

Nos. 18-1153, 18-1091

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

FIRST STUDENT, INC., A DIVISION OF FIRST GROUP AMERICA

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**UNITED STEEL, PAPER AND FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE
WORKERS INTERNATIONAL UNION, AFL-CIO/CLC, LOCAL 9036**

Intervenor

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Local Rule 28(a)(1) of the Rules of this Court, counsel for the National Labor Relations Board (the Board) certifies the following:

A. Parties and Amici

First Student, Inc., a Division of First Group America was the Respondent before the Board and is the Petitioner/Cross-Respondent before the Court. Local 9036, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, ALF-CIO/CLC was the charging party before the Board and has intervened on behalf of the Board. The Board is the Respondent/Cross-Petitioner before the Court; its General Counsel was a party before the Board. There were no intervenors or amici before the Board.

B. Ruling Under Review

The ruling under review is a Decision and Order of the Board in *First Student Inc., A Division of First Group America*, 366 NLRB No. 13 (February 6, 2018).

C. Related Cases

This case has not previously been before this or any other court. Board counsel is not aware of any related cases.

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GLOSSARY

Act	National Labor Relations Act, 29 U.S.C. § 151 et seq.
Amicus	Brief of amicus curiae Restaurant Law Center
Appendix	The parties' deferred joint appendix
Board	National Labor Relations Board
Br.	First Student's opening brief
District	Saginaw School District
First Student	First Student, Inc., a Division of First Group America
School Board	Saginaw County Board of Education
Union	United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, ALF-CIO/CLC and its Locals, 8410 and 9036

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JURISDICTIONAL STATEMENT

This case is before the Court on the petition of First Student, Inc., a Division of First Group America to review, and the cross-application of the National Labor

Relations Board to enforce, a Board Order issued against First Student on February 6, 2018, reported at 366 NLRB No. 13. (Appendix 629-36.)¹ The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, ALF-CIO/CLC, Local 9036 (the Union) has intervened on the Board’s behalf.² The Board had subject-matter jurisdiction under Section 10(a) of the National Labor Relations Act (the Act), 29 U.S.C. § 160(a), which authorizes the Board to prevent unfair labor practices affecting commerce.

The Court has jurisdiction over this appeal because the Board’s Order is final under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). Venue is proper under Section 10(f), which provides that petitions for review may be filed in this Court. First Student’s petition and the Board’s cross-application were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

¹ “Appendix” refers to the parties’ deferred joint appendix, “Br.” refers to First Student’s opening brief, and “Amicus” refers to the amicus curiae brief filed by the Restaurant Law Center. References preceding a semicolon are to the Board’s findings; those following are to supporting evidence.

² Although three separate entities represented the unit of employees at issue here during the relevant period, it is not necessary to distinguish among them. As used in this brief, “the Union” refers to the Steel Workers International Union collectively with either of its Locals, 8410 or 9036.

ISSUES PRESENTED

(1) Is the Board entitled to summary enforcement of the unchallenged portions of its Order?

(2) Does substantial evidence support the Board's finding that First Student was a "perfectly clear successor" to the Saginaw School District, and thus violated Section 8(a)(5) and (1) of the Act by unilaterally changing the terms and conditions of employment for bargaining-unit employees?

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are set forth in First Student's brief.

STATEMENT OF THE CASE

This case involves First Student's duty, as an admitted successor employer to the Saginaw School District (the District), to bargain with the Union as the representative of the unit of unionized bus drivers and monitors it employed when it took over the District's student-transportation services. The Board found that First Student committed a series of unfair labor practices stemming from failures to fulfill its duty to bargain. First Student challenges only the Board's finding that it was not only a successor but a "perfectly clear successor," and therefore lost the right to set initial terms and conditions of employment different from those the employees enjoyed working for the District.

I. THE BOARD'S FINDINGS OF FACT

A. Background

Saginaw School District is a public entity overseen by the Saginaw County Board of Education (the School Board). First Student is the largest provider of school-transportation services in North America. Until 2012, the District directly employed bus drivers and monitors. They were represented by the Union, with which the District had a collective-bargaining agreement. (Appendix 629, 640; 34, 140, 194-234.) The District required all applicants for driver and monitor positions to pass a background check and a drug test. It also required employees to receive physical examinations every two years and pass random drug tests. (Appendix 631; 14, 66, 74-75, 199, 233.)

