Five Star Transportation, Inc. *and* Transportation Division, United Food and Commercial Workers Union, Local 1459, AFL–CIO. Case 1–CA–41158

January 22, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On June 23, 2004, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed partial exceptions and a brief in support of his partial exceptions and in partial support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, partial exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

I. INTRODUCTION

The central issue presented in this case is whether the Respondent, which entered into a new contract to provide school bus transportation services to the Belchertown School District, may lawfully refuse to hire 11 bus drivers who worked for First Student, Inc., the previous contract provider of these services, because those drivers had sent individual letters to the Belchertown school committee in an effort to convince the school committee to award the new school bus contract to First Student, Inc. In analyzing the conduct of the drivers at issue, we find that the letters at issue fall into the following three categories: (1) letters that failed to raise common employment-related concerns of the drivers as a group; (2) letters that essentially disparaged the Respondent's business; and (3) letters that primarily raised the drivers' common employment-related concerns. As more fully explained below, we find that only those six drivers whose letters fall within the last category engaged in protected concerted activity. Thus, we find that the Respondent violated the Act when it refused to hire those six employees—Steve Kahn, Suzanne LeClair, Terri Nadle, Caron Rose, Pauline Taylor, and Deborah Wenzel—based on their letters. In the absence of a finding of protected concerted activity for the other letters, we shall dismiss the refusal-to-hire allegations pertaining to the remaining five drivers.

II. FACTUAL BACKGROUND

The relevant facts, as set forth more fully in the judge's decision, are as follows. The Belchertown, Massachusetts School District has a history of contracting with private companies to provide school bus transportation services. In 2000, an entity currently known as First Student, Inc. was awarded the 2000–2003 bus services contract. At the time that First Student won the contract, the United Food and Commercial Workers Union, Local 1459 (the Union) had been representing all the regular bus drivers, spare drivers, utility drivers, and trainers employed by the company operating under the expiring contract. After First Student took over the operations, it voluntarily recognized the Union as the bargaining representative for the drivers and signed a collective-bargaining agreement with the Union.

On or about January 16, 2003,[3] the Respondent, Five Star Transportation, Inc., and the Union learned that the School District had awarded the 2003–2006 Belchertown school bus services contract to the Respondent. On January 21, Daniel Clifford, a union vice president and business agent for the First Student drivers, sent a letter to the associate superintendent of the Belchertown schools. In his letter, Clifford questioned how the Respondent's bid for the Belchertown contract, which was about $300,000 lower than First Student's current contract, would be able to cover "the current wage and benefit package, maintain operation costs (fuel, equipment, etc.) and provide safe and effective service." Clifford

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent excepts to the judge's finding that it violated Sec. 8(a)(1) of the Act when its president, Theresa Lecrenski, told discriminatees Terri Nadle, Caron Rose, and Pauline Taylor that they were not being hired because of their letters to the Belchertown school committee. While the judge did not include a factual description of this incident in his decision, the uncontested testimony of Lecrenski fully supports the judge's finding of an 8(a)(1) violation here. The Respondent does not dispute Lecrenski's testimony, but it instead argues that no violation occurred because Nadle, Rose, and Taylor "were [not] employed by the Respondent, and had not even submitted applications for employment to, or otherwise indicated in any way a desire to be employed by, the Respondent, at the time they sent their E-mails/letters" to the school committee. It is clear from the record, however, that all three individuals involved had applied for, and had unlawfully been denied, employment with the Respondent. Accordingly, discriminatees Nadle, Rose, and Taylor are to be regarded as the Respondent's employees. Thus, we find no merit in the Respondent's exception and affirm the 8(a)(1) violation found by the judge.

[2] We shall modify the judge's recommended Order and shall substitute a new notice to conform to the Board's standard remedial language. See, e.g., *Harco Trucking, LLC*, 344 NLRB 478 (2005).

[3] All dates are 2003, unless otherwise indicated.

further commented: "In order to create a level playing field and a more equitable bid process, we asked previously that any prospective bidder factor into their bid model the wages and benefits of the current labor agreement [between the Union and First Student]."

Also on January 21, Clifford faxed a letter to Theresa Lecrenski, the president of the Respondent. Clifford sought to secure a "guarantee" that the Respondent would voluntarily recognize the Union as the drivers' bargaining representative, allow the union members to continue in their jobs with full seniority after the 2003–2006 bus services contract began, and meet with the Union to negotiate a successor collective-bargaining agreement encompassing the Belchertown drivers. Clifford's letter also 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." Lecrenski did not respond to Clifford's letter.

On January 31, Clifford organized a meeting of several Belchertown drivers. At this meeting, two drivers who had previously worked for the Respondent at other locations spoke of alleged problems, including alleged problems with timely and adequate bus servicing and maintenance, that had arisen during their employment with the Respondent. In addition, Clifford distributed several unflattering newspaper articles about the Respondent that had appeared in a local newspaper in 1996. The articles described the following incidents: (1) a February 1996 incident in which several of the Respondent's buses failed to start in extremely cold weather, leaving students stranded at their bus stops; (2) a March 1996 article concerning the Respondent's employment of a convicted sex offender—who did not have a valid school bus driver's license—as a school bus driver in Amherst, Massachusetts; and (3) a May 1996 article concerning a driver for Respondent who had consumed alcoholic beverages at lunch and then drove a school bus route in the afternoon.[4] During the meeting, Clifford also encouraged the drivers to write to the school committee. Thereafter, approximately 15 drivers of First Student sent letters to the school committee.

The award of the Belchertown school bus contract was delayed while the school committee considered the issues raised in the First Student drivers' letters. Ultimately, the school committee awarded the contract to the Respondent and, in response to the Respondent's request under the Massachusetts Freedom of Information statute, provided the drivers' letters to the Respondent.

Seventeen Belchertown drivers who were members of the First Student bargaining unit applied for bus driver positions with the Respondent; 11 of those drivers had sent letters to the school committee. The Respondent hired only the six drivers who had not sent letters to the school committee. Lecrenski admitted that her decision not to hire the other 11 applicants was based solely on the fact that each had sent a letter to the school committee.

III. THE JUDGE'S DECISION

The judge found that the First Student drivers who wrote letters to the school committee, with the exception of Candy Ocasio and Charles Kupras, had engaged in protected concerted activity. As a result, the judge found that the Respondent violated Section 8(a)(1) of the Act by refusing to consider for hire and refusing to hire Donald Caouette, Patricia Grasso, Steve Kahn, Suzanne LeClair, Andrea MacDonald, Terri Nadle, Caron Rose, Pauline Taylor, and Deborah Wenzel. The judge found that, based on the substantive content of their letters, Ocasio and Kupras had not engaged in protected activity, and that, therefore, the Respondent did not violate the Act by refusing to hire or consider for hire those two drivers. Finally, the judge determined that, had the Respondent hired the nine discriminatees, a majority of the drivers employed by the Respondent would have been former First Student bargaining unit members. Accordingly, the judge found that the Respondent was a successor employer of First Student and, as such, had an obligation to recognize and bargain with the Union as the exclusive representative of the Respondent's drivers.

IV. ANALYSIS

Did the Drivers Engage in Concerted Activity

To begin, we agree with the judge that all of the drivers engaged in concerted activity by preparing and submitting individual letters to the school committee. The Board has recognized that "concerted activity" within the meaning of Section 7 of the Act encompasses conduct "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." See *Salisbury Hotel, Inc.,* 283 NLRB 685, 685 (1987), citing *Meyers Industries (Meyers I),* 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). Here, it is undisputed that the drivers held a meeting to discuss their group concerns about their employment situation, and

[4] After this last incident, the driver was fired, but it was later revealed that the driver had had eight previous driving infractions, including one for drunken driving and one for driving with a revoked license.

that, at the meeting, Union Business Agent Clifford urged the drivers to write letters to the school committee. Thus, it follows that the resulting letter-writing campaign constituted concerted activity within the meaning of Section 7 of the Act.

Did the Drivers Engage in Protected Activity

The more difficult issue, however, is whether the drivers, in sending their individual letters, engaged in activity "for mutual aid or protection" under Section 7 of the Act. In order to resolve this issue, we find it useful to separate the drivers into three groups, based on their individual letters.

A. Drivers Whose Letters Failed to Raise Common Employment-Related Concerns

The first group consists of drivers Candy Ocasio and Charles Kupras. As noted above, the judge found that Ocasio and Kupras, in sending their individual letters, did not engage in protected activity under the Act. Analyzing the letters of Ocasio and Kupras, the judge found that "[o]ther than some very generalized assertions about the quality of [the] Respondent's buses, neither made any other reference to the wages and working conditions of the school bus drivers. Moreover, it is unclear from [the] two letters that the writers are concerned with the safety of the drivers, as opposed to the [school children]."

We agree with the judge, and find that Ocasio and Kupras did not engage in protected activity under the Act. Section 7 of the Act provides employees with the right to engage in concerted activities for the purpose of collective bargaining or "other mutual aid or protection." It is well established that Section 7 protects employee efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB,* 437 U.S. 556, 565 (1978). Nevertheless, "some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity," and that "at some point e relationship becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause." Id. at 567–568.

In the case of drivers Ocasio and Kupras, we find that the content of their letters was not sufficiently related to the drivers' terms and conditions of employment to constitute protected conduct. In their letters, Ocasio and Kupras focused solely on general safety concerns and did not indicate that their concerns were related to the safety of the drivers as opposed to others.[5] As the Board recently reiterated, consistent with long standing precedent, merely raising safety or quality of care concerns on behalf of nonemployee third parties is not protected conduct under the Act. See *Waters of Orchard Park,* 341 NLRB 642 (2004).[6] Further, we are not persuaded that these two letters should be interpreted as raising the drivers' common concerns simply because they were written as part of the drivers' letter-writing campaign. Instead, we determine whether certain communications are protected by examining the communications themselves. Accordingly, because the concerns expressed in the letters of Ocasio and Kupras were limited to a discussion of generalized safety concerns, as opposed to the drivers'

[5] For instance, Kupras' letter reads, in pertinent part:

> As you know better than I do, there is a serious question rising pertaining to the Busing Contract with the Five-Star Transportation Company. The School Board, the parents, and the children of our Town are facing a serious problem in the transportation of our children to and from school.
>
> . . . .
>
> Five-Star has a long publicized history of problems. The primary issue to consider is safety. Five Star buses are of low standard and maintained inadequately. Some drivers are poorly trained and of questionable character. There have been reported incidences [sic] of drivers with criminal records. One such driver was allowed to operate while his license was suspended. Five-Star lacks the values of its competitors and fails to warrant the responsibility of transporting our children.

Ocasio's letter reads, in pertinent part:

> I am writing to you today with some concerns, not only as a school bus driver but as a resident of Belchertown and a mother of two children who attend Belchertown Schools. It's my understanding that there may be a chance you will be accepting a bid from Five Star Transportation for the new school busing contract to start September 2003.
>
> It has come to my attention through research and talking with past employees of Five Star Transportation that this may not be a wise decision. The safety of the children in Belchertown are at stake. It has been know in the past that the company has hired not only unlicensed bus drivers, but there has been two incidents of them hiring a convicted child Molester, and a driver who was driving a school bus with a half dozen children under the influence. They have also been known to be unreliable with buses being unsafe.
>
> . . . .
>
> Would you feel safe putting your children on these buses knowing what you know? I know I would not and will not be placing my children on these buses if indeed they will be the school busing transportation company for this town.
>
> So I ask of you to think long and hard about this decision as it is not an easy one. On one hand you have to save money for the town and on the other hand you have an obligation to this community not only to provide transportation for the children of Belchertown back and forth to school but to also keep them safe. I do hope the right decision is made.

[6] Contrary to our dissenting colleague, we do not find that either Ocasio's self-identification in her letter as a bus driver or Kupras' "tout[ing] the professionalism of First Student personnel" in his letter was sufficient to indicate that either driver's letter raised the issue of the bus drivers' common concerns.

common concerns involving their terms and conditions of employment, we find that the judge properly found that the conduct of Ocasio and Kupras was not protected by Section 7 of the Act.

Our dissenting colleague contends that Ocasio and Kupras sent their letters as part of a letter-writing campaign with the protected intention of preserving the drivers' terms and conditions of employment. Since their aim was common, it follows for the dissent that the content of the letters by Ocasio and Kupras should be "irrelevant" to the Board's consideration. We disagree. Preliminarily, as discussed above, we disagree that the intention of Ocasio and Kupras was to preserve terms and conditions of employment. But, assuming arguendo that this was their purpose, it is essential to look at the means that they used to accomplish that purpose. The means here were the letters themselves. More specifically, it was the content of the letters, not the act of sending them, that caused the discharges. As the Respondent's president testified (correctly quoted in the dissent), "I had to read the letter first to make sure what it said."

The fact that Ocasio and Kupras identified themselves as predecessor employees and touted their professionalism does not establish that their interest was in their own terms and conditions of employment. These attributes were part and parcel of their effort to show that the predecessor and its employees could be trusted to transport the school's students. They were not aimed at improving terms and conditions of employment under the Respondent.

We agree with our colleague that a written communication must be viewed "in its entirety and in context," in order to determine whether there is a nexus to terms and conditions of employment. See *Endicott Interconnect Technologies,* 345 NLRB 448 (2005), enf. denied 453 F.3d 532 (D.C. Cir. 2006). However, having said that, the Board in *Endicott* went on to analyze separately the two communications involved in that case, and found that, in each communication, there was a reference to a layoff, i.e., a term or condition of employment. There is no comparable reference to a term or condition of employment in the letters of Ocasio and Krupas here. Similarly, in *Allied Aviation*, 248 NLRB 229, 231 (1978), the communication at issue was part of an ongoing labor dispute about the safety of employees, i.e., a term or condition of employment.

B. Drivers Whose Letters Disparaged the Respondent's Business

The second group of drivers that we consider consists of Donald Caouette, Patty Grasso, and Andrea MacDonald. Unlike Ocasio and Kupras, these three drivers wrote letters that expressed concerns for the drivers' terms and conditions of employment. However, in doing so, the letters criticize and disparage the business reputation of the Respondent in ways that go beyond complaints about terms and conditions of employment. The judge found that, based on the content of their letters, Caouette, Grasso, and MacDonald had engaged in protected activity under Section 7 of the Act. We disagree. We find that the letters of Caouette, Grasso, and MacDonald constitute disparagement of the Respondent's business and are unprotected under the Act.

