protect its members' benefits.

The record likewise supports the finding that the letters were "protected" in that they were written for the purpose of "mutual aid or protection." In writing their letters, the drivers sought, by pressuring the School District, to preserve their employment and their then-current wages, benefits, and working conditions. Five Star is wrong in asserting that the absence of a formal employer-employee relationship at the time the drivers sent their letters precludes a finding of protected activity. That assertion founders on the plain language of the statute, which expressly provides that the term "employee . . . shall not be limited to the employees of a particular employer," 29 U.S.C. § 152(3), as well as on the case law applying that definition.

2. Having established that the six letters facially qualified for the Act's protection, the Board further reasonably found that nothing in the letters caused them to forfeit the Act's protections, inasmuch as the letters primarily concerned working conditions and did not needlessly tarnish Five Star's image.

The letters, first of all, focused primarily on group concerns over the preservation of the drivers' employment and their terms and conditions of employment. Five Star's contention that the letters were primarily about children's safety, rather than their own employment-related concerns, is simply at odds with the record. To the extent that the letters referred to the safety of the drivers' charges, those references were intertwined with the drivers' discussion of safety issues relevant to their employment. Moreover, even if some of the discriminatees' letters were understood as including issues of purely public concern along with their own employment-related concerns, this would in no way render the letters unprotected, as employees may raise issues that are of interest to third parties in addition to complaining about their own working conditions without losing the Act's protection.

The record also fully supports the Board's finding (A 17) that "[t]o the extent that any of the letters . . . contained statements criticizing [Five Star], such statements were minor and occurred in the context of the drivers expressing their common employment concerns." The main thrust of the letters was to express the drivers' concerns about their employment. The letters at issue here included only the most measured of criticism, and even that was related to the drivers' legitimate concerns regarding their own working conditions.

There is no merit to Five Star's sweeping assertion that any attempt by employees to interfere with Five Star's contractual or business relations, or otherwise to hurt it financially, is perforce unprotected. Many protected activities are intended to, and often do in fact, cause persons not to do business with the targeted employer but are not for that reason unprotected.

Five Star also misses the mark in attempting to leverage the Board's finding (A 16) that *some* of the drivers' letters disparaged Five Star "in ways that go beyond complaints about terms and conditions of employment" into an argument for finding that *all* of the letters were unprotected. Five Star simply blurs the critical distinctions between the two groups of letters. In contrast to the letters written by the six discriminatees, which contained measured criticisms that were bound up with the drivers' employment-related concerns, the three letters that the Board found *unprotected* detailed a litany of years-old derelictions by Five Star that "had no relation to the drivers' concern that the [Company] would not maintain the[ir] terms and conditions of employment" (A 16) and that were laced with inflammatory characterizations and exaggerated embellishments on the public record.

There is no merit to Five Star's contention that the absence of a formal employer-employee relationship between it and the drivers at the time that the drivers sent their letters precludes the finding of a labor dispute here. Just as it

defines the term “employee” broadly, so, too, does the Act define “labor dispute” broadly to include “any controversy concerning terms, tenure or conditions of employment . . . regardless of whether the disputants stand in the proximate relation of employer and employee.” 29 U.S.C. § 152(9). This statutory language is sufficiently broad to include circumstances, such as those here, where employees exert pressure on a business to preserve the economic foundation of their livelihoods and leaves no room for Five Star’s contention that no labor dispute existed here.

ARGUMENT

I. GIVEN THAT FIVE STAR REFUSED TO HIRE SIX APPLICANTS BECAUSE THEY WROTE LETTERS TO THE SCHOOL DISTRICT, SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE REFUSAL TO HIRE VIOLATED SECTION 8(a)(1) OF THE ACT BECAUSE THE LETTERS CONSTITUTED CONCERTED, PROTECTED ACTIVITY

A. Introduction and Standard of Review

Section 7 of the Act (29 U.S.C. § 157) guarantees employees the right to engage in “concerted activities” not only for the purposes of “self-organization” and “collective bargaining,” but also “for the purpose of . . . other mutual aid or protection.” To make that guarantee effective, Congress enacted Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7.” Accordingly, it is well settled that Section

8(a)(1) prohibits an employer from refusing to hire applicants for employment because of their participation in concerted, protected activities, just as it prohibits an employer from discharging employees for engaging in such activities. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941).

There is no question in this case but that Five Star refused to hire Kahn, LeClair, Nadle, Rose, Taylor, and Wenzel solely because they had written to the School District. Lecrenski admitted as much in her testimony. (A 57-58.) Thus, there is no dispute in this case as to motive or causation. The only contested issue here is whether substantial evidence supports the Board's findings (1) that the six applicants' letters were concerted, protected activity, and (2) that nothing in the applicants' letters caused them to lose the Act's protections.

The Board's factual findings are "conclusive" under Section 10(e) of the Act if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e). Under this standard, a reviewing court "may [not] displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

As to questions of law, under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), where the plain terms of the statute do not specifically address the precise issue, the courts must defer to the Board's

reasonable interpretation of the Act, *id.* at 843, and “must respect the judgment of the agency empowered to apply the law ‘to varying fact patterns,’ even if the issue ‘with nearly equal reason [might] be resolved one way rather than another.’” *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996) (citation omitted).