In 2011, the District considered subcontracting its transportation services and initially selected First Student for the contract, but later withdrew its request for proposals and notified First Student that it would not proceed that year. The District opted to explore subcontracting its transportation services again for the 2012-13 school year and accordingly issued a request for proposals in early 2012. On February 3, 2012, First Student submitted a proposal. Shortly thereafter, with the School Board's approval, First Student and the District began negotiating a contract for transportation services that would take effect the following school year. (Appendix 629-30, 640-41; 61-62, 95, 235-39, 345-56, 456.)

B. First Student Meets with Unit Employees on March 2 and Reassures Them that It Plans To Hire Most of Them

On March 2, 2012, the District arranged for a meeting between the bargaining-unit bus drivers and monitors and First Student to discuss the transition of transportation services from the District to First Student. Most of the unit employees attended the meeting. First Student told them that they would receive an application form at a future meeting if a contract was reached between it and the District. First Student further informed the employees that applicants would need to pass a preemployment drug screen, a physical examination, and receive training. It then assured them that it would offer employment to all existing employees who met its hiring criteria. (Appendix 630, 641; 6-11, 81-84, 120-22.)

Several unit employees asked questions at the meeting. When asked how many of them would be hired, First Student's representative replied that it typically hired 80 to 90 percent of a school district's existing workforce. He further told employees that if First Student hired 51 percent or more of the existing workforce, it would recognize the Union and negotiate a new contract. When an employee asked how many hours employees would work under First Student, its representative replied that he did not know and that it would depend on the bus routes set by the District's routing system for the following school year. First Student also told employees that any other terms and conditions of employment would be "subject to negotiations." (Appendix 630, 641; 123-24.)

C. At a Public Hearing on May 16, First Student Confirms that It Plans To Hire Employees at the Same Wage Rate

First Student and the District finalized contract terms in early May 2012. At the School Board's regularly scheduled public meeting on May 16, the agenda included whether to approve the proposed contract. A representative of the Union, representatives of First Student, and several unit employees attended the meeting. (Appendix 630, 642; 90-91, 101-02.)

The School Board asked several questions of First Student's representative at the meeting. When it sought reassurance that First Student would hire current employees, the representative stated that First Student would extend offers to all current employees who applied and met its requirements, which included background checks, drug screens, an interview, and dexterity tests. He further stated that First Student would recognize the Union if it hired at least 51 percent of the workforce. He assured the School Board and its audience that any employees hired would receive the same rate of pay as they had received from the District. (Appendix 630, 642; 102-03.)

At the meeting, the School Board voted to approve the contract with First Student. The contract states that the parties agreed to it as of May 16, but it was executed by the District on May 24 and by First Student on June 1. The contract was effective July 1, 2012 through June 30, 2017. (Appendix 642-43; 341.)

After the meeting, First Student's representative met with a union representative and a group of employees in the parking lot. He acknowledged that First Student would recognize the Union if it hired 50 percent plus one of the current employees. He reassured the group that First Student's goal was to hire as many of them as possible who met its hiring protocols. He also reiterated that if employees met First Student's hiring criteria, their wages would be maintained, and insisted that "they shouldn't have anything to worry about in coming to work for our [c]ompany." (Appendix 643; 156-57.)

D. On May 17, First Student Distributes Employment Applications and Informs Employees of Changed Terms of Employment

The following day, First Student held a meeting with nearly all of the District's unit employees. There, its representatives discussed its operation and management structure, then distributed a memo to employees along with employment applications. The memo informed employees that the District had selected First Student as its new student-transportation provider. It further stated that all current drivers and monitors "who successfully pass [First Student's] hiring criteria will be offered an employment opportunity with First Student." (Appendix 630; 240-44.)

The memo also described First Student's planned terms and conditions of employment, which differed in several respects from those in the collective-bargaining agreement between the District and the Union. For example, although

First Student would pay employees at the same hourly rate they had earned from the District for transportation duties, it would pay them less for other duties such as attending training, mandatory meetings, clerical work, and