As stated above, employees do not lose their Section 7 protection simply because they seek "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex*, 437 U.S. at 565.[7] Not all employee conduct is protected under the Act however: "[E]mployee conduct involving a disparagement of an employer's product, rather than publicizing a labor dispute, is not protected." *NLRB v. Electrical Workers, Local 1229*, 346 U.S. 464 (1953); accord: *Emarco, Inc.,* 284 NLRB 832, 833 (1987) ("[E]mployees may engage in communications with third parties in circumstances where the communication is related to an ongoing labor dispute and when the communication is not so disloyal, reckless, or maliciously untrue to lose the Act's protection."); see also *Arlington Electric, Inc.,* 332 NLRB 845, 846 (2000) (employee's distribution of flyer urging boycott of hospital found to be protected where the flyer's content was related to an ongoing labor dispute).

In determining whether employee conduct falls outside the realm of conduct protected by Section 7, we consider whether "the attitude of the employees is flagrantly disloyal, wholly incommensurate with any grievances which they might have, and manifested by public disparagement of the employer's product or undermining of its reputation." *Vandeer-Root Co.,* 237 NLRB 1175, 1177 (1978). A critical further determination is whether the conduct bears "a sufficient relation to [employee] wages, hours, and conditions of employment." Id.; see also *Emarco, Inc.*, 284 NLRB 832, 834 (1987) (employee's disparaging remarks were protected when they were "made in the context of and were expressly linked to the labor dispute"); *Community Hospital of Roanoke,* 220 NLRB 217, 223 (1975), enfd 538 F.2d 607 (4th Cir. 1976) (employee's comments on television program

[7] We note that the judge's reliance on *Montauk Bus Co.,* 324 NLRB 1128 (1997), is misplaced, as that case does not present the question of whether an employee's conduct is protected by Sec. 7, but rather whether a strike would be rendered unprotected because the union had a conflict of interest. Accordingly, *Montauk* applied a legal analysis different from the rationale appropriate here.

were protected where they were specifically related to employees' efforts to improve wages and working conditions and where there was no deliberate intent to impugn employer).

The letters of Donald Caouette, Patty Grasso, and Andrea MacDonald, in addition to raising the drivers' common concerns, explicitly referred to the 1996 incidents that were reported in the newspaper articles distributed by Clifford at the drivers' January 31 meeting. In the context of those incidents, the letters criticized the Respondent's operations and, further, used inflammatory language to describe the Respondent. For example, MacDonald characterized the Respondent as a "substandard company" that was "so reckless that they have employed alcohol abusers, drug offenders, child molesters, and persons that have had their license suspended." Similarly, Grasso voiced her concern over "the incompetence and negligence" of the Respondent's management, and Caouette criticized the Respondent for being "careless" in its hiring and for its poor reputation.

We find that the letters of Caouette, Grasso, and MacDonald fall outside the realm of protected activity within the meaning of Section 7.[8] Their letters disparaged the Respondent's business by bringing to the school committee's attention incidents that had occurred approximately 7 years prior to the instant labor dispute and that, significantly, had no relation to the drivers' concern that the Respondent would not maintain the terms and conditions of employment that the drivers had negotiated with First Student. Furthermore, these three drivers used inflammatory language—again, in the context of incidents not related to the drivers' group concerns—to describe the Respondent in a manner that suggested that the drivers intended to damage the Respondent's reputation. We recognize that these letters refer to terms and conditions of employment and, in this sense, refer to a "labor dispute" with the Respondent. But these references are minor in comparison with the many disparaging remarks, which did not involve terms and conditions of employment, set forth in the letters. For these reasons, we reverse the judge's findings that Caouette, Grasso, and MacDonald engaged in protected concerted activity and that the Respondent violated the Act by refusing to hire, or consider for hiring, Caouette, Grasso, and MacDonald.

Our dissenting colleague's reliance on *Town & Country Electric*, 516 U.S. 85 (1995), is misplaced. That case held that salt applicants were employees within the meaning of Section 2(3) of the Act. We do not question the statutory employee status of any of the drivers involved herein. That case also held that the salts' intention to organize was not an act of disloyalty to the prospective employer. While we agree with that general proposition, we observe that the letters here did not simply indicate an adherence to the Union. More importantly, the letters reflected an effort to undermine the Respondent's standing in order to secure the school bus contract for First Student, the contract provider preferred by Caouette, Grasso, and MacDonald.

We also disagree with the dissent's suggestion that there is no duty of loyalty owed to a prospective employer by driver-applicants. Just as an employer legitimately wants extant employees to be loyal, so a prospective employer legitimately wants prospective employees to be loyal. In both cases, the goal is the same—not to have disloyal employees on the payroll. Indeed, *Town & Country,* supra, supports this view. The Court in *Town & Country* did not suggest that the salts had no duty of loyalty to the prospective employer. Rather, the Court held that the salts' actions were not disloyal.

Our colleague cites cases where the Board held that certain communications were not disloyal. However, none of those cases involved the fact pattern here. The individuals here attacked the capacity of the Respondent to safely drive school children, a matter that would be of the utmost concern to the school board. It matters not whether the communications were true or false. Indeed, we may applaud these individuals for raising a matter of public concern. But, the issue here is whether *the National Labor Relations Act* affords protection to those individuals. Where, as here, the drivers' letters implicate the safety of children, not the common concerns of employees, and those letters are aimed at keeping the Respondent from becoming the new bus service contract provider, we conclude that the NLRA does not offer protection to the drivers.

For all of the above reasons, we conclude that the letters of five of the individuals were unprotected. As set forth below, we conclude that six other letters were protected. The dissent repeatedly notes that the Respondent did not distinguish between the five letter writers and the six. However, the General Counsel had the burden of establishing that the activity was protected, and we have the obligation to decide whether he has met that burden. We conclude that he has done so for the six and not for

[8] It is undisputed that the Respondent refused to hire Caouette, Grasso, and MacDonald because of their letters to the school committee. Accordingly, the only issue presented is whether the letters constituted protected conduct under the Act and, once that is decided, our inquiry ends. See *American Steel Erectors, Inc.,* 339 NLRB 1315, 1316 (2003) (relying on *Neff-Perkins Co.,* 315 NLRB 1229 fn. 2 (1994), for the proposition that the "*Wright Line* analysis [is] unnecessary in [a] single-motive case"). Accordingly, we disagree with our dissenting colleague's assertion that a burden-shifting analysis, such as that used in *Waste Management of Arizona,* 345 NLRB 1339 (2005), a pretext case, is appropriate here.

the five. Similarly, inasmuch as the discharges were based on the letters, we do not think it inappropriate to analyze the content of each of the letters. Further, the fact that the purpose of the letters was to maintain terms and conditions of employment does not itself establish that all of the letters were protected. Even if a goal concerns terms and conditions of employment, that does not necessarily yield a conclusion that the means are protected. To take one of many examples, a strike in breach of contract may be aimed at improving terms and conditions of employment but it is nonetheless unprotected. Finally, we do not agree with the dissent's hypothetical in fn. 32. If the Respondent had considered the content of individual letters and had refused to hire any of the letter-writers, there would be a violation as to the protected letters, but no violation as to the unprotected ones. This would not be a "pretext" case. The Respondent's real reason for nonhire would be the individual letters. As to some, the Respondent would be correct. As to others, it would be incorrect.

C. Drivers Whose Letters Raised Common Employment-Related Concerns

The final group of drivers consists of six drivers whose letters all specifically referred to the drivers' common concerns about their employment conditions in conjunction with the awarding of the new bus services contract to the Respondent. The letters written by drivers Steve Kahn, Suzanne LeClair, Terri Nadle, Caron Rose, Pauline Taylor, and Deborah Wenzel urged the school committee to retain First Student as the contract provider, on the grounds that the drivers were concerned that the Respondent would not maintain the terms and conditions of employment that the drivers had negotiated with First Student. Unlike the letters of Caouette, Grasso, and MacDonald, however, none of these letters significantly disparaged the Respondent's business.

We find that the letters of Kahn, LeClair, Nadle, Rose, Taylor, and Wenzel were protected under Section 7 of the Act. We note that each driver expressed concerns about the Respondent within the context of the drivers' common desire to retain their negotiated terms and conditions of employment.[9] Further, to the extent that any of these drivers' letters contained statements criticizing the Respondent, such statements were minor and occurred in the context of the drivers expressing their common employment concerns. As a result, we find that the judge properly found that Respondent violated Section 8(a)(1) of the Act by refusing to hire, or considering for hire, these six drivers.

The Respondent is not a Successor Employer

Having found that nine drivers who wrote letters to the school committee had engaged in protected concerted activity and should have been hired by the Respondent, the judge concluded that the Respondent was a successor employer of First Student. Central to the judge's finding was his determination that, but for its unlawful refusal to hire the discriminatees, 11 of the Respondent's 20 regular drivers and two of the Respondent's three "spare" drivers (i.e., a total of 13 employees) would have been former First Student employees.[10]

In light of our finding that only 6 drivers were unlawfully denied employment, it follows that, at most, only 10

[9] The following excerpts support this finding:

> The bus drivers have two main concerns. 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. [Kahn's letter.]
>
> As a driver, it is very unsettling to have the fate of your career put in jeopardy every three years. 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. The Belchertown School System employees and Town employees all receive decent rates of pay and benefits without threat of losing their contracts, please don't allow this company to come in and take everything we have worked so hard for. [LeClair's letter.]
>
> I would hope Five Star will keep the drivers that are very familiar with the roads and children. Will the parents and student have the same quality of service? Will The Drivers still have the benefits, incentives and wages? [Nadle's letter.]
>
> Eighteen of our drivers live in Belchertown, have children in the school system, pay taxes and are voters. It is my hope that the school committee will take into consideration 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? [; and] (3) Will the drivers be treated fairly? (This includes pay rate and benefits.) [Rose's letter.]
>
> I was very surprised to hear how some bus companys will try and under bid our current employer and not include in their bids our current wages and benefits. I hear Five Star Transportaion i[s] the low bidder this time. They bid less per day than First Student currently services the work. Life is hard at these times now I can't imagine how its gonna be with someone bidding lower then what we have now. Also Five Star has not indicated whatsoever that they will honor our correct wages and benefit package. They are also a non-union company. It also makes you wonder how much quality service they can provide and safety with such a lower bid. That really makes me wonder.
>
> . . . .
>
> It would be fair to see a re-bid with a[n] even field created, where all bidders should go by our current Labor Agreement." [Taylor's letter.] [typographical errors in original].
>
> 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. [Wenzel's letter.]

[10] One of the criteria for a finding of successorship is that a majority of the new employer's employees had been employed by the predecessor. See *NLRB v. Burns Security Services*, 406 U.S. 272 (1972); accord: *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987).

former First Student drivers were employed by Respondent or unlawfully denied employment. Consequently, we reject the judge's finding that the Union had majority status among the Respondent's drivers.[11] As a result, we reverse the judge's finding that the Respondent was a successor employer to First Student.[12]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that Five Star Transportation, Inc., Agawam, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 2(a) and reletter the subsequent paragraphs.

2. Substitute the following for the former paragraphs 2(b) and (c)

"(a) Within 14 days from the date of this Order, offer Steve Kahn, Suzanne LeClair, Terri Nadle, Caron Rose, Pauline Taylor, and Deborah Wenzel instatement to the position they would have held absent the Respondent's refusal to hire them or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the Respondent's refusal to hire them."

"(b) Make Steve Kahn, Suzanne LeClair, Terri Nadle, Caron Rose, Pauline Taylor, and Deborah Wenzel whole for any loss of earnings and other benefits suffered as a result of the Respondent's refusal to hire them, with interest, as set forth in the remedy section of the judge's decision."

3. Substitute the attached notice for that of the administrative law judge.

MEMBER LIEBMAN, concurring in part and dissenting in part.

The majority errs in upholding the Respondent's refusal to hire five school bus drivers because (as the majority correctly recognizes) they and six other driver-applicants engaged in a concerted letter-writing campaign "seeking to protect . . . their legitimate, mutual interest in maintaining their terms and conditions of employment that had been negotiated with their previous employer." That result follows, the majority says, from the content of the drivers' individual letters. But viewing each letter in isolation is a mistake.

The letters were all part of a concerted campaign arising out of a labor dispute, and Respondent Five Star Transportation, Inc. concededly acted against the driver-applicants on that general basis (and not based on the particular content of the individual letters). This error aside, the majority is mistaken in its analysis of the five drivers' individual letters. The letters of two drivers raised safety concerns that necessarily implicated their own terms and conditions of employment. The letters of the remaining three drivers did not, in fact, amount to unprotected "disparagement." Five Star, then, unlawfully refused to hire not just 6 of the drivers-applicants, but all 11—including the 5 drivers separated out by the majority (but not by Five Star). Consequently, as a successor employer, Five Star was required to recognize the drivers' union, contrary to the majority's conclusion.

I.

In early 2003, the Belchertown School District put its bus service contract up for bid. The drivers of the incumbent contractor (First Student, Inc.) were represented by United Food and Commercial Workers Local 1459.

The Union's secretary-treasurer, Daniel Clifford, attended a meeting at which the District passed out the specification for its upcoming bus contract. After the meeting, Clifford sent letters to all prospective bidders, including Five Star, indicating that the Union wished to continue to represent the drivers, no matter who won the bus contract. Five Star never responded to the Union's overture.

Five Star was the lowest bidder at the District's "bid opening" meeting on January 16, 2003. After the bid opening meeting, in a letter to the District's head of transportation, Union Official Clifford expressed concern that employees might not maintain their current wage and benefit package because Five Star's bid "had come in so low." Five Star was a nonunion company that paid lower wages and benefits to its drivers than First Student paid, and its bid was significantly lower than First Student's existing contract price.