B. The Board Reasonably Found that the Six Drivers Engaged in Concerted, Protected Activity by Writing to the School District

Given the undisputed fact that Five Star refused to hire the six applicants because of their letters to the School District, this case turns on whether or not the letters were protected by the Act. As we show in what follows, the Board reasonably found that the letters were protected, which required the Board to find (1) that, by writing their letters to the School District, the six applicants engaged in concerted, protected activities; and (2) that nothing in the letters caused the applicants to lose the protection of the Act.

1. By writing to the School District, the discriminatees engaged in concerted, protected Activity

As the text of Section 7, 29 U.S.C. § 157, suggests, to fall within the Act’s protections, an employee must act in a “concerted” manner and must also act for a protected purpose, *i.e.*, “for the purpose of collective bargaining” or “for other mutual aid or protection.” Both of these requirements are easily satisfied here.

(a) Under the Board’s court-approved test, an employee engages in “concerted activity” within the contemplation of the Act when he or she “acts with

. . . other employees” or when the employee, even on an individual basis, raises “truly group complaints.” *Meyers Industries*, 281 NLRB 882, 885 (1986), *enforced sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). The six applicants here acted concertedly in both respects.

It is undisputed that the drivers met in late January 2003 and discussed their group concerns about Five Star’s bid, that the Union urged the drivers to write to the School District and provided the relevant addresses as well as a sample letter, and that the drivers’ letters resulted directly from that meeting. *See* pp. 7-8 above. The Board thus reasonably found (A 14) that the drivers in fact acted with other employees when participating in the letter-writing campaign.

Moreover, even reviewing each letter individually, it is plain that each raised “truly group complaints,” 281 NLRB at 885, about Five Star’s bid—that is, the drivers’ potential loss of employment or their employment under less favorable terms and conditions than those provided by their labor contract. *See Mount Desert Island Hosp.*, 695 F.2d at 639 (finding individual employee’s letter concerted because the employee “had discussed working conditions extensively with other employees” before writing and because “[i]n the letter itself, he includes references to the plight of fellow workers”). The excerpts that follow bear this out.

Steve Kahn’s February 6 e-mail to several School District officials stated, in relevant part:

The bus drivers are stakeholders in this decision.

The first concern is that Five Star undercut the other bidders by not agreeing to adhere to our current labor agreement. This created a less than equal playing field among bidders. [A 155-56.]

Suzanne LeClair's February 5 letter to several School District officials stated, in relevant part:

We have finally received a rate of pay and benefits that are comparable to most other towns and communities. We are not looking for any more, but to maintain what we have and with this new company we will lose everything.

Please reconsider the awarding of the busing contract or put it back to re-bid to include such things as the wages and benefits that we currently receive, and a full-time, on-si[te] mechanic. [A 158.]

Terri Nadle's February 6 letter to School District officials stated, in relevant part:

I would hope that Five Star will keep the drivers that are very familiar with the roads and children. Will the parents have the same quality of service? Will the drivers still have the benefits, incentives, and wages? [A 161.]

Caron Rose wrote to several School District officials on February 6 stating that:

It is my hope that the school committee will take into account the concerns of the drivers. These concerns being:

1. Will we have safe and dependable equipment to drive?
2. When a driver needs assistance, immediately, will help be there quickly?
3. Will the drivers be treated fairly? (This includes pay and benefits.) [A 166.]

In her February 3 e-mail to a School District official, Pauline Taylor stated, in relevant part:

[S]ome compan[ies] will try and underbid our current employer and include in their bids current wages and benefits. I hear Five Star bid i[s] the low bidder this time. They bid less per day than First Student currently services the work. Also Five Star has not indicated whatsoever that they will honor our current wages and benefit package. They are also a non-union company.

It would be fair to see a re-bid with an even field created, where all bidders would go by our current labor agreement. This can be done just by making the attached resolution part of the contract bid specifications. [Taylor letter, A 67-68.⁵]

Deborah Wenzel wrote in her February 6 letter to several School District officials as follows:

Based on the bid amount, I do not see how Five Star could possibly plan to give the drivers a competitive wage and benefit package comparable to what they are currently receiving. . . .

If this new company does not hire the current drivers, where do you suppose the new drivers will come from? [A 169.]

Each of the letters thus clearly articulated the drivers' group concern that Five Star, a non-union firm, might not continue their employment or maintain their current terms and conditions of employment. Indeed, the fact that the letters specifically sought to protect the drivers' *collectively bargained* wages and benefits further underscores their concerted nature: "[W]hen an employee invokes

⁵ The resolution attached to Taylor's letter was the very one that union official Clifford had distributed to the drivers at the January 31 meeting. (A 26; A 440.)

a right grounded in the collective-bargaining agreement, he does not stand alone. Instead, he brings to bear . . . the power and resolve of all his fellow employees.” *NLRB v. City Disposal Systems Inc.*, 465 U.S. 822, 832 (1984). And, because safety issues such as the availability of mechanical support are an integral part of the drivers’ conditions of employment, the letters also raised group concerns by questioning whether the safety practices and maintenance capabilities associated with First Student would continue.⁶

Against this, Five Star urges (Br 19-24) that the drivers did not act in concert and that, even if they did, Five Star had no notice of the concerted nature of the letter-writing campaign. Neither argument withstands scrutiny.

Five Star’s contention that the letters were nothing more than individual complaints of employees, each “acting solely on his/her own behalf” (Br 20), is a non-starter in light of our showing of the concerted impetus for the letter-writing campaign as well as the common, group concerns articulated in the letters.⁷

Five Star’s contention (Br 23-24) that it had no notice of the concerted nature of the drivers’ letter-writing campaign is equally meritless. The record

⁶ We discuss the letters’ references to safety issues in more detail below at pp. 32-33.

⁷ Five Star’s suggestion (Br 20, 22, 24) that the letters must be “identical” in order to be deemed “concerted” need not detain the Court. Simply put, there is nothing in the Act’s text or legislative history, or in Board and court jurisprudence under the Act, supporting the notion that in order to engage in “concerted activities” employees must, as if marching in lock-step, intone the exact same words.

more than amply supports the Board's finding (A 29) that Lecrenski had notice of the concerted nature of the drivers' letter-writing campaign. As we have shown above, the letters facially evidenced their concerted nature by raising group complaints. In any event, the context in which the letters were sent left no room for doubt as to their concerted nature. The letters were all sent between February 3 and 8, 2003, within 3 weeks of the Union's letter to Lecreski promising that, if she did not signal that she was willing to "cooperate in [the Union's] reasonable demands on behalf of our members . . . we will exercise all of our legal options as aggressively as a labor union could be expected to protect the hard-won benefits of its members." (A 338.) Given the content and context of the letters, there can be no serious argument that Lecrenski had no notice of their concerted nature.

(b) The foregoing also establishes that the drivers wrote their letters for the purpose of "mutual aid or protection" and that the letters therefore qualify as protected under Section 7 of the Act.

It is settled that the right of employees to engage in concerted activities for "other mutual aid or protection" includes the right of employees to appeal to third parties for support in aid of a dispute with an employer. *NLRB v. Mount Desert Island Hospital*, 695 F.2d 634, 640 (1st Cir. 1982). As the Supreme Court made clear in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1967), "in choosing to protect concerted activities for the somewhat broader purpose of 'mutual aid or protection'

as well as for the narrower purposes of ‘self-organization’ and ‘collective bargaining,’” Congress demonstrated that it “knew well enough that labor’s cause often is advanced on fronts other than [those] within the immediate employment context.” Thus, the Court found “no warrant for [the] view that employees lose their protection . . . when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.” *Id.* This is precisely what the drivers sought to do here.

As is clear from the excerpts quoted above (pp. 21-23), each letter sought to preserve the drivers’ employment and to safeguard their terms and conditions of employment by applying pressure to the School District. After all, the School District had the power to make the award of the contract conditioned on the contractor’s maintaining the drivers’ jobs, wages, and benefits. The drivers’ activities thus lie at the very heart of “mutual aid or protection.” *See, e.g., Misericordia Hosp. Medical Center v. NLRB*, 623 F.2d 808, 813 (2d Cir. 1980) (holding that employees’ submission of critical report to accreditation committee was “‘for mutual aid and protection’” because it raised “issues directly related to employee working conditions” (citation omitted)).

There is no merit to Five Star’s assertion (Br 18, 19-20) that, because “[t]here was no employer/employee relationship” at the time that the drivers sent

their letters, there can be no finding of protected activity here. Five Star vainly endeavors to draw support for this view from the text of Section 7 and Section 8(a)(1). To be sure, each provision refers to the protections of “employees,” but the Act expressly provides that the term “employee . . . *shall not be limited to the employees of a particular employer*, unless the Act explicitly states otherwise.” 29 U.S.C. § 152(3) (emphasis added). And the Act nowhere suggests, much less “explicitly states,” that as a prerequisite for the protections afforded by Section 7 and Section 8(a)(1), an employer-employee relationship exist between employees who have banded together in a labor dispute, on the one hand, and the employer that is the object of the dispute, on the other.⁸

Board and court decisions applying the Act’s broad definition of “employee” make this point. It is clear, for example, that “area standards” picketing—in which employees of a unionized employer picket other, non-unionized employers who pay below prevailing area standards—“is a protected activity under the Act.” *Tradesmen Int’l, Inc. v. NLRB*, 275 F.3d 1137, 1142-43 (D.C. Cir. 2002). And it follows that an employer who was the object of area standards picketing may not refuse to hire an applicant on the ground that the applicant, while working

⁸ Indeed, as we discuss further below (p. 41), the Act also defines “labor dispute” broadly to include “any controversy concerning terms, tenure or conditions of employment, . . . *regardless of whether the disputants stand in the proximate relation of employer and employee.*” 29 U.S.C. § 152(9) (emphasis added).