Clifford hoped to convince the District to rebid the contract with a resolution requiring that all bidders respect the Union's collective-bargaining agreement. On

[11] It is undisputed that the unit would, at the least, include the Respondent's regular drivers. Thus, the smallest possible unit would be 20 employees. The Respondent contends that, for the purpose of determining whether there was a successorship majority, the unit should also include additional, "spare" drivers. It is not necessary for us to resolve that issue, because adding those spare drivers, none of whom had been employed by First Student, would only decrease the percentage, already less than a majority, consisting of former First Student drivers.

Because it is clear that a majority of the Respondent's drivers would not have been former First Student employees, even in the absence of the Respondent's unlawful conduct, we do not find it necessary to reach the issue of whether the judge properly applied the *Davison-Paxon* test in the instant case. *Davison-Paxon*, 185 NLRB 21 (1970).

[12] Further, because we find that the Respondent is not a successor employer to First Student, the General Counsel's exception that the judge erred in failing to include a finding of an 8(a)(5) violation in his decision is rendered moot.

January 31, 2003, Clifford and driver Andrea MacDonald, the shop steward, met with a group of drivers to discuss their concerns. Clifford asked the drivers to write letters, make phone calls, or talk to school committee members. The drivers met again on February 7 and discussed their e-mails, letters, and calls that they had prepared as part of their campaign. They then identified two drivers, including MacDonald, as spokespersons for a February 11 meeting of the District School Committee. In advance of the meeting, Clifford also passed out packets to each of the school board members, asking them to rebid the contract and require adherence to the Union's labor agreement.

Before the February 11 meeting, the District's superintendent of schools, Richard Pazasis, called Five Star's president, Theresa Lecrenski. According to Lecrenski, Pazasis told her that he had received e-mails and letters about Five Star's safety record, maintenance history, and treatment of employees. He told her that current drivers had written some of the e-mails and letters. She asked for copies, which she later received.

At the February 11 school committee meeting, driver and shop steward MacDonald spoke about the drivers' concerns regarding "our jobs, our wages, and our health benefits" and "safety issues we were aware of with the company." She requested that bidding be reopened so that all the contractors would bid with the union agreement in mind. Union Official Clifford expressed the same view.

The next morning, Clifford and 10 drivers (including Donald Caouette and MacDonald) met with Superintendent Pazasis. Pazasis assured them that he would do a thorough investigation of the issues that the drivers raised, and promised to talk to representatives of other school districts.

On February 24, 2003, the District's School Committee held a meeting to announce its new contract. Union official Clifford and a number of the drivers (including Charles Kupras and MacDonald) attended. Superintendent Pazasis began the meeting by stating that he had discussed the concerns raised by the drivers with other school districts, but that he was satisfied with what he learned. The meeting ended with the committee awarding the contract to Five Star.

At the end of the meeting, Union Official Clifford told driver MacDonald to talk to Five Star President Lecrenski about the drivers' wages and benefits. As she walked outside with her fellow drivers, MacDonald asked Lecrenski if they might meet to discuss the drivers' options. MacDonald testified that Lecrenski looked over her shoulder, said, "I don't think so," and kept walking.

On February 27, 2003, Lecrenski signed the District's contract on behalf of Five Star. Later, she picked up copies of the drivers' e-mails and letters from Superintendent Pazasis' office. She immediately read them. Shortly thereafter, Lecrenski decided that, solely because of their letters, Five Star would not hire any of the drivers. At the hearing in this case, Lecrenski explained her reasoning, asking rhetorically "Why would I want to hire someone who is against me before he even started working for me?" Lecrenski's later testimony is significant:

> Q. And the reason that you did not hire them or consider them for hire was because they sent the letters?
>
> A. They were trying to hurt me. Yes, that is correct.
>
> . . . .
>
> Q. So you looked at the letters in the big picture and treated the authors of the letters all of the same. Did you not?
>
> A. Anyone who is trying to hurt me and my company would not be a team player. So I guess I would have to answer yes to that. They were all against me.
>
> Q. So it did not matter to you what the particular letter said. It offended you that the Drivers had written the letters to the School Committee expressing their concerns.
>
> A. Well, I had to read the letter first to make sure what it said. They were against me. I mean why would I want someone who was against me? They did not even know me. They did everything that they could to deter the School Committee from giving me the contract. It [sic] is not a team player. It is just not a team player.

In May 2003, Lecrenski had phone conversations with drivers Rose, Ocasio, Nadle, and Taylor. She testified that she told each of them the same thing: that they were not being considered for hire because they wrote letters or e-mails "trying to deter the School Committee from awarding the contract to Five Star." She told each that she did not want this type of employee on her team.

II.

The majority begins by finding, correctly, that "all of the drivers engaged in concerted activity by preparing and submitting individual letters to the School Committee." It then divides the driver-applicants into three groups, based on the content of their individual letters, in order to determine whether they engaged in *protected*

activity. As to one group of six drivers,[1] the majority finds refusal-to-hire violations, observing that these drivers "expressed concerns about the Respondent within the context of the drivers' common desire to retain their negotiated terms and conditions of employment" and that any disparagement of the Respondent "was minor and occurred in the context of the drivers expressing their common employment concerns." I concur in that result. But the majority finds that the letters of the remaining five drivers, which fall into two groups, were unprotected, and so finds no unlawful refusal to hire with respect to those drivers. I disagree.

As I will explain, the majority's general approach (examining the content of the individual letters) is mistaken, although it leads to the right result with respect to six of the drivers.[2] But even if the majority were correct in parsing the letters separately, its analysis with respect to the five "unprotected" letters is mistaken.

A.

On the record here, an unlawful refusal to hire all 11 of the driver-applicants has been established. Contrary to the majority, the issue of whether a particular driver engaged in protected activity (and suffered retaliation as a result) does not turn on the individual content of each driver's letter, apart from the fact that each letter was part of a concerted effort before the school committee to prevent Five Star from winning the bus contract (and so to preserve the drivers' union-negotiated terms and conditions of employment).[3] As the Board has explained, in cases like this one involving "employee communications to third parties seeking assistance in an ongoing labor dispute," the "touchstone [is] . . . whether the communication was *a part of and related to* the ongoing labor dispute," not whether the communication referred to particular issues involved in the dispute. *Allied Aviation Service Co. of New Jersey,* 248 NLRB 229, 231 (1980) (emphasis in original).

The drivers' effort was protected under Section 7 of the Act, as the majority effectively acknowledges in finding that Five Star unlawfully refused to hire six of the drivers who participated in the campaign before the school committee.[4] The majority properly acknowledges that Five Star president "Lecrenski admitted that her decision not to hire the . . . eleven [driver] applicants was based solely on the fact that each had sent a letter to the School Committee." That admission established the refusal-to-hire violations.[5]

Obviously, the refusal to hire all of the drivers demonstrates that Five Star did not distinguish among them, based on the particular content of their letters. Lecrenski's testimony, set out earlier, confirms that fact. What mattered to her was simply that the eleven drivers each had sent letters that opposed Five Star's bid—as she told four of the drivers herself. Lecrenski said she read each letter, in order to verify that the letter writer was "against" her. As she testified, it was the common feature of all the letters that solely motivated her decision not to hire the drivers. The letters showed that "[T]hey were against [her]." Every driver who sent a letter was "not a team player."

Nothing in Lecrenski's testimony suggests that she regarded some letters as somehow different from others or that she focused on the particular content of individual letters. Only the majority does so. But there is no sound basis for this approach, given that Five Star's motive in refusing to hire the drivers was based entirely on the statutorily protected aim of the drivers' campaign (preserving their working conditions by preventing Five Star from winning the contract).

B.

The majority divides these five drivers into two groups, which I address in turn. The majority's analysis is flawed not only in analyzing the drivers' letters individually, but also on its own terms. Insofar as the particular content of the letters matters, the majority errs in failing to find the letters statutorily protected.

[1] The six are Steve Kahn, Suzanne LeClair, Terri Nadle, Caron Rose, Pauline Taylor, and Deborah Wenzel.

[2] I agree with the majority that, insofar as the issue is material, the individual letters of the six drivers did not lose the protection of the Act, based on their content.

[3] That campaign, of course, involved not only letter-writing, but also personal statements before the school committee (including by driver MacDonald, who was denied employment by Five Star), a meeting with Superintendent Pazasis (which included drivers MacDonald and Donald Caouette, also denied employment), and attendance at a school committee meeting (again including MacDonald, as well as driver Charles Kupras, also denied employment).

[4] *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–567 (1978) (endorsing decisions holding that Sec. 7's "mutual aid or protection" clause "protects employees from retaliation . . . when they seek to improve working conditions through resort to administrative and judicial forums" and that "employees' appeals to legislators to protect their interests as employees are within the scope of this clause"). See, e.g., *North Carolina License Plate Agency #18*, 346 NLRB 293 (2006) (complaint to state contracting agency by contractor's employees). See generally 1 *The Developing Labor Law* 239–241 (5th ed. 2006) (John E. Higgins, Jr., ed.).

[5] See *Tradesmen International, Inc.*, 332 NLRB 1158 (2000) (finding refusal-to-hire violation where employer did not dispute that union organizer was denied employment solely because of testimony before municipal board), enf. denied 275 F.3d 1137 (D.C. Cir. 2002). As the *Tradesmen* Board observed, "it is well settled that 'activity that is otherwise protected does not lose its protected status simply because [it is] prejudicial to the employer.'" 332 NLRB at 1160 (brackets in original), quoting *NLRB v. Circle Bindery, Inc.*, 536 F.2d 447, 452 fn. 7 (1st Cir. 1976).

1.

The majority concludes that the letters of two drivers, Candy Ocasio and Charles Kupras, were "not sufficiently related to the drivers' terms and conditions of employment to constitute protected conduct." Without a persuasive explanation, the majority rejects the view that "the letters should be interpreted as raising the drivers' common concerns simply because they were written as part of the drivers' letter-writing campaign." Citing *Waters of Orchard Park*,[6] the majority concludes that the "content of [the] letters of Ocasio and Kupras did not "constitute protected conduct," because the letters "focused solely on general safety concerns and did not indicate that their concerns were related to the safety of the drivers as opposed to others." The majority's approach is flawed.

As the majority itself recognizes, the drivers' campaign was both concerted (it involved the Union and several drivers, acting together) and protected (the drivers acted to preserve their existing terms and conditions of employment, in the context of a labor dispute). Ocasio and Kupras engaged in protected, concerted activity by participating in that campaign and sending letters to the school committee.[7] In turn, Five Star refused to hire *all* drivers who wrote letters (including Ocasio and Kupras) because they participated in the letter-writing campaign, not because of the individual content of their letters.[8]

But even ignoring that the letters were an inextricable part of the Union's campaign and assuming that only their content matters, each of the two letters—or, more properly speaking, the sending of those letters—was protected, because both Ocasio and Kupras referred to the safety of Five Star's buses. Ocasio, who said she wrote "as a school bus driver" employed by First Student (and as "a resident of Belchertown and a mother of two children who attend Belchertown schools"), asserted among other things that Five Star had "been known to be unreliable with buses being unsafe." Kupras stated, in part, that "Five Star buses are of low standard and maintained inadequately." He contrasted the standards of First Student, including "safe vehicles and most importantly the personnel who have all proven to be responsible professionals." Contrary to the majority's view, these statements directly implicated the drivers' terms and conditions of employment.[9] Unsafe buses are obviously a danger not only to passengers, but also to drivers.[10]

Waters of Orchard Park, cited by the majority, does not support its position. There, nurses who called a state agency to complain about excessive heat in a nursing home "explicitly disclaimed an interest in their own working conditions when they called the hotline," and insisted that they were calling only to protect patients. 341 NLRB 642, 643. It was on that basis alone that a Board majority found no violation with respect to the nurses' discharge for complaining.[11] Here, in contrast, Ocasio and Kupras never disclaimed an interest in their own working conditions. Indeed, Ocasio identified herself as a First Student bus driver, while Kupras touted the professionalism of First Student personnel.

The majority asserts that the letters of Ocasio and Kupras were "not aimed at improving terms and conditions of employment under the Respondent." But what matters, as the majority seems to recognize elsewhere, is that the drivers' campaign was directed to maintaining their existing terms and conditions of employment. There is no statutory requirement that the letters be aimed at the terms and conditions of employment of any particular prospective employer in order for them to be protected by Section 7. See *Eastex*, supra, 437 U.S. at 566–567. Nor were the letters required to be "virtual carbon cop[ies]" of the letters that the majority does find to be protected. *Allied Aviation*, supra, 248 NLRB at 231. The Ocasio and Kupras letters indisputably were part of and related to the letters of the other drivers, satisfying the controlling standard. Id.

2.

According to the majority, the remaining three drivers (Donald Caouette, Patty Grasso, and Andrea MacDonald) sent letters that constituted unprotected "disparagement of the Respondent's business."[12] The majority

[6] 341 NLRB 642 (2004).

[7] Kupras also attended a meeting of the school committee.

[8] The majority insists that "it was the content of the letters, not the act of sending them, that caused the discharges." In support, it cites the testimony of Five Star President Lecrenski that she read the letters. But Lecrenski's testimony, discussed earlier, establishes that the only "content" of the letters that mattered to her was each driver's expressed opposition to Five Star's bid, not the particulars of what the driver wrote.

[9] As the administrative law judge here recognized, despite upholding the refusals to hire, "Ocasio and Kupras' concern for the safety of the busses [sic] could be considered as pertaining to a condition of employment, since, if they had been hired, they would be driving one of the Respondent's busses [sic]."

[10] The welfare of an employer's customers or clients is often inextricably intertwined with the working conditions of its employees. See, e.g., *Misercordia Hospital Medical Center v. NLRB*, 623 F.2d 808, 813 (2d Cir. 1980) (discussing relationship between welfare of patients and working conditions of hospital staff).

[11] Member Meisburg concurred separately, joining Chairman Battista and Member Schaumber, and supplying the majority rationale. Member Walsh and I dissented. While I believe that *Waters of Orchard Park* was wrongly decided, I acknowledge that the decision represents Board law.

[12] In addition to writing a letter, McDonald addressed the School Committee at a meeting, met with Superintendent Pazasis, and at-

invokes the Supreme Court's *Jefferson Standard* decision[13] and its progeny in Board case law to conclude that the drivers' letters lost the protection of the Act. That conclusion is mistaken for several reasons.