elsewhere, engaged in area standards picketing against the employer. *See Willmar Elec. Service*, 303 NLRB 245, 245 (1991), *enforced* 968 F.2d 1327 (D.C. Cir. 1992).⁹ Indeed, this is just one example of a principle that has been settled for more than half a century: the Act forbids an employer from refusing to hire an applicant because the applicant had engaged in union or other protected activities while employed elsewhere. *See Phelps Dodge*, 313 U.S. at 187. *See also Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 143-44 (1st Cir. 1981) (employer violated the Act by refusing to hire applicant based on applicant’s union activism at previous employer); *NLRB v. Corning Glass Works*, 293 F.2d 784, 786-87 (1st Cir. 1961) (employer violated Section 8(a)(1) by refusing to hire applicant because of his participation in strike at his former place of employment).

It is thus of no moment that the drivers applied for employment after they had engaged in their protected activity. Applicants for employment are considered “employees” under the Act when they tender their applications; as such, they are protected from discrimination by reason of their participation in protected

⁹ Area standards activity is predicated on a theory that is strikingly similar to that underlying the discriminatees’ letters here—namely, that by applying pressure to a non-unionized employer, “employees may effectively protect their job security by seeking to raise non-union employment wages and benefits . . . thereby increasing non-union employers’ costs and succeeding, albeit indirectly, in ‘leveling the playing field.’” *Tradesmen*, 275 F.3d at 1143.

activities, regardless of when they engaged in such activities. *See Willmar Elec. Service, Inc. v. NLRB*, 968 F.2d 1327, 1329 (D.C. Cir. 1992).¹⁰

2. Nothing in the letters deprived the six drivers of the Act's protections

As we have seen, the Act's protections apply with full force when employees appeal to third parties in support of their aims. But the right of employees to appeal to third parties is not without limits. An employee may engage in what is otherwise concerted, protected activity in such an abusive manner that he or she loses the protection of Section 7. In the seminal case in this area, *NLRB v. Electrical Workers Local 1229 ("Jefferson Standard")*, 346 U.S. 464, 466-67, 476 (1953), the Court upheld a Board ruling denying reinstatement to broadcasting technicians who, during a dispute over their employer's discharge of several employees, distributed handbills to the public that made no mention of the labor dispute but instead simply disparaged the quality of their employer's programming. In affirming the Board's determination that the handbills were unprotected, the Court emphasized that the handbills made no reference to the union, the current labor controversy between the union and employer, or to

¹⁰ Although it is immaterial whether an immediate employer-employee relationship existed at the time of the conduct in question, we note that the First Student drivers had much more than a speculative interest in employment with Five Star, inasmuch as the School District's bid specifications, and the contract it was to sign with the successful bidder, required the successful bidder to give the drivers working for the previous contractor "first consideration" in hiring. (A 276, 288.)

ongoing collective-bargaining negotiations. Instead, the Court found, in agreement with the Board, that the handbill “attacked public policies of the Company” on matters “which had no discernible relation to [the labor] controversy.” *Id.* at 476-77.¹¹

Consistent with these principles, the Board, with court approval, has established a two-part test, under which a communication to a third party that criticizes an employer remains protected by the Act if it is (1) related to an ongoing labor dispute, and (2) “not so disloyal, reckless or maliciously untrue as to lose the Act’s protection.” *American Golf Corp.*, 330 NLRB 1238, 1240 (2000), *affirmed sub nom. Jensen v. NLRB*, 86 Fed Appx. 305 (9th Cir. 2004). *Accord Endicott Interconnect Technologies, Inc. v. NLRB*, 453 F.3d 532, 537 (D.C. Cir. 2006) (noting that “the Board’s formulation accurately reflects the holding in *Jefferson Standard*”). As this Court succinctly summarized the law, criticism of an employer in the course of an appeal for public support is protected so long as it “concern[s] primarily working conditions and . . . avoid[s] *needlessly* tarnishing

¹¹ The handbills in question attacked the broadcaster’s policies with regard to “finance and public relations,” complaining that the station only aired dated programs, failed to carry local programming such as sports broadcasts because the employer failed to invest in “proper equipment,” and suggesting that management “consider[s] Charlotte a second-class community and only entitled to the pictures now being presented to them.” *Id.* at 473.

the [employer's] image.” *NLRB v. Mount Desert Island Hospital*, 695 F.2d 634, 640 (1st Cir. 1982) (emphasis added).

While it is true that the Court’s opinion in *Jefferson Standard* drew on the common-law duty of loyalty owed by employees, it is also plain that not every action that harms an employer, and which could therefore be characterized as “disloyal” in a broad sense, is unprotected, else the Act’s protections would prove illusory. *See, e.g., NLRB v. Circle Bindery, Inc.*, 536 F.2d 447, 452 (1st Cir. 1976) (“[C]oncerted activity that is otherwise proper does not lose its protected status merely because it is prejudicial to the employer.”); *Mohave Electric Cooperative, Inc. v. NLRB*, 206 F.3d 1183, 1189 (D.C. Cir. 2000) (“[T]he fact that an employee’s actions may cause some harm to the employer does not alone render them disloyal.”). Rather, as this Court has held, the critical question is whether the conduct “appeared necessary to effectuate the employees’ lawful aims.” *Mount Desert Island Hosp.*, 695 F.2d at 640. *See also NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962) (distinguishing *Jefferson Standard* on the ground that the employees in that case were “denied the protection of § 7 . . . because they were there found to show a disloyalty to the workers’ employer *which this Court deemed unnecessary to carry on the workers’ legitimate concerted activities*” (emphasis added)).

In determining whether otherwise protected activity loses its protection, the inquiry is a fact-specific one focusing on whether the conduct is reasonable and proportional in light of the particulars of the labor dispute. And, on that score, it is settled that the “primary responsibility for drawing the line between protected and unprotected activity falls on the Board.” *NLRB v. Lummus Indus., Inc.*, 679 F.2d 229, 234 (11th Cir. 1982). *Accord NLRB v. Parr Lance Ambulance Service*, 723 F.2d 575, 577 (7th Cir. 1983) (“We will not reposition a line drawn by the Board between protected and unprotected behavior unless the Board's line is ‘illogical or arbitrary.’”).

In this case, the record amply supports the Board’s finding (A 17) that nothing in the discriminatees’ letters to the School District caused them to forfeit the Act’s protections, inasmuch as the letters “concern[ed] primarily working conditions and . . . avoid[ed] needlessly tarnishing the [employer’s] image.” *NLRB v. Mount Desert Island Hospital*, 695 F.2d 634, 640 (1st Cir. 1982).

We have already shown (pp. 21-24 above) that the letters written by the six discriminatees focused on group concerns over the preservation of the drivers’ employment and their terms and conditions of employment. A review of the letters in their entirety further shows that those employment-related concerns were the primary focus of the letters. Kahn’s letter, for instance, was explicit on this point: “The [drivers’] first concern is that Five Star undercut the other bidders by not

agreeing to adhere to our current labor agreement.” (A 155.) And the other five letters were of a piece with this sentiment. Each focused on preserving the drivers’ employment and safeguarding their terms and conditions of employment, specifically the level of wages, benefits and workplace safety that they enjoyed while working with First Student. (A 158 (LeClair), 161-62 (Nadle), 165-66 (Rose), 167-68 (Taylor), 169-70 (Wenzel).)

Five Star’s contention that the discriminatees’ letters were “primarily about children’s safety” (Br 36), rather than their own employment-related concerns, is simply at odds with the record. To be sure, four of the letters included general references to the safety of the drivers’ charges. (A 161, 165-66, 167-68, 169-70.) But those references are intertwined with the drivers’ discussion of safety issues relevant to their employment.¹² Accordingly, they do not transform the letters into

¹² Kahn’s letter, for example, made it clear that “student safety” was the drivers’ “second concern,” behind their employment-related concerns. (A 165.) The letter went on to discuss safety issues affecting drivers and riders alike, such as the availability of mechanical support in case of breakdowns. (*Id.*) The other letters referencing safety are to similar effect. Nadle’s stated: “Having the office staff and the mechanics in town is extremely important when it comes to response times. When a bus br[eak]s down, the response time [with First Student] is kept to a minute.” (A 161.) The same goes for LeClair, Rose, Taylor, and Wenzel, each of whom stressed the emergency assistance that First Student provided. (A 158, 165, 167, 169.) By contrast, the Board found the letters written by Kupras and Ocasio (A 157, 163-64), to be *unprotected* precisely because they gave primacy to the safety of the district’s schoolchildren “and did not indicate that their concerns were related to the safety of the drivers as opposed to the others” (A 14). Five Star endeavors to confuse the issue by quoting those letters (Br 37-38) notwithstanding that the Board found them unprotected.

communications “primarily” addressed to public concerns. *See Misericordia Hosp. Medical Center v. NLRB*, 623 F.2d 808, 813 (2d Cir. 1980) (holding employee report “rais[ing] issues that related not only to patient welfare but to the working conditions of the employees” protected).

Moreover, even if some of the discriminatees’ letters were understood as including issues of purely public concern along with their own employment-related concerns, this would not render the letters unprotected: “If [employees] are not permitted to address matters that are of direct interest to third parties in addition to complaining about their own working conditions, it is unlikely that workers’ undisputed right to make third party appeals in pursuit of better working conditions would be anything but an empty provision.” *Sierra Publishing Co. v. NLRB*, 889 F.2d 210, 217 (9th Cir. 1989).

Turning to the second consideration—whether the six letter-writers “avoid[ed] needlessly tarnishing the [employer’s] image,” *Mount Desert Island Hospital*, 695 F.2d at 640—the Board reasonably concluded (A 17) that “to the extent that any of [the six discriminatees’] letters contained statements criticizing [Five Star], such statements were minor and occurred in the context of the drivers expressing their common employment concerns.”