To begin, the notion of unprotected "disparagement" depends on a duty of loyalty created by the existence of an employment relationship, as *Jefferson Standard* makes clear. There, the Supreme Court upheld the discharge of employees who circulated a disparaging handbill that made no reference to the employees' own interests or to an ongoing labor dispute between the employees' union and the employer. The Court observed that "[t]here is no more elemental cause for discharge of an employee than disloyalty to his employer." 346 U.S. at 472.[14] The Board, in turn, has recently recognized that in the absence of an existing employment relationship, a statutory employee owes no duty of loyalty to a future, prospective employer. *American Steel Erectors, Inc.*, 339 NLRB 1315, 1317 (2003).[15]

Here, of course, there was no employment relationship between the drivers and Five Star. At the time the letters were sent, the drivers had not even applied to Five Star for work: Five Star had not yet been awarded the school bus contract; the award was precisely what the drivers hoped to prevent because it represented a grave risk of loss not only of their existing terms and conditions of employment but also of their jobs. As a result, the drivers could hardly be guilty of disloyally disparaging Five Star, and the *Jefferson Standard* line of cases has no proper application.

The analogy in this case is not with *Jefferson Standard*, but with the Supreme Court's decision in *Town & Country Electric*.[16] Five Star simply assumed that because the driver-applicants had participated in the protected, concerted letter-writing campaign—at a time when they owed Five Star no duty of loyalty—they were categorically unfit for employment when they applied, following the school committee's award of the contract to Five Star. As the Supreme Court explained in *Town & Country*, in the context of the statutory-employee status of paid union organizers who seek employment, employers are not legally entitled to base their hiring decisions on such assumptions. "[E]ven if a company perceives . . . protected activities as disloyal," they remain protected. 516 U.S. at 96.

There is no basis for concluding that the driver-applicants were categorically unfit for employment, simply because they participated in the letter-writing campaign. That campaign was designed to preserve the drivers' status quo. Once Five Star had been awarded the contract, the drivers' efforts to prevent the award had no connection to their fitness for employment. If they wanted to continue their service as school bus drivers, the drivers had no choice but to seek, and seek to keep, jobs with Five Star. Presumably, then, they would be loyal to their new employer. On the other hand, it is surely no coincidence that by refusing to hire the driver-applicants, Five Star avoided a duty, as a successor employer, to recognize the drivers' union.

In any case, Five Star did not justify the refusal to hire the three drivers in question because of their supposed "disparagement" of the Company. Rather, it acted on a common basis with respect to all of the driver-applicants: their participation in the letter-writing campaign, as opposed to the individual content of their letters. Even assuming that some of the content of the letters was unprotected (a point I do not concede), the testimony of Company President Lecrenski precludes Five Star from arguing—much less proving—that it refused to hire drivers Caouette, Grasso, and MacDonald because of their unprotected statements.

It is not enough to show, as the majority apparently believes, that certain statements were unprotected. See, e.g., *Waste Management of Arizona*, 345 NLRB 1339, 1341–1342 (2005).[17] The letters in question were sent as

tempted to speak to Lecrenski about the drivers' situation. Caouette participated in the meeting with the superintendent.

[13] *NLRB v. Local 1129,* 346 U.S. 464 (1953).

[14] A leading treatise contends that the "logic of *Jefferson Standard* is not compelling and its reach unclear," citing the Court's borrowing of the concept of "cause" from outside the Act and the "admixture of factual elements" on which the holding was based. Robert A. Gorman & Matthew W. Finkin, *Basic Text on Labor Law* § 16.11 at 426–427 (2d ed. 2004).

[15] In *American Steel Erectors*, supra, the majority found no unlawful refusal to consider the applicant, under the circumstances. The majority applied not the *Jefferson Standard* test, but rather the test used by the Board "[w]hen an employee is discharged for conduct that is part of the res gestae of protected concerted activity." 339 NLRB at 1316, citing *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). The applicant, a former union official, had made "disparaging remarks" about the employer to a state agency "in the absence of any labor management dispute." 339 NLRB at 1317. According to the majority, those remarks were "deliberate and outrageous exaggerations," accusing the employer of unsafe work practices that were the equivalent of "throwing babies into the Merrimack River." Id.

I dissented, arguing that the proper standard was whether the applicant's language was "so extreme that it made him categorically unfit for future service with the [employer]. Id. (emphasis and footnote omitted). In my view, the applicant was a "paid advocate" "guilty of nothing more than hyperbole." Id. *American Steel Erectors* does not support the majority's position in this case. Here, as I will explain, there were no "deliberate and outrageous exaggerations," and there *was* a labor dispute.

[16] *NLRB v. Town & Country Electric, Inc.,* 516 U.S. 85 (1995).

[17] In *Waste Management of Arizona*, supra, a union supporter engaged in an argument with a supervisor, involving a reduction in pay, during which employee screamed profanities. The Board found that the employee "lost the protection of the Act by engaging in opprobrious

part of the protected concerted letter-writing campaign. Moreover, the majority acknowledges that the letters did "refer to terms and conditions of employment, and in this sense, [did] refer to a 'labor dispute' with" Five Star. The General Counsel has shown, at a minimum then, that Five Star's refusal to hire was based in part on the protected, concerted activity of Caouette, Grasso, and MacDonald. Given Lecrenski's admission, Five Star, in turn, cannot establish that it would have refused to hire the three drivers even in the absence of this protected conduct.

The majority argues that because "[i]t is undisputed that the Respondent refused to hire Caouette, Grasso, and MacDonald because of their letters to the School Committee," the "only issue is whether the letters constituted protected conduct under the Act." That formulation is misleading because Five Star has never argued that it relied on the supposedly unprotected aspects of the three drivers' letters in refusing to hire them.[18]

Finally, even assuming that a *Jefferson Standard* "disparagement" approach is proper here, the majority fails to evaluate the three letters correctly, in light of Board precedent.

Under the established test, the Board asks whether the communication to a third party is "so disloyal, reckless or maliciously untrue as to lose the Act's protection," and it evaluates the communication "in its entirety and in context." *Endicott Interconnect Technologies, Inc.*, 345 NLRB 448, 451 (2005) (internal quotation marks omitted). The Board has cautioned that "great care must be taken to distinguish between disparagement and the airing of what may be highly sensitive issues." *Allied Aviation,* supra at 231.[19] The majority's analysis reflects a lack of requisite care. The result is to chill employees involved in labor disputes from seeking the help of third parties—in this case, a government body that the drivers were constitutionally entitled to petition.

It is certainly true that, in the words of *Allied Aviation*, the letters of the three driver-applicants raised "highly sensitive issues." As the majority points out, the letters referred to 1996 incidents involving Five Star that had been reported in newspaper accounts: the failure of Five Star's buses to start in cold weather, leaving students stranded; Five Star's hiring of a convicted sex offender who lacked a bus driver's license; and a Five Star driver with a long history of driving infractions, who drove his route after drinking alcohol at lunch. Five Star was surely embarrassed by these references. But embarrassment is not the standard for losing the protection of Section 7. Rather, as the judge correctly observed:

> [N]one of the information or contentions communicated by the eleven drivers to the Belchertown School Committee were made with knowledge of their falsity, or with reckless disregard of the truth. Indeed, many of the unflattering contentions were accurate, albeit dated.

The majority does not take issue with the judge's characterization.

Instead, the majority points out that the letters used "inflammatory language," citing references to Five Star as "substandard" and "reckless" (MacDonald), as displaying "incompetence and negligence" (Grasso), and as being "careless" (Caouette). Precedent makes clear, however, that such language is protected by the Act. "Federal law gives license in the collective-bargaining arena to use intemperate, abusive, or insulting language without fear of restraint or penalty if the speaker believes such rhetoric to be an effective means to make a point." *Phoenix Transit System*, 337 NLRB 510, 514 (2002). See generally *Letter Carriers (Old Dominion Branch No. 496) v. Austin*, 418 U.S. 264 (1974).

The statements cited by the majority are certainly no more "inflammatory" than other language used by *current* employees that the Board has found to be protected, such as:

> [S]tatements by a bus-drivers' union to a school board and to parents that questioned the qualifications of replacement drivers, intimated that the employer was using undue influence to win a contract extension, and

and abusive conduct." 345 NLRB at 1341. It nevertheless held that given the General Counsel's showing that antiunion animus was a factor in the discharge of the employee, the employer was required to prove that it would have discharged the employee because of his unprotected outburst, even in the absence of protected conduct. Id. at 1342. (I dissented, finding that the employer had not satisfied its burden on this point. Id. at 1343.)

[18] Rather, as pointed out, Five Star denied employment to all of the drivers who wrote letters, simply because they wrote letters. It did not distinguish among the letters, nor did it sift through the content of any individual letter.

The flaw in the majority's position is easily demonstrated. Assume that Five Star *had* argued that it considered the particular content of individual letters, that it refused to hire only those drivers whose statements lost the protection of the Act, and that its action was based on the unprotected nature of the statements. On the record here, the General Counsel would have established that Five Star's defense was a pretext, in light of the fact that it refused to hire *all* the drivers.

Under the majority's view, ironically, Five Star is shielded from liability *because* it never asserted a lawful basis for refusing to hire Caouette, Grasso, and MacDonald (the arguably unprotected nature of certain of their statements), but instead invoked only an unlawful reason for refusing to hire all of the drivers (their protected opposition to Five Star's bid).

[19] "The cases decided subsequent to *Jefferson Standard* have placed a nuanced and limiting gloss on the concept of 'disloyalty.'" Gorman & Finkin, *Basic Text on Labor Law*, supra, §16.11 at 427.

> characterized the employer's owners as "belligerent" and arrogant."[20]
>
> [S]tatements in letters to customers that the employer was using a procedure that was a "hazzard [sic] to airline personel [sic], equipment, facilities, and customers" and that employees' "only purpose is to act as a scapegoat, should a tragedy occur."[21]
>
> [S]tatements to a customer that the employer "can't finish the job," that "these people never pay their bills," that the employer "is no damn good," and that the employer's president was "no damn good" and a "son of a bitch."[22]
>
> [S]tatements reported in a newspaper and in an on-line forum that the employer was "being tanked" and "put into the dirt" by management, and that layoffs had left "gaping holes" and "voids in the critical knowledge base" of the company.[23]

The majority cites no precedent at odds with these decisions.

Instead, the majority asserts that the use of "inflammatory language," the references to "incidents not related to the drivers' group concerns," and the fact that references to the labor dispute were "minor in comparison to the disparaging remarks," together meant that the letters were unprotected. Such a fine parsing of the drivers' letters has no support in the Board's case law, even apart from the mistaken reliance on "inflammatory language." Indeed, the *Allied Aviation* Board has rejected essentially the same approach. What matters, the Board said there, is "whether the communication was *a part of and related to* the ongoing labor dispute." 248 NLRB at 231 (emphasis in original). A more restrictive test, like the one created by the majority here, "would, in many cases, be depriving employees of what may be their most cogent argument for obtaining the third party's aid." Id. at fn. 10. The majority's test, moreover, is both unworkable and under-protective. It offers employees no guidance in deciding how much "protected" matter a communication must contain, in relation to what the Board may determine to be content that is unrelated to group concerns, before employees may safely seek the aid of a third party in a labor dispute.

III.

Five Star, then, unlawfully refused to hire all 11 drivers who participated in the letter-writing campaign. The majority's mistaken failure to find violations with respect to all 11 drivers has the exacerbating effect of excusing Five Star's failure to recognize the Union—just as the drivers feared would happen. Absent unlawful discrimination, seventeen of Five Star's drivers (the 11 drivers at issue here, plus 6 drivers who were hired) would have been former employees of First Student, a number sufficient to make Five Star a successor employer, required to recognize the Union. As the judge did, I would find that Five Star violated Section 8(a)(5) by failing to do so. Accordingly, I dissent.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discriminate against any of you in consideration for employment for engaging in activities protected by the National Labor Relations Act.

WE WILL NOT tell any of you that you are being discriminated against in consideration for employment due to your protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the National Labor Relations Act.

WE WILL, within 14 days from the date of this Order, offer Steve Kahn, Suzanne LeClair, Terri Nadle, Caron Rose, Pauline Taylor, and Deborah Wenzel instatement to the position they would have held absent the Respondent's refusal to hire them or, if those positions no longer exist, to substantially equivalent positions, without

[20] *Montauk Bus Co.*, 324 NLRB 1128, 1138–1139 (1997). The majority's assertion that the "judge in *Montauk* applied a legal analysis different from the analysis appropriate here" is simply incorrect. The judge applied the *Jefferson Standard* test in rejecting the argument that a strike was unprotected because the Union had disparaged the employer's product. Id. at 1138.

[21] *Allied Aviation*, supra, 248 NLRB at 229, 231.

[22] *Emarco, Inc.*, 284 NLRB 832, 833–834 (1987).

[23] *Endicott Interconnect*, supra, 345 NLRB at 452–453.

prejudice to their seniority or any other rights or privileges they would have enjoyed absent the Respondent's refusal to hire them.

WE WILL make Steve Kahn, Suzanne LeClair, Terry Nadle, Caron Rose, Pauline Taylor, and Deborah Wenzel whole for any loss of earnings and benefits suffered as a result of our refusal to hire them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to our unlawful refusal to hire Steve Kahn, Suzanne LeClair, Terri Nadle, Caron Rose, Pauline Taylor, and Deborah Wenzel, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that their protected concerted activities will not be used against them in any way.

FIVE STAR TRANSPORTATION, INC.

Elizabeth Tafe and *Elizabeth Vorro, Esqs.,* for the General Counsel.

Robert L. Dambrov, Esq. (*Cooley, Shrair, P.C.*), of Springfield, Massachusetts, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Springfield, Massachusetts, on April 20–22, 2004. The charge was filed on August 14, 2003, and the complaint was issued on March 17, 2004.