An examination of the six letters that the Board found protected fully bears this out. As we have seen, the main thrust of the letters was to express the drivers’

concerns about their employment. In that context, such criticism as the letters offered was truly minor. The letters from Kahn, LeClair, and Taylor each made only a passing reference to unspecified safety problems at Five Star.¹³ Neither elaborated on those issues. And the remainder of the discussion of safety in each letter was devoted to raising questions pertinent to the drivers' group concerns (none of which names, much less disparages, Five Star) and praising the safety practices of First Student and its drivers. (A 155-56, A 158, 165-66, A 167-68.) Similarly, Wenzel reported that four current drivers had left Five Star because of "poor treatment," again a matter of obvious concern to the drivers *qua* employees, and mentioned only in passing the fact that Belchertown had once rejected a Five Star bid. (A 169.) Nadle's letter did not criticize Five Star or its safety record at all, but instead praised the quality of the incumbent drivers and of First Student's safety record. (A 161-62.)

The sum of the matter is this: the letters that the Board found to have retained the Act's protection included only the most measured criticism, and even that was related to the drivers' legitimate concerns regarding their own working

¹³ Specifically, the letters referred to "a publicized history of problems" (Kahn, A 155), "several safety concerns" (LeClair, A 158), "some stories about Five Star[']s drivers and how the company is run[']" (Taylor, A 167). Rose's letter was slightly more specific, in that it referenced a report "about [Five Star's] lack of maintenance on the school buses," an issue of obvious relevance to the drivers, but it went no further, and instead emphasized the quality of First Student's maintenance and mechanical support. (A 165.)

conditions. Thus, as in *Mount Desert Island Hospital*, it cannot be said any of the six discriminatees “needlessly tarnish[ed Five Star’s] image.” 695 F.2d at 640.

Here, as in that case, the criticisms were “intertwined inextricably with complaints” regarding (in this case, potential) “working conditions.” 695 F.2d at 641. Indeed, the only appreciable difference between this case and *Mount Desert Island Hospital* is that the protected criticisms in that case were far more pointed than those here. *See id.* at 636 n.1.¹⁴

Five Star nonetheless urges that the letters lost the Act’s protections based on the sweeping assertion (Br 30, 40, 41) that any attempt to interfere with Five Star’s contractual or business relations, or otherwise “to hurt it financially,” is perforce unprotected. This is not the law. Many protected activities (strikes and boycotts, for example) are intended to, and often do in fact, cause persons not to do business with the targeted employer and in so doing “hurt it financially.” But such activities are not for that reason unprotected. *See Washington Aluminum*, 370 U.S. at 17 (holding spontaneous walkout to protest working conditions protected; rejecting “disloyalty” argument); *George A. Hormel & Co. v. NLRB*, 962 F.2d

¹⁴ The employee in that case, a licensed practical nurse, published a letter in the local newspaper to protest hospital staff cuts, stating that as a result of the layoffs, “[o]nly very minimal patient care is given and safety standards are stretched to the limit and beyond,” “quality patient care [is] go[ing] down the drain,” and “the real loser is the patient.” *Id.* This Court found these comments protected because they “were made for the purpose of improving working conditions and thus the level of patient care.” *Id.* at 641.

1061, 1064 (D.C. Cir. 1992) (“[A] boycott is protected § 7 activity if it (1) is related to an ongoing labor dispute and (2) does not disparage the employer’s product.”).¹⁵

Thus, the relevant question is not whether the conduct that the employee engages in seeks to interfere with business or contractual relations, as this Court’s decision in *NLRB v. Circle Bindery, Inc.*, 536 F.2d 447, 452 (1st Cir. 1979), makes clear. There, a union member working for a non-union shop discovered that the shop was binding booklets with a “union bug,” thereby incorrectly signifying that they were produced using union labor. *Id.* at 450. The employee took several booklets away from the shop, without permission, and reported this fact to the union, with the eventual result that the bindery lost the binding contract. *Id.* This Court, finding that the employee’s actions related to a labor dispute, rejected the employer’s claim that the conduct was unprotected, holding that “[c]oncerted activity that is otherwise proper does not lose its protected status simply because [it is] prejudicial to the employer.” *Id.* at 452. *Accord Misericordia Hospital*, 623 F.2d 815 (adopting the preceding passage from *Circle Bindery* and adding that

¹⁵ Five Star (Br 43) misleadingly describes the court’s decision in *George A. Hormel* as holding that an employee’s support of a boycott against his employer is unprotected. In fact, the *Hormel* decision held that the employee engaged in protected activity by supporting the boycott *during the pendency of the labor dispute*, 962 F.2d at 1065, but that his persisting in boycott activities “*after the end of the labor dispute*” (in that case, a strike that had settled), was unprotected, *id.* at 1064 (emphasis added).