The General Counsel alleges that the Respondent, Five Star Transportation, Inc., violated Section 8(a)(1) of the Act in refusing to consider for hire, and in refusing to hire, 11 job applicants because they engaged in protected concerted activity by writing or sending e-mails to the Belchertown, Massachusetts school committee that were critical of Five Star. The 11 alleged discriminatees are former employees of First Student, Inc., which operated the Belchertown school buses before Respondent. Five Star concedes that it refused to consider for hire, or hired, any of the 11 alleged discriminatees solely due to the fact that they sent these letters and e-mails to the school committee. In fact, when four of the alleged discriminatees inquired as to the status of their employment applications, Theresa Lecrenski, Five Star's president, told them they were not being hired due to the fact that they had sent these letters and e-mails to the school committee. The General Counsel alleges that in informing these employees that this was the reason they were not being hired, Respondent committed and independent violation of Section 8(a)(1).[1]

However, Respondent contends that the letters are not protected due to the fact that they disparaged Respondent and sought to have the school committee award its contract for school bus services to First Student or one of Respondent's other competitors. Respondent also contends that the letters were individual acts and do not constitute concerted activity.

The General Counsel further alleges that Respondent violated Section 8(a)(5) and (1) of the Act in refusing to recognize and bargain with the Union. This allegation is predicated on a contention that had Five Star not illegally discriminated against the 11 former employees of First Student, it would have been obligated to recognize and bargain with the Union as First Student's successor. Respondent contends that even if it had hired the 11, a majority of its bargaining unit employees would not have been former members of the First Student bargaining unit. Therefore, it would not have been obligated to recognize and bargain with the Union.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, Five Star Transportation, Inc., a corporation, has its main office in Agawam, Massachusetts, and operates school buses under contract with several school districts in the vicinity of Springfield, Massachusetts. It annually derives revenues in excess of $250,000, and purchases and receives goods at the Agawam facility valued in excess of $5000 directly from points outside of the State of Massachusetts. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Local 1459 of the Transportation Division, United Food and Commercial Workers Union (UFCW) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Belchertown School District has contracted with private companies to operate its school buses for a number of years. In 1999, Laidlaw Transit, Inc., which had the contract at the time, voluntarily recognized the Union as the exclusive bargaining representative of all regular bus drivers, spare drivers, utility drivers, and trainers employed by Laidlaw at Belchertown. In 2000, Belchertown put its school bus contract out for bids and awarded the contract to Bruce Transportation, Inc., which later changed its name to First Student, Inc. Bruce recognized the Union and signed a collective-bargaining agreement.[2] That agreement included provisions for fringe benefits including several paid holidays, employer contributions to employee health insurance, an employer-paid life insurance policy of $15,000 and a seniority system for allocating nonrevenue work and charter trips. First Student and the Union negotiated a new contract in November 2002 with similar provisions in anticipation of the bidding for the 2003–2006 Belchertown school bus contract.

On or about January 16, 2003, Respondent Five Star, and the

[1] This is alleged as a separate violation in par. 8 of the complaint. Lecrenski concedes that she told Terri Nadle, Candy Ocasio, Caron Rose, and Pauline Taylor that they were not being hired due to these letters and emails.

[2] The collective-bargaining agreements between the Union and both Laidlaw and First Student include "special needs drivers" in the bargaining unit. However, the Union apparently never represented such employees.

Union learned that Respondent had been awarded the 2003–2006 Belchertown school bus contract. Five Star has been in business for 35 years operating school buses for a number of localities in the Springfield, Massachusetts area. It has never had employees who were represented by a union.

On January 21, Daniel Clifford, a union vice president and business agent for the Belchertown school bus drivers, sent one letter to the associate superintendent of the Belchertown Public Schools and another to Theresa Lecrenski, the president of Five Star. In pertinent part his letter to the associate superintendent stated:

> Local 1459 has struggled long and hard over the years negotiating decent wages and benefits in the industry for our school bus drivers. These area standards are subject to erosion by potential "predatory bidding" by less than fair-minded bus operators.
>
> . . . .
>
> Five Star Transportation, Inc. of Agawam bid about $300,000 lower than the current contractor. They bid about $30 a day cheaper than the work that is done currently. We question how they will be able to pay the current wage and benefit package, maintain operation costs (fuel, equipment, etc.) and provide safe and effective service at the bargain basement price. In order to create a level playing field and a more equitable bid process, we asked previously that any prospective bidder factor into their bid model the wages and benefits of the current labor agreement.
>
> The school bus drivers serving Belchertown are your neighbors and fellow taxpayers, their jobs and quality of life are in jeopardy. We hope you will support those that safely transport the district's school children. [GC Exh. 15.]

Clifford faxed to Lecrenski a letter that stated in part:

> If my information is correct and your organization does intend to seek to replace the current contractor, I want to hear from you promptly and I want to secure from your organization a guarantee that, if you are the successful bidder, our members will continue in their jobs with full seniority, that you will recognize Local 1459 as the exclusive bargaining agent for all of your employees not specifically excluded from representation by the National Labor Relations Act and that you will sit down with Local 1459 immediately upon your selection as the successor to negotiate a successor agreement that our members expect such a contract to be in effect prior to the first bus leaving the yard for the fall semester.
>
> If we do not hear from your organization 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 organization could be expected to in protecting the hard-won benefits of its members. [GC Exh. 5.]

Theresa Lecrenski received this letter but did not respond to it. Clifford then organized a meeting on January 31, 2003, that was attended by a number of the Belchertown school bus drivers. Two of these drivers, Alma Coderre and Lorrie Poulin, had worked for Five Star previously. Coderre told fellow employees that Five Star had fired her because she was unable to work full time after recovering from an injury. Poulin asserted that when the buses had mechanical problems they were not quickly corrected. (Tr. 168.)[3] Poulin may also have stated that Respondent's drivers did not always conduct pretrip inspections.[4] In preparation for the meeting Clifford downloaded a number of unflattering newspapers articles concerning Five Star that appeared in the Daily Hampshire Gazette in the spring of 1996. He distributed these articles to the drivers on January 31.

One article concerned an incident in February 1996, in which a number of Five Star buses failed to start in extremely cold weather, resulting in a number of students being stranded at their bus stops in the Amherst-Pelham school district. The Amherst School superintendent was quoted as criticizing Respondent for not notifying him of the problem in time for him to delay the opening of school. The newspaper article stated, as Lecrenski testified, that other school bus companies in the Springfield area had similar problems. Lecrenski does not deny that the incident occurred. However, she explained at the instant trial that her buses were new and that her company had followed all the manufacturer's recommendations. There is no evidence that Five Star ever experienced such a problem other than on the one day in question.

Another article in March 1996 concerned Five Star's employment of a convicted sex offender as a school bus driver in Amherst. Due to the conviction the driver did not have a valid Massachusetts school bus driver's license. Theresa Lecrenski does not deny that the incident occurred. She stated at the instant trial that the employment of the driver was the result of an administrative oversight by the Massachusetts Department of Public Utilities.[5]

A May 1996 article concerned a Five Star driver, who had consumed alcoholic beverages at lunch and then drove a school bus in the afternoon. As a result of failing to take a Breathalyzer test, the driver was fired. Another article later that month reported that the driver in question had eight driving infractions between 1983 and 1990, including one for drunken driving and another for driving with a revoked license. Lecrenski does not take issue with the fact that the 1996 incident occurred. No followup to any of these stories appeared in any newspaper giving the exculpatory factors about which Lecrenski testified at the instant hearing.

A third article appearing in the Daily Hampshire Gazette in May 1996 reported that the Amherst school district was abrogating its contract with Respondent and that Respondent was suing the school district for breach of contract. There is no evidence in this record bearing on the accuracy of the story or the outcome of the suit, if there was one.

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[3] Neither Coderre nor Poulin is an alleged discriminatee in this matter. Neither applied for a job with Respondent.

[4] I infer that either Coderre or Poulin was the source of this assertion by Caron Rose in her letter to the Belchertown school committee.

[5] According to the news article, in 1996, someone with a commercial driver's license, but not a school bus driver's license, could drive a school bus in Massachusetts in a "loosely defined" emergency, generally for not more than 3 consecutive days.

At the union meeting on January 31, the drivers were encouraged to write to the Belchertown school committee. Copies of the 1996 newspaper articles were disseminated. The eleven discriminatees and a few other drivers, who never applied for a job with Five Star, wrote such letters between February 3 and 8, 2004. During this period Union Vice President Clifford faxed a recognition agreement to Lecrenski, which she ignored.

The letters of the discriminatees are not identical, however, with the exception of Candy Ocasio's e-mail and Charles Kupras' letter, each one of them explicitly communicates a concern as to whether Respondent will retain their services if it is awarded the contract and/or whether it will reduce the wages and benefits the drivers received from First Student.[6] The letters differ with regard to the emphasis they place on these concerns as opposed to the safety of Belchertown school children and in the degree that they disparage Respondent.

Donald Caouette's letter is written both in the first person singular and first person plural. He wrote, "[I]n speaking collaboratively for the majority of Belchertown drivers, we are extremely concerned about this contract for many reasons and would like the opportunity to convey these concerns to you." Caouette summarized the benefits provided to the drivers by First Student: health insurance, paid holidays, bonus opportunities and a 401(k) plan. He then complained that the Five Star does not employ part-time drivers. Caouette discussed the incidents set forth in the Daily Hampshire articles. With regard to the failure of Five Star's buses to start, Caouette asserted that this occurred on "a couple of days during the winter back a few years ago." However, the news articles mention only one day of such a problem.

Caouette suggested that the selection of Respondent would compromise the safety of Belchertown's school children. He opined that if Belchertown parents were presented with Respondent's reputation they would be willing to pay a fee to avoid relying on "a company of this stature." He concluded by asking for an opportunity for the incumbent drivers to meet with the school committee members to explain their concerns.

Patty Grasso's letter also raised child safety concerns citing the 1996 newspaper articles. She also questioned whether Five Star would retain the current Belchertown drivers and whether they would retain their benefits if they were hired.[7] Her letter concluded, "I ask you to reconsider Five Star Transportation as the new school bus contractor. I believe they have made it perfectly clear that they provide Five Star(s) in name only and not in the service."

Steve Kahn wrote:

> The bus drivers have two main concerns. The first is that Five Star undercut the other bidders by not agreeing to adhere to our current labor agreement. This created a less than even playing field among bidders.
>
> Our second concern focuses on student safety: You need to be satisfied with the answer to the following questions.

The questions posed relate to maintenance, staffing, and driver qualifications. Kahn made no accusations about Five Star and did not specifically ask the school committee to award the school bus contract to another bidder. However, Kahn asked that it "consider the worth of proven performance balanced against reasonable cost. Ask yourself, how can one company be able to bid lower than the others? What corners will be cut? Please compare reputations."

Charles Kupras wrote:

> Five Star Transportation has intentionally underbid other companies in the hope of taking advantage of the financial problems being forced on our cities and towns by State budget cuts.
>
> Five Star has a long publicized history of problems. The primary issue is safety. Five Star buses are of low standard and maintained inadequately. Some drivers are poorly trained and of questionable character. There have been reported incidences of drivers with criminal records. One such driver was allowed to operate while his license was suspended. Five-Star lacks the values of its competitors and fails to warrant the responsibility of transporting our children.
>
> The right to re-bid, disregard or veto the low bidder is a decision you must make for the entire community. Please put our children's safety first.

Suzanne LeClair asked the school committee to reconsider awarding the bus contract to Respondent. She stated, "There are several safety concerns with this company, which you have been made aware of, and you can't put a dollar sign on safety." LeClair predicted that if Respondent was awarded the contract that the drivers would lose all their benefits. She continued, "What will you be left with? . . . School bus drivers that don't know your children or care if they get home safely, or in a timely fashion and poorly maintained busses!?" LeClair concluded by asking the school to either reconsider the award or to rebid the contract to include the driver's current wages and benefits. "This would allow more safety oriented companies a fair chance."

Andrea MacDonald in her letter to the school committee characterized Five Star as a "sub standard company" and opined that "the best decision is not made if you chose this company." She characterized Respondent as having "a poor safety record and work ethic" and being reckless in employing "alcohol abusers, drug offenders, child molesters, and persons that have had their license suspended." Additionally, she raised the specter of children waiting in the cold beside the road in broken-down buses. MacDonald also expressed concern about wages and benefits and suggested that either the contract should be awarded to a bidder other than Five-Star, or be rebid.

In contrast, Terri Nadle's letter expressed concerns if Five Star was awarded the contract, but made no accusations against

[6] Ocasio and Kupras' concern for the safety of the buses could be considered as pertaining to a condition of employment, since, if they had been hired, they would be driving one of Respondent's buses.

[7] The 2003–2006 contract provided that if the successful bidder was not the current vendor that, "all current drivers and the current supervisor on site should be given first consideration for employment (emphasis added)." The 2000–2003 contract provided that if the successful bidder was not the current vendor, "all current drivers must have a first refusal option for employment." GC Exhs. 8–11.

Respondent and asked nothing specific from the school committee. Nadle wrote:

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

Candy Ocasio wrote that awarding the school bus contract to Five Star "might not be a wise decision." She continued:

> It has been know[n] in the past that this company has hired not only unlicensed drivers, but there have been two incidents of them hiring a convicted child molester, and a driver who was driving a school bus with a half dozen children under the influence. They have also been known to be unreliable with busses being unsafe.

Ocasio concluded by stating that she would not have her own children ride on Five Star buses due to her lack of confidence in their safety record. In isolation, Ocasio's letter would not provide the reader with an indication that she was concerned with the wages and terms of employment of the Belchertown drivers—other than the safety of the buses employees would have to drive.

Caron Rose told the school committee that based on her review of newspaper articles and conversations with former Five Star employees that she had concerns about the safety of Belchertown students if Respondent was awarded the school bus contract. She stated that former Five Star drivers (assumedly Coderre and Poulin) had indicated that Respondent did not properly maintain its buses and that it did not require its drivers to complete a pretrip inspection of the bus before leaving the garage. Rose commented favorably on First Student's maintenance of its buses.

Rose then stated:

> Based on Five Star Transportation's past performances, I feel there will be no continuity of the top-notch service, which Belchertown has become accustomed to, from Joan Crowther [First Student's supervisor in Belchertown] and her drivers. I know this company had the low bid for the contract, but can a price be put on the safety and well being of our children?

She concluded by expressing several concerns, including whether Five Star would treat the drivers fairly with regard to wages and benefits.