“[t]o hold otherwise would be to render meaningless the rights guaranteed to employees by § 7”).¹⁶

Five Star (Br 46-49) also attempts to leverage the Board’s finding (A 15) that *some* of the drivers’ letters did disparage Five Star “in ways that go beyond complaints about terms and conditions of employment” into an argument for a finding that *all* of the letters were unprotected. But in order to do so, Five Star simply blurs the critical distinctions between the two groups of letters.¹⁷ As shown above (pp. 34-35), the letters written by the six discriminatees contained, at most, muted and generic references to safety problems at Five Star, which were bound up with the employment-related concerns articulated in the letters. In contrast, the three letters that the Board found *unprotected* detailed a litany of years-old derelictions by Five Star that “had no relation to the drivers’ concern that [Five

¹⁶ Despite Five Star’s protests to the contrary (Br 28-30), the Board properly distinguished cases such as *ATC/Forsythe & Assocs.*, 341 NLRB 501 (2004); *Kenai Helicopters, Inc.*, 235 NLRB 931 (1978); and *Associated Advertising Specialties, Inc.*, 232 NLRB 50 (1977), on the ground that those cases involved employees who sought to, or did, compete directly with their employer by taking the employer’s business for their own benefit. (A 29.) It is entirely rational to distinguish between such employee self-dealing, on the one hand, and employee activity that simply attempts to safeguard terms and conditions of employment without appropriating the employer’s business, on the other. To the extent that the language from the ALJ’s opinion in *ATC/Forsythe* that Five Star heavily relies upon (Br 29-30) can be construed as stating a broader proposition, that language is dicta, which the Board (A 29) properly rejected here.

¹⁷ Five Star (Br 37-38) endeavors to muddy the waters by indiscriminately quoting letters that were found unprotected or that were written by drivers who did not seek employment (and thus were not at issue) alongside the discriminatees’ letters.

Star] would not maintain the[ir] terms and conditions of employment” (A 16) and that were laced with inflammatory characterizations and exaggerated embellishments on the public record.¹⁸

For these reasons, Five Star’s reliance (Br 49) on *Endicott Interconnect Technologies v. NLRB*, 453 F.3d 532 (D.C. Cir. 2006), is unavailing. The employee in that case protested the employer’s layoff decision by publishing assertions that management left “gaping holes in [the employer’s] business” caused by its “gutting” of the company; and, after being warned not to repeat such remarks, the employee accused management of “tank[ing]” the business and “put[ing] it into the dirt.” 453 F.3d at 534-35. The D.C. Circuit viewed such remarks as unprotected disparagement. 453 F.3d at 537. But the types of rhetorical liberties that the *Endicott* employee took more closely resemble those found in the three letters that the Board found *unprotected* here (see note 18

¹⁸ Andrea MacDonald’s letter railed against Five Star as a “substandard company” that is “so reckless that they have employed alcohol abusers, drug offenders, child molesters, and persons that have had their licenses suspended.” (A 160.) Patricia Grasso’s letter inveighed against “the incompetence and negligence” of company management as evidenced by Five Star’s hiring of “a convicted sex offender” as well as drivers who had “been drinking” or were “on drugs.” (A 152-53.) And Donald Caouette’s letter was likewise dominated by a detailed exposition of the “child sex offender” incident, Five Star’s “neglect” when students waited in “frigid winter weather” for buses that were delayed due to mechanical failure, and the alcohol incident. (A 148-49 (emphasis in original).)

above), than the minor, and measured, criticism in the six letters the Board found protected.

Apart from its mistaken reliance on *Endicott*, Five Star offers a four-page string of citations to cases that, it contends, support its position that the activity here was unprotected. None of those cases compels a different outcome in this case. Rather, as we show in the margin, those cases dealt, variously, with disparaging statements that employees made in the absence of a labor dispute;¹⁹ gratuitous criticisms that were unrelated to, or only tangentially related to, a pending labor dispute;²⁰ statements that either were maliciously false or that

¹⁹ *E.g.*, *American Steel Erectors, Inc.*, 339 NLRB 1315, 1317 (2003) (applicant's statement to apprenticeship certification body was unprotected because it was made "in the absence of any labor management dispute"); *Turner Beverage Co.*, 279 NLRB 160, 167 (1986) (telephone calls attacking a particular manager "did not represent an attempt to improve the working conditions of [employer's] employees" but simply sought the removal of a manager whom the employees disliked).

²⁰ *E.g.*, *Mountain Shadows Golf Resort*, 338 NLRB 581 (2002) (employee's flyer had a "total lack of reference to any protected activity" and "did not relate to a labor situation or to union activity"); *Studio S.J.T.*, 277 NLRB 1189, 1201 (1985) (employee's "ad hominem attack" against owners, urging that employer's customer refrain from doing business with the employer "because its owners were lesbians" obviously had no connection to ongoing legitimate labor dispute); *New York Chinatown Senior Citizens Coalition*, 239 NLRB 614, 614 n.1, 617 (1978) (activities of employees unprotected because their "purpose of . . . was to effect a change in the top management of their Employer," not to better their working conditions).

revealed confidential information;²¹ or some combination thereof.²²

Finally, we address Five Star's effort to recycle its "no employer-employee relationship argument." This time, Five Star (Br 27, 36, 40) asserts that the absence of an employer-employee relationship between Five Star and the drivers at the time the drivers wrote their letters means there was no "labor dispute." This argument fares no better in its current guise than it did in its prior iteration.

²¹ *E.g.*, *TNT Logistics of North America*, 347 NLRB No. 55, slip op. at 1 (2006) (statement in letter accusing employer of directing employees to "fix" logbooks was "maliciously false" in that they were "made . . . with knowledge of its falsity or at least reckless disregard for its truth"); *American Arbitration Association, Inc.*, 233 NLRB 71, 75 (1977) (employee breached numerous important employer confidences in preparing what amounted to a "childish" questionnaire ridiculing the employer's dress code in grossly exaggerated terms).

²² *E.g.*, *Sahara Datsun*, 278 NLRB 1044, 1045-46 (1986) (allegations that employer was falsifying customer loan applications were only "[a]rguably" related to labor dispute and in any event were "unsubstantiated"); *American Firehouse Restaurant*, 220 NLRB 818 (1975) (employees' statements that restaurant served contaminated food to employees, made "without . . . any personal knowledge," were an effort to harm the restaurant "apart from their desire to enforce certain provisions of the collective-bargaining contract"). Similarly, in *Coca-Cola Bottling Works, Inc.*, 186 NLRB 1050, 1054 (1970), employees circulated a flyer to the public suggesting that "[r]oaches, ants, flies, bugs and even dead mice" could end up in bottles of Coca-Cola, based on nothing more than the fact that the employer was operating with replacement workers during a strike. The Board found that flyer unprotected. A similar fact-pattern drove the Board's early decision in *Patterson-Sargent Co.*, 115 NLRB 1627, 1628-30 (1954), in which flyers suggested that the employer was producing "shoddy and inferior merchandise" merely because the struck employer was operating with replacement workers. These decisions are best understood as reflecting the principle that employee criticisms, even when related to the labor dispute, can be so disproportionate and unreasonable that they amount to needless disparagement.

Just as the Act defines the term “employee” broadly, so, too, does it define “labor dispute” broadly to include “*any controversy concerning terms, tenure or conditions of employment . . . regardless of whether the disputants stand in the proximate relation of employer and employee.*” 29 U.S.C. § 152(9) (emphasis added). As the court observed in *Overstreet v. United Bhd. of Carpenters & Joiners of America, Local Union No. 1506*, 409 F.3d 1199, 1217-18 (9th Cir. 2005), “[t]his definition does not specify whose employment may be the subject of a labor dispute.” Rather, the language is sufficiently broad to include circumstances, such as those here, where employees “exert[] pressure on businesses to preserve the economic foundation of [their] livelihoods.” *Soft Drink Workers Union Local 812, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. NLRB*, 657 F.2d 1252, 1258 n.11 (D.C. Cir. 1980). The statutory language, in short, leaves no room for Five Star’s contention that the absence of a “proximate relation between employer and employee” at the time the drivers wrote their letters means that the drivers’ letters lost the Act’s protection because they did not relate to a labor dispute.²³

²³ For completeness, we reiterate that although the absence of a formal employer-employee relationship is immaterial, the First Student drivers did have an entitlement to “first consideration” (A 288) under the bid specifications, which were to be incorporated into the contract that the successful bidder made with the School District (A 276). See note 10 above.

II. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS FINDING THAT FIVE STAR VIOLATED THE ACT BY TELLING THREE APPLICANTS THAT THEY WOULD NOT BE HIRED BECAUSE THEY WROTE LETTERS TO THE SCHOOL DISTRICT

In addition to finding that Five Star violated the Act by refusing to hire the six discriminatees, the Board also found (A 12), based on Lecrenski's admissions (A 61-62, 352-53), that Five Star independently violated Section 8(a)(1) by telling drivers Terri Nadle, Caron Rose, and Pauline Taylor that they were being denied employment because of their letters to the School District. Five Star has not contested this finding in its opening brief. Given Five Star's failure to contest this issue, and given our showing above that the drivers' letters constituted concerted, protected activity, the Board is entitled to summary enforcement of this finding. *See NLRB v. Hotel Employees & Restaurant Employees Int'l Union Local 26*, 446 F.3d 200, 206 (1st Cir. 2006); *National Steel & Shipbuilding Co. v. NLRB*, 156 F.3d 1268, 1273 (D.C. Cir. 1998).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court deny Five Star's petition for review, grant the Board's cross-application for enforcement, and enter a judgment enforcing the Board's Order in full.

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NATIONAL LABOR RELATIONS BOARD

July 2007

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

FIVE STAR TRANSPORTATION, INC., :
 : Nos. 07-1316, 07-1383
 Petitioner/Cross-Respondent :
 :
 v. :
 : Board Case No.
 : 01-CA-41158
 NATIONAL LABOR RELATIONS BOARD :
 :
 Respondent/Cross-Petitioner :
 :
 UNITED FOOD AND COMMERCIAL :
 WORKERS, LOCAL 1459 :
 :
 Intervenor :

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 10,562 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 18th day of July 2007