Pauline Taylor expressed concern about the wages and benefits to be offered by Five Star. She continued:

> They are also a non-union company. It also makes you wonder how much quality service they can provide and safety with such a lower bid.
>
> . . . .
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> I have heard some stories about Five Stars drivers and how their company is runed [sic]. It really worries me. I am concerned about driving for Five Star and very concerned about letting my children ride on their buses.

Taylor then requested that the contract be rebid with what appears to be a union-initiated resolution attached to the bid specifications.[8]

Deborah Wenzel stated that she did not see how, given the amount of its bid, Respondent could give the drivers a wage and benefit package comparable to what they were receiving from First Student. She continued:

> I have heard of and read about many of the poor practices of this company. Four of our current drivers left Five Star due to the poor treatment by them. My husband recalls a time when the Belchertown School Committee refused to accept a bid from Five Star. This was because of their mishandling and subsequent forfeiture of the Amherst contract before completion of year one of a five-year contract. Do we really want to put our town in this position?

The award of the Belchertown school bus contract was delayed while the school committee considered the issues raised in the drivers' letters. Ultimately, however, Respondent was awarded the contract and the superintendent of Schools provided all 11 letters to Lecrenski, pursuant to her request and the Massachusetts Freedom of Information statute.

Seventeen Belchertown drivers, who were members of the First Student bargaining unit, applied for a bus driver position with Respondent. Six, none of whom wrote letters to the school committee, were offered employment; four accepted. Respondent gave preference to these drivers over applicants who worked for Five Star in other localities and over new hires. Theresa Lecrenski did not consider hiring any of the 11 letter writers, solely due to the fact that they wrote the aforementioned letters to the school committee.

Did the Alleged Discriminatees Engage in Concerted Protected Activity

Section 7 of the Act provides:

> Employees shall have the right of self-organization, to form join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

In *Myers Industries,* 268 NLRB 493 (1984), and again in *Myers Industries,* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, when individual activity, such as the letter writing campaign in the instant case, is a logical outgrowth of concerns expressed by a group of employees, it is a continuation of the concerted activity and protected by Section 7. *Salisbury Hotel,* 283 NLRB 685 (1987); *Every Woman's Place,* 282 NLRB 413 (1986).

[8] I assume this is the resolution that appears on the last page of GC Exh. 16. It essentially requires any successor contractor to offer employment to the current Belchertown drivers and abide by the terms of the Union's collective-bargaining agreement with First Student. Taylor's letter is the only 1 of the 11 that makes specific reference to this resolution.

I find that the letter writing campaign to the school committee was a logical outgrowth of the concerns expressed by the employees collectively at the January 31, 2003 meeting. Moreover, the fact that Respondent treated the 11 letter writers as a group in deciding not to consider them for employment, leads me to conclude that Lecrenski recognized the concerted nature of the letter writing campaign. *Mike Yurosek & Son, Inc.,* 306 NLRB 1037 (1992); 310 NLRB 831 (1993). Respondent's belief that the employees acted in concert brings them within the protection of the Act even if their activities were not concerted. *Daniel Construction Co.,* 277 NLRB 795 fn. 4 (1985); *Monarch Water Systems,* 271 NLRB 558 (1984).

Were All or Some of the Letters Protected

Alleged Interference with Respondent's Contractual Relationship

Respondent relies on the Board's recent decision in *ATC/Forsythe & Associates,* 341 NLRB 501 (2004), in arguing that the alleged discriminatees' letters to the school committee are not protected by Section 7 because they attempted to interfere with the contractual relationship or potential contractual relationship between Respondent and the Belchertown school committee.

In *ATC/Forsythe* an employee of a company providing bus service to the city of Tempe, Arizona, met with city officials and offered his dissident union group "as an organized alternative to ATC Tempe either as city employees, or as an alternate service provider." The employer accused the employee of interfering with its contractual relationship with the city and offered the employee an opportunity to explain his activities. The employee refused to respond to the request for information. He was fired for his refusal to cooperate in the company's investigation. The Board held that the employee's activities were unprotected because the object was the replacement of his employer as Tempe bus contractor by his dissident union group.

Other cases in which the Board has reached similar conclusions are *Kenai Helicopters,* 235 NLRB 931, 936 (1978), *Associated Advertising Specialists, Inc.*, 232 NLRB 50, 53–54 (1977), and *North American Dismantling Corp.,* 341 NLRB 665 (2004). In *Kenai Helicopters*, the Board found the activities of a helicopter pilot and mechanic unprotected. The two told their employer's dispatcher that they were going on strike and while doing so would operate as a competitor of their employer, flying tourists around the island of Kauai who otherwise would fly with their employer.

In *Associated Advertising Specialists, Inc.,* the employer produced advertising materials for its customers, the principal one of which was Rite-Aid. The alleged discriminatee, using information he had acquired while working for the employer, underbid it for some of Rite-Aid's business, as a direct competitor.

In *North American Dismantling Corp.,* an employee told one of his employer's clients that he could do the job for less than the client was paying his employer. More specifically, the alleged discriminatee told the client that he "could put some people together and do this job for you for cash."

Thus, each of these cases is distinguishable from the instant matter by the fact that the discharged employee was attempting to compete directly with his employer. I conclude the principle stated in these cases is limited to situations in which employees attempt to engage in the business of their employer as a competitor and does not extend to situations in which employees attempt to prevent a prospective employer from obtaining a contract based on a legitimate fear that this employer will not maintain their wages, hours, and working conditions. Moreover, each of these cases rests on the employees' duty of loyalty to their employer. At the time, the Belchertown employees wrote to the school committee, they had no such duty. *American Steel Erectors, Inc.,* 339 NLRB 1315 (2003).

A union and/or employees acting in concert have a legitimate interest in protecting the employment standards that the union has negotiated from unfair competitive advantages that would be enjoyed by an employer whose labor cost package is less than those of employers subjected to the standards imposed by the Union. *Petrochem Insulation, Inc.,* 330 NLRB 47, 49 (1999).

A union and/or its members may communicate with third parties to advance such legitimate interests when the communication is not so disloyal, reckless, or maliciously untrue to lose the Act's protection. *Arlington Electric,* 332 NLRB 845 (2000). Thus, I find that nine of the discriminatees were acting in accordance with their Section 7 rights in petitioning the Belchertown school committee to refrain from awarding its school bus contract to Respondent in view of their reasonable belief that such an award would result in a reduction in their benefits and possibly in the loss of their jobs. I view these letters as a legitimate effort to persuade the school committee not to save money by contracting with an employer for whom they had every reason to believe would not provide them with benefits such as health insurance.

On the other hand, I find that Candy Ocasio's e-mail and Charles Kupras' letter are unprotected. Other than some very generalized assertions about the quality of Respondent's busses, neither made any other reference to the wages and working conditions of the school bus drivers. Moreover, it is unclear from these two letters that the writers are concerned with the safety of the drivers, as opposed to the school children.

The Board found activities similar to the discriminatees' letters to be protected in *Montauk Bus Co.,* 324 NLRB 1128 (1997), which is indistinguishable from the instant case except for the fact that union officials, rather individual members wrote to the school district. Moreover, in *Montauk Bus Co.,* the school district had already contracted with the employer prior to some of the union's communications with the school district, whereas in the instant case the Belchertown school committee had not decided whether to accept Five Star's bid when the discriminatees sent their letters to its members.

The facts in *Montauk Bus Co.* are as follows: the Sachem School District in Long Island, New York, also contracted out most of its school bus services. The drivers, who worked for two different contractors between 1989 and 1995, were represented by a labor organization. In 1995, the School District put its contract out for bids and awarded Montauk Bus Company the home to school transportation contract. As in the instant case, the union contacted Montauk before it was awarded the contract in an attempt to assure that Montauk would hire its

members, recognize the union, and agree to be bound by the collective-bargaining agreement signed by its predecessor. As in the instant case, Montauk ignored the union's overture.

The union continued to seek recognition and a commitment by Montauk to adhere to the collective-bargaining agreement. However, a union official also wrote to the school district, asking it to award the contract to Montauk's predecessor. After the contract was awarded, and after the union received what it considered an unsatisfactory response from Montauk, it asked the school district to vacate the award to Montauk.

When school started in the fall of 1995, a majority of the employees driving school buses for Montauk were former employees of its predecessor. Montauk continued to refuse to recognize the union. After working 3 days, the union commenced a strike and the union wrote the school district about what it alleged was "abysmal service and total disregard for safety." The union also passed out flyers disparaging the qualifications of Montauk's replacement drivers. Then the union wrote another letter to the school district alleging that some of Montauk's buses did not comply with New York State safety and registration requirements. The school district determined that these allegations were baseless.

After a week, the union drivers offered to come to work unconditionally. Montauk refused to recall them. As a result of the strike, the Sachem School District assessed Montauk a $150,000 penalty for nonperformance of its contract.

Montauk Bus Company argued that it was entitled not to recall the strikers because their union was initially trying to get the Sachem School District to accept the bid of its predecessor and then to annul its contract. The judge, who was affirmed by the Board, opined:

> [T]his hardly represents the type of conflict of interest outlawed by the Act. It does not demonstrate, and there is no independent evidence to demonstrate that the Union was acting either as an agent of or in conspiracy with Laidlaw [the predecessor].
>
> There was, therefore, a legitimate and separate union interest in having the School District retain Laidlaw as the contractor, or failing that, in trying to ensure that any successor contractor would hire all of the employees and assume the terms of the collective bargaining agreement.
>
> . . . .
>
> Once the contract was won by Montauk, the Union attempted to contact the company to insure that it would hire the former employees and retain their existing wages and benefits. When the Union met with what can only be described as a stall, it tried to enlist the School Board to convince Montauk to live up to a promise to hire all of the Laidlaw employees. These actions also represented a legitimate interest that the Union had in attempting to save jobs and to have those people hired by Montauk not suffer a loss of wages or benefits. [324 NLRB at 1136.]

The Board found that Montauk violated Section 8(a)(3) and (1) in refusing to reinstate the strikers. It rejected the argument that the strike was unprotected because the union had a conflict of interest due to its attempt to get the school district to cancel Montauk's contract and its disparagement of Montauk's services. The Board distinguished *Kenai Helicopters,* supra, on the grounds that the employees in that case "used the circumstances of a strike by their fellow employees to further their own personnel [sic] interests by trying to get the company's customers to shift work to a company that the two were going to join." 324 NLRB at 1138 fn. 10.

Similarly, the Belchertown employees contacted the school committee only after Five Star had made it clear that it did not intend to recognize the Union or was likely to accord the drivers the benefits they enjoyed from First Student. Respondent's failure to respond to Clifford's letter, in light of the amount of its bid and 35-year history of union-free operation, would reasonably have led the Union and the drivers to conclude that Five Star intended to employ drivers without the benefits accorded by First Student and would also raise substantial doubt in the minds of the drivers as to whether Respondent intended to employ them.

I find that in collectively petitioning the school district, at least in part regarding their wages, job security, and other terms of their employment, the alleged discriminatees, with the exception of Candy Ocasio and Charles Kupras, were engaging in concerted activities protected by the Act. There is nothing in this record to suggest that the Union or the drivers would have made any effort to deny Five Star the Belchertown contract had Respondent agreed to hire them, recognize the Union, and maintain the drivers' wages and benefits.

Disparagement of Respondent

In *NLRB v. Electrical Workers Local 1229*, 346 U.S. 464 (1953), the Supreme Court upheld a Board ruling denying reinstatement to broadcasting technicians who distributed handbills to the public disparaging the quality of programming by their employer. However, the decision rested in large part on the fact that the handbills made no reference to the union, a labor controversy or to collective bargaining.[9]

Justice Burton, writing for the court, observed, "there is no more elemental cause for discharge of an employee than disloyalty to his employer." However, legions of cases arising under the Act recognize that Section 7 protects many acts considered by employers to be "disloyal." Indeed, some, if not

[9] Respondent, at p. 10 of its brief, contends that the discriminatees' emails and letters are unprotected because they had never worked for, or even applied for work with Respondent at the time these communications were sent to the school committee. However, the letters were written after the Union asked for assurances that the discriminatees would be retained and that their wages and benefits would be preserved. Sec. 2(9) of the Act defines "labor dispute" very broadly to include "any controversy concerning the terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." Respondent's failure to respond to Clifford's letter of January 21, 2002, created a "labor dispute." See *Fabric Services,* 190 NLRB 540 (1971).

Mountain Shadows Golf Resort, 338 NLRB 581 (2002), cited by Respondent, turns on the fact that the alleged discriminatee's unprotected flyer made no reference to a labor controversy or collective bargaining, *Mountain Shadows Golf Resort,* 330 NLRB 1238, 1241 (2000).

many employers would consider support for a union, striking or any concerted effort that interferes with the ability of the employer to run his business as he or she sees fit, to be disloyal. On the other hand, the evolution of the law makes clear that there are limits to what is protected even in the context of a legitimate dispute over wages, hours, and the terms and conditions of employment.[10]

The Board has held on many occasions that employees may properly engage in communication with a third party in an effort to obtain the third party's assistance in circumstances where the communication was related to a legitimate, ongoing labor dispute—so long as the communication did not constitute disparagement or vilification of the employer's product or reputation. Moreover, what an employer may regard as unprotected disparagement or vilification is not necessarily sufficient to forfeit an employee's statutory protection. Thus, in *Allied Aviation Service Co. of New Jersey,* 248 NLRB 229, 232 (1980), the Board opined:

> In determining whether an employee's communication to a third party constitutes disparagement of the employer or its product, great care must be taken to distinguish between disparagement and the airing of what may be highly sensitive issues" absent a malicious motive" an employee's right to appeal to the public is not dependent on the sensitivity of Respondent to his choice of forum.

In *Emarco, Inc.,* 284 NLRB 832, 833 (1987), the Board found that remarks made by two employees to the general contractor of their employer were not so disloyal, reckless, or maliciously untrue to forfeit the Act's protection. In the context of a dispute centering on their employer's failure to make timely contributions to the union welfare and pension plan, the two employees told the general contractor that, "these people never pay their bills . . . can't finish the job . . . is no damn good" and "this job is too big for them." Obviously, remarks such as these would tend to undermine the contractual relationship between the general contractor and *Emarco*. However, an employee only loses the protection of the Act in the context of a legitimate labor dispute, if: (1) he or she tries to divert his employer's business to another business entity in which he has an interest unrelated to his status as an employee of the employer, *ATC/Forsythe & Associates*, supra; and/or (2) the employee makes a statement "with the knowledge of its falsity, or with reckless disregard of whether it was true or false." *HCA/Portsmouth Regional Hospital,* 316 NLRB 919 (1995).[11]

In *Sierra Publishing Co. v. NLRB,* 889 F.2d 210, 220 (9th Cir. 1989), Judge Fletcher summarized the state of the law regarding disparagement as follows:

> In summary, the disloyalty standard is at base a question of whether the employees' efforts to improve their wages or working conditions through influencing strangers to the labor dispute were pursued in a reasonable manner under the circumstances. Product disparagement unconnected to the labor dispute, breach of important confidences, and threats of violence are clearly unreasonable ways to pursue a labor dispute. On the other hand, suggestions that a company's treatment of its employees may have an effect upon the quality of the company's products . . . are not likely to be unreasonable particularly in cases when the addressees of the information are made aware of the fact that a labor dispute is in progress. Childish ridicule may be unreasonable, while heated rhetoric may be quite proper under the circumstances. Each situation must be examined on its own facts, but with an understanding that the law does favor a robust exchange of viewpoints.

An employee generally has no obligation to investigate whether information he disseminates to third parties in a labor dispute is true or false, at least if he or she has no reason to believe it is false. *KBO, Inc.,* 315 NLRB 570, 571 fn. 6 (1994). In the instant case, I find that none of the information or contentions communicated by the 11 drivers to the Belchertown school committee were made with knowledge of their falsity, or with reckless disregard of the truth. Indeed, many of the unflattering contentions were accurate, albeit dated. The only inaccurate statement in any of the letters is Donald Caouette's assertion that Five Star's buses failed to start on a number of days in the winter of 1996, which actually occurred only on one day. I do not deem that so maliciously false or reckless as to deny him the protection of the Act. *Cincinnati Suburban Press,* 289 NLRB 966, 968 (1988).

None of the drivers sought to obtain Respondent's side of the story with regard to the incidents reported by the *Daily Hampshire Gazette,* or for assertions made to them by Alma Coderre and Lorrie Poulin. However, the Act placed no obligation on them to do so in order to retain the Act's protection. Although many of their factual assertions and concerns were based on very dated newspaper articles, this was not so reckless as to forfeit the protection of the Act in the context of their labor dispute.

[10] Although the employees herein did not have a duty to be loyal to Respondent at the time they wrote to the school committee. *American Steel Erectors, Inc.,* 339 NLRB 1315 (2003), the test as to whether their letters are protected is essentially the same as if they did have such a duty. I see no practical difference between the standard applied in *American Steel Erectors,* whether the remarks were "so flagrant, violent or extreme as to render the individual unfit for further service" (citing *Dreis & Krump,* 221 NLRB 309, 315 (1975)), and the standard applied to writings and utterances of employees who do owe a duty of loyalty to the maligned employer. Thus, employees do not lose the protection of the Act unless their writings and utterances are maliciously false or otherwise reckless. They do not lose the protection of the Act whereas here, their accusations are based on dated information, which appears to be accurate, although missing exculpatory information offered by Lecrenski at trial.

[11] Respondent relies on *Patterson-Sargent Co.,* 115 NLRB 1627, 1629 (1956), and its progeny for the proposition that the truth or falsity of the discriminatees' e-mails and letters has no bearing on whether or not they are protected by Sec. 7. Numerous Board and Court cases have overruled *Patterson-Sargent*, sub silento. These include cases cited herein such as *Allied Aviation Service Co., Inc.,* supra; *Emarco Co.,* supra; *HCA/Portsmouth Regional Hospital,* supra, as well as *Cincinnati Suburban Press, Inc.,* 289 NLRB 966, 967 (1988); and *Sierra Publishing Co.,* 291 NLRB 540, 545 (1988), enfd. 889 F.2d 210, 218–219 (9th Cir. 1989).

Some of the Letters Constitute Protected Activity, Even Assuming that Some Do Not

All the letters, save Ocasio's and Kupras', explicitly concern a legitimate concern of the First Student drivers as to their job security and terms of employment. They differ in the degree to which they disparage Respondent. Neither Steve Kahn nor Terri Nadle disparaged Respondent, nor did either one ask that the school bus contract be rebid. Although, Donald Caouette and Deborah Wenzel disparaged Respondent to some extent, Caouette and Wenzel did not specifically ask that the school bus contract be rebid. Suzanne LeClair, Andrea MacDonald and Pauline Taylor disparaged Respondent and asked that the contract be rebid, however, they indicated that an award to Respondent would be acceptable if it safeguarded their current wages and benefits.

In conclusion, I find that Respondent violated Section 8(a)(1) by refusing to hire and refusing to consider for hire Donald Caouette, Patricia Grasso, Steve Kahn, Suzanne LeClair, Andrea MacDonald, Terri Nadle, Caron Rose, Pauline Taylor and Deborah Wenzel for engaging in protected concerted activity by writing to the members of the Belchertown school committee.

Respondent Violated Section 8(a)(1)

Respondent, by Theresa Lecrenski, violated Section 8(a)(1) in telling Terri Nadle, Caron Rose, and Pauline Taylor that they were not being hired due to their protected communications with the Belchertown School Committee.

Lecrenski, in telling discriminatees Nadle, Rose, and Taylor that they were not being hired due to their protected communications, committed a separate, and distinct violation of Section 8(a)(1), as alleged in the complaint. *Kunja Knitting Mills, U.S.A.,* 302 NLRB 545 (1991).

Is Five Star a Successor Employer of First Student

An employer, such as Respondent, who takes over the unionized business of another employer, acquires the collective-bargaining obligations of its predecessor if it is a successor employer. For Respondent to be a successor employer, the similarities between its operations and those of First Student must manifest "a substantial continuity between the enterprises" and a majority of its employees in an appropriate bargaining unit must be former bargaining unit employees of the predecessor. The bargaining obligation of a successor employer begins when it has hired a "substantial and representative complement" of its work force. *NLRB v. Burns Security Services,* 406 U.S. 272 (1972); *Fall River Dyeing Corp.,* 482 U.S. 27 (1987).

In determining whether such substantial continuity exits, the Board generally considers whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs under the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and has basically the same body of customers. Respondent satisfies all these criteria with respect to First Student, with the exception of the replacement of First Student's supervisor by Lecrenski. It operated the Belchertown school busses in essentially the same manner as First Student. Five Star is thus a successor of First Student if a majority of Respondent's employees in its bargaining unit were former members of the First Student bargaining unit on the day Respondent started operating with a "substantial and representative complement" of its work force.

This calculation must take into account that nine discriminatees would have been hired, absent the discrimination against them, and that the replacements for the seven regular drivers would not have been hired. Thus, absent discrimination, thirteen of Respondent's bargaining unit members would have been former First Student bargaining unit members. The more difficult issue is the size of Respondent's bargaining unit. Five Star, in its brief, contends that its bargaining unit should include the 33 individuals, other than Theresa Lecrenski, whose names appear on the list submitted for approval to the Belchertown school superintendent prior to September 1, 2003 (R. Exh. 2), and/or a supplemental list submitted on September 9 (R. Exh. 1 and GC Exh. 9).[12]

The critical date for determining the size of Respondent's bargaining unit is the morning of August 27, 2003, the first day of school in Belchertown. On that morning, Respondent, as it was required by its contract, operated all 19 school bus routes.

Respondent's contract with the Belchertown School District provides:

> The contractor shall furnish fully and properly licensed drivers to operate any buses or vehicles used in carrying out the transportation services provided under this contract. A list of all persons assigned as regular and substitute drivers must be submitted to the Superintendent of Schools by August 15, of every year of the contract or as changes occur. All drivers must be acceptable to the Superintendent of Schools.
>
> . . . .
>
> The School Committee, acting through the Superintendent of Schools, reserves the right to accept or reject any and all drivers if it is deemed in the best interest of the Town to do so.

(GC Exh. 8, p. 6 of the contract specifications, pars. III, A–C.)

There was some confusion at trial regarding the first list of drivers that Respondent submitted to the school superintendent. On September 11, 2003, Lecrenski met with a NLRB agent investigating the Union's charge. She provided a list of approved drivers. (GC Exh. 9.) This is clearly not the first list she provided to the school superintendent. Although the first list is not in the record, I infer that it was a mirror image of the superintendent's list of approved drivers as of September 1, 2003. (R. Exh. 2.)[13] From this exhibit and from Respondent's time

[12] At hearing, Respondent also asserted that two individuals not on either list, Raymond Hughes and Kim Stitzinger, who started driving busses in Belchertown later in the fall, should be included in the unit.

[13] My reasons for so concluding are that R. Exh. 2 includes the names of individuals hired by Respondent on or prior to August 18, 2003, who drove a regular school bus route for Respondent on the morning of August 27, 2003, and who were no longer working for Respondent by September 1, such as Edward Baran and Natalina King. R. Exh. 1 is identical to GC Exh. 9 except for the fact that it has two pages instead of one and that on its face it indicates that it was provided

sheets it is possible, with the exception of route 14, to determine who drove each school bus route for Five Star on the first morning of school:

Drivers on the morning of August 27, 2003 by route #

1. Mary MacIntyre-Gadde (AM route)
Kathy Condi, a First Student bargaining unit member, (PM route)[14]
2. Edward Baran, whose employment ended after one shift.
3. Christine Caney
4. Joan Hilliard, a First Student bargaining unit member.
5. Sandra Lepine
6. Kathy Brady
7. Robin Demetrius
8. Michael Gentile
9. Natalina King, who only worked two days for Five Star.[15]
10. Diane Stuller, who only worked two days for Five Star.
11. Pamela Bousquet
12. Wilfred Auclair, a First Student bargaining unit member.
13. Raymond Forget
14. Unknown[16]
15. Christine Abare
16. Amy Randall
17. Darlene White
18. Paul Greene, a First Student bargaining unit member.
19. Tina Stone

Considering just the regular route drivers, I conclude that but for Respondent's refusal to hire the discriminatees, 11 of the 20 regular route drivers on the morning of August 27, 2003 would have been former First Student bargaining unit members. This includes the four First Student drivers who drove bus routes for Respondent on August 27 (Condi, Hilliard, Green, and Auclair) and seven discriminatees who were regular drivers for First Student (Wenzel, Kahn, Rose, Nadle, LeClair, Taylor, and Grasso). Discriminatees Andrea Macdonald and Donald Caouette were spare drivers for First Student. I conclude that if the discriminatees had been hired, Respondent would not have hired or transferred the seven employees who replaced them as regular route drivers.

The critical issue in this case is how many of the individuals listed as drivers in Respondent's Exhibit 2 should be included in the bargaining unit. I exclude anyone whose name does not appear on Respondent's Exhibit 2 because they had not been approved to drive a Belchertown school bus as of September 1, 2003.[17] While Respondent concedes that Lecrenski should not be included there is an issue with regard to most of the other individuals listed on Respondent's Exhibit 2. Several of these individuals either drove in school districts other than Belchertown or performed significant nondriving functions for Respondent. Some, including four of the regular drivers on the morning of August 27, performed negligible amounts of bargaining unit work.

An employee should not be included in the bargaining unit solely because he or she appears on Respondent's original list of drivers. There must be some other indicia of a community of interest with the Belchertown school bus drivers, at or immediately following the beginning of the school year, when Respondent began operating with a substantial and representative complement of its work force. The best examples of why the list is not dispositive are Stephanie Meloni and Barbara Lapalme, whose names appears on the list, but who did not drive a single school bus run in Belchertown up to the date of the hearing.

The spare drivers are essentially casual, part-time, or dual-function employees of Respondent. In the context of a representation proceeding, the Board includes or excludes part-time employees on the basis of their relationship to the job, "whether they perform unit work and whether they have a sufficient regularity of work to give them a community of interest with full-time employees with respect to wages, hours, and other working conditions." *Children's Hospital of Pittsburgh,* 222 NLRB 588, 591 (1976); *Arlington Masonry Supply, Inc.,* 339 NLRB 817 (2003). The standard that the Board generally applies to casual employees in determining whether they have a sufficient community of interest is whether they regularly average 4 hours or more per week for the last quarter prior to the eligibility date. *Davison-Paxon Co.,* 185 NLRB 21, 23–24 (1970).[18]

The spare drivers, who also work in other localities or have other job functions, are essentially dual-function employees,

to the superintendent on September 9, 2003. It is evident from the markings on the front of R. Exh. 1 that it is a supplemental list reflecting changes in Respondent's drivers that had occurred since the beginning of the school year.

[14] This route was intended to be split between MacIntyre-Gaddie and Condi from the outset. This situation differs from those routes on which the original driver was replaced.

[15] The timesheets for King, Baran, and Stuller in GC Exh. 20 show that they did not drive in Belchertown after August 28 and their names do not appear on the list of approved drivers, which Respondent submitted to the superintendent on September 9 (GC Exh. 9 and R. Exh. 2).

[16] Petrina Williams-Hidalgo apparently did dry runs on route 14 on August 26 and 27 (GC Exh. 20(dd). It is unclear who transported the school children on route 14 that day. Williams-Hidalgo began driving the route regularly on September 2.

[17] There is no evidence that Respondent submitted the names of any of these individuals to the superintendent prior to September 9, 2003. On that date, Lecrenski apparently supplemented her original list to account for the fact that some of the people on that list no longer worked for her. On this basis I would exclude from the bargaining unit, Adolph Pipczynski, Curtis Littlefield, and Raymond Hughes (whose name does not appear on either R. Exh. 1 or 2). Additionally, Pipczynski, who drove a regular bus route for Respondent in South Hadley, Massachusetts, never drove a school bus route (as opposed to a charter run) in Belchertown. Hughes could not, pursuant to the contract, drive a school bus in Belchertown until late September since his criminal background check was not complete until then. Curtis Littlefield's name was not submitted to the superintendent until September 9 although he drove in Belchertown prior to that date on September 5. He appears to have alternated between Belchertown and Hadley in September, but did not drive a school bus route in Belchertown between October 1 and December 31, 2003.

[18] Four hours per week for a quarter amounts to 52 hours. However, a casual employee who worked 52 hours on 7 consecutive days at the beginning of a quarter and then didn't work at all afterwards might not be included in a bargaining unit under this formula.

Syracuse University, 325 NLRB 162 (1997). As such, the time period in which they performed bargaining work is critical in determining whether or not they should be included in the bargaining unit. In the election context, the Board does not determine voter eligibility on the basis of after-the-fact considerations, *Georgia Pacific Corp.,* 201 NLRB 831, 832 (1973). However, since there is no other way of determining whether Respondent's drivers had a community of interest with the employees who regularly worked in Belchertown, I will apply the *Davison-Paxon* test to the quarter following the commencement of the school year.

Applying the *Davison-Paxon* test to those individuals who drove a school bus route on the morning of August 27, I would exclude from the bargaining unit the following individuals, on the basis of the negligible number of hours they worked in fall of 2003:

Mary MacIntyre-Gadde—19.5 hours
Edward Baran—2.75 hours
Diane Stuller—11 hours
Natalina King-14.12 hours

The spare drivers appearing on Respondent's original list are the following:

Sharie Truehart: At page 17 of her affidavit of September 11, 2003 (GC Exh. 17), which the parties have agreed is to be considered equivalent to her testimony, Lecrenski stated:

> Sharie Truehart was working for 5-Star, and not working for First Student in Belchertown during the last few months of the 2002–2003 school year. I had prepared to offer her a route, but she did not show up this fall. I called several times and she didn't call back.

Truehart had no employment relationship with Respondent as of September 11, 2003. She had been laid off at the end of the 2002–2003 school year and had not yet been rehired.[19] She did not drive in Belchertown until November 2003. On this basis I conclude that she was not a member of the bargaining unit on August 27, 2003.

Susan Rousseau: Respondent hired Susan Rousseau in mid-August as the co-coordinator for the Belchertown garage at a salary of $650 per week. Rousseau receives no fringe benefits such as health insurance or paid vacations. Unlike other drivers, Rousseau does not fill out timesheets for the time spent driving a school bus.

Theresa Lecrenski introduced Rousseau to the school board as the person to contact at the Belchertown garage. Respondent's contract with the Belchertown school committee requires it to "appoint or assign one supervisor on site to be in charge of the routes within the District's transportation system." Rousseau is the person so designated. However, the fact that she is Respondent's "supervisor" within the meaning of its contract with the School District does not mean that she is necessarily a supervisor within the meaning of Section 2(11) of the Act.

Rousseau's primary function is to make sure that there is a driver for every route, every run. If the regular driver is unavailable, she finds a replacement and sometimes drives a school bus route herself. She sometimes selects replacements on the basis of their familiarity with the route in question. Rousseau checks other drivers' timesheets for accuracy and performs office work when she does not drive. At times she accompanies new drivers to show them their bus route.

Section 2(11) of the Act defines "supervisor" as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

A party seeking to exclude an individual from the category of an "employee" has the burden of establishing supervisory authority. The exercise of independent judgment with respect to any one of the factors set forth in Section 2(11) establishes that an individual is a supervisor. However, not all decision-making constitutes the independent judgment necessary to establish that an individual is a statutory supervisor. Similarly, the fact that an individual gives direction to other employees without first checking with a higher authority, does not necessarily make one a supervisor. For example, an individual does not necessarily become a supervisor in situations in which his authority to direct employees emanates solely from his skill or experience. *Southern Bleachery & Print Works,* 115 NLRB 787, 791 (1956), enfd. 257 F.2d 235, 239 (4th Cir. 1958). Moreover, the exercise of supervisory authority on an irregular and sporadic basis is not sufficient to establish supervisory status. *Browne of Houston,* 280 NLRB 1222, 1225 (1986).

Rousseau's exercise of her limited authority does not entail sufficient independent judgment to make her a supervisor. Moreover, I find that the fact that she is salaried and the regular drivers are hourly is insufficient to exclude Rousseau from the bargaining unit as a spare.

However, I find that Respondent has established only that Rousseau drove a school bus route on 2 days, August 28 and September 24 (R. Exh. 9). I give no weight to her testimony that she drove on other days in the fall of 2003, for which there is no documentation. Applying the *Davison-Paxon* criteria, I find that Rousseau has insufficient community of interest to be considered part of the bargaining unit.

Clark Isham: Clark Isham was on Respondent's original list of approved drivers for the Belchertown School District and also on a list Five Star submitted to the South Hadley School District. Between August 27 and December 31, 2003, Isham drove a school bus route in Belchertown on just one occasion, route 2, on the morning of August 28. Due to the paucity of his contacts with other Belchertown drivers, I deem that Isham had an insufficient community of interests with the Belchertown drivers to be included in the bargaining unit.

Judith Marsche: Judy Marsche drove school buses for Respondent between August and December 2003. However, she did not drive a school bus route even once in Belchertown during that time period. Marsche may have driven twice in Belchertown between January and April 2004, but was driving regularly in the town of Hatfield. When Christine Caney left

[19] Five Star drivers are laid off for the summer and collect unemployment insurance. They are rehired in the fall.

Respondent's employ, Donald Lecrenski took over Caney's route until the Respondent could obtain Marsche's release from her obligations in Hatfield.[20] On these facts I deem that Judy Marsche should be excluded from the bargaining unit under the *Davison-Paxon* criteria.

Stephanie Meloni: Stephanie Meloni did not drive a single school bus route in Belchertown between August 27, 2003, and the hearing in this matter. Thus, there is no evidence on which to conclude that she has any interests similar to those of bargaining unit members. She therefore should be excluded from the unit.

Donald Lecrenski: Donald Lecrenski, Theresa Lecrenski's brother-in-law, is the fleet manager for Respondent's buses. He is responsible for 70 buses at several different locations. On most days, Donald Lecrenski works at Respondent's garage in Agawam but he has driven school bus routes on a regular basis in Belchertown and did so as early as September. However, I would exclude Donald Lecrenski from the bargaining unit for other reasons. He is a salaried employee who works 12 months a year (6:30 a.m. to 4:30 p.m.) and doesn't fill out timesheets. Additionally, unlike any bargaining unit employee, Respondent provides Donald Lecrenski with health insurance coverage and paid holidays. I conclude that, given the benefits that Lecrenski is provided, which other unit employees are not offered, that he does not have a sufficient interest in the wages, hours, and terms of employment of unit employees to be included in the bargaining unit.

Donald Carter: Although Donald Carter drove in school districts other than Belchertown, he drove regular bus routes on a sufficiently regular basis and early enough in the school year that he should be included in the bargaining unit. Carter drove routes on August 28 and 29 and on several occasions in September.

Barbara Lapalme (not to be confused with Sandra Lepine, the regular driver on route 5): Barbara Lapalme did not drive a single school bus route in Belchertown as of the date of the instant hearing. I therefore conclude that she should be excluded from the bargaining unit. Lapalme primarily drove special needs routes in South Hadley. She may also have driven charters in Belchertown.[21]

Other individuals on Respondent's Lists of Drivers

Gregory Hansenko: On the list it provided to the School District on September 9, 2003, Respondent designated Gregory Hansenko as the regular route driver for route 16. Hansenko is on Respondent's original list of drivers and in fact drove Belchertown route 16 the second week of school.[22] Respondent's Belchertown contract requires it to maintain one full-time mechanic. That individual is Gregory Hansenko. Mechanical work that cannot be performed by Hansenko at Belchertown is performed at Respondent's main garage in Agawam.

Hansenko's terms of employment, however, differ from the other drivers' in a number of respects. He works from 6:30 a.m. to 5 p.m., while bus route drivers work several hours in the morning and several hours in the afternoon, less than an 8-hour day. Respondent employs Hansenko for 12 months of the year; other drivers are laid off for the summer. He is also salaried and gets a paid vacation in the summer. Additionally, Respondent accords Hansenko paid sick time and on occasion, paid personal days. None of the other Belchertown drivers have such a benefit and these facts are sufficient in my view to exclude Hansenko from the bargaining unit. Due to his significantly different status, I deem Hansenko to have an insufficient community of interest with the other drivers to be included in the bargaining unit. *Dlubak Corp.,* 307 NLRB 1138, 1167–1172 (1992).[23]

Joseph Marsche: Joseph Marsche, whose name appears on Respondent's Exhibit 2, began driving route 10 as the regular driver on September 3, 2003. There is no evidence that Joseph Marsche worked as a spare driver in Belchertown. He replaced Diane Stuller as the regular driver on route 10, as Respondent's Exhibit 1 indicates. Applying the *Davison-Paxon* criteria, I include Joseph Marsche in the bargaining unit as a regular driver.

Bienvenido Torres: Torres appears on Respondent's Exhibit 2 and took over route 2 a few days after the beginning of the school year as the regular driver. He is a member of the bargaining unit under *Davison-Paxon* as a regular driver.

Kim Stitzinger: Stitzinger's name appears on neither Respondent's Exhibit 1 or 2 and she did not drive a school bus in Belchertown until October 13. I exclude Stitzinger from the unit for these reasons.

In conclusion, 23 individuals should be included in Respondent's bargaining unit. The 23 members of the bargaining unit are 20 regular drivers and 3 spare drivers. The 20 regular drivers include the 7 discriminatees, the 4 former First Student employees who drove buses for Respondent on August 27, 2003, and the 9 drivers who would have hired for available regular driver positions in the absence of Respondent's dis-

[20] Of the 20 regular route drivers who drove on the morning of August 27, 2003, at least 8 no longer worked for Respondent in Belchertown by the time of the hearing in this matter in April 2004 (MacIntyre-Gaddie, Barran, Caney, Brady, Demetrius, King, Suller, and Forget). Thus, there were plenty of openings for employees who had not been bargaining unit employees earlier in the school year.

[21] I conclude that an employee who drove charter runs and did not regularly drive school bus routes early in the school year is not a member of the bargaining unit. Only those who regularly drove school bus routes had a sufficient community interest with bargaining unit members.

[22] Amy Randall, who drove route 16 on the first day of school, switched to route 9, replacing Natalina King, who only drove the first 2 days.

[23] The fact that certain employees are salaried and receive better benefits than hourly employees does not always warrant excluding them from the same bargaining unit as hourly employees, *K. G. Knitting Mills,* 320 NLRB 374 (1995) (a case in which, unlike the instant case, such employees performed exclusively bargaining unit work). However, the totality of the circumstances regarding the wages, hours, and terms of employment of Gregory Hansenko and Donald Lecrenski, convinces me that neither have a sufficient community of interest with hourly employees who exclusively drive the school buses. This is even more evident in the case of Lecrenski than it is in Hansenko's situation.

criminatory hiring.[24]

The spare drivers in Respondent's unit are discriminatees Donald Caouette and Andrea MacDonald, and Five Star employee Donald Carter.[25] Thus, but for Respondent's illegal refusal to hire the discriminatees on August 27, 2003, 13 of the 23 members of the bargaining unit were former members of the First Student bargaining unit and therefore Respondent was obligated to recognize and bargain with the Union as the exclusive representative of its bargaining unit employees.

SUMMARY OF CONCLUSIONS OF LAW

1. The Respondent, Five Star Transportation, Inc., violated Section 8(a)(1) of the Act by refusing to consider for hire and by refusing the hire Donald Caouette, Patricia Grasso, Steve Kahn, Suzanne LeClair, Andrea MacDonald, Terri Nadle, Caron Rose, Pauline Taylor, and Deborah Wenzel.

2. Respondent, by telling discriminatees Nadle, Rose, and Taylor that they were not being hired due to their protected communications with the school committee, violated Section 8(a)(1) of the Act.

3. Respondent had hired a substantial and representative complement of its work force on the morning of August 27, 2003.

4. On the morning of August 27, 2003, absent its discriminatory refusal to hire nine discriminatees, a majority of the members of Respondent's bargaining unit, i.e., regular route bus drivers and spare route drivers, would have been members of the bargaining unit of First Student, Inc., the Belchertown school bus contractor prior to Respondent.

5. Respondent is a successor employer to First Student and is thus obligated to recognize and bargain with the Union, which represented First Student's bargaining unit employees.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily refused to hire employees, must offer them employment and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date they would have been hired absent discrimination to the date of a proper offer of employment, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

The Respondent, Five Star Transportation, Inc., Agawam, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire or consider for hire any employee for engaging in protected concerted activity or otherwise discriminating against any employee for engaging in protected activity.

(b) Telling employees that they are not being hired or otherwise being discriminated against due to protected activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in an appropriate bargaining unit consisting of regular school bus route drivers and spare school bus route drivers, concerning terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement.

(b) Within 14 days from the date of the Board's Order, offer Donald Caouette, Patricia Grasso, Steve Kahn, Suzanne LeClair, Andrea MacDonald, Terri Nadle, Caron Rose, Pauline Taylor, and Deborah Wenzel full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Donald Caouette, Patricia Grasso, Steve Kahn, Suzanne LeClair, Andrea MacDonald, Terri Nadle, Caron Rose, Pauline Taylor, and Deborah Wenzel whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the Decision.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discrimination in hiring, and within 3 days thereafter notify the employees in writing that this has been done and that the circumstances surrounding this discrimination will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its

[24] Although 14 of Respondent's regular drivers, who were not members of the First Student bargaining unit, qualify as unit members using the *Davison-Paxon* criteria, there would have only been nine regular driver positions available on August 27, had Respondent hired the seven discriminatees who were regular drivers.

[25] Benvenido Torres, Joseph Marsche, and Petrina Williams-Hidalgo never worked as spare drivers; they each replaced a regular driver who quit on the first or second day of work. Torres replaced Baran as the regular route 2 driver; Marsche replaced Diane Stuller. Williams-Hidalgo was the regular route 14 drivers, although she apparently did not transport students on August 27. GC Exh. 20. On GC Exh. 9 and R. Exh. 1, these three drivers are listed as regular route drivers. The markings on R. Exh. 2 also indicate that these three were never spare drivers for Belchertown.

[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Belchertown, Massachusetts facility copies of the attached Notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 27, 2003.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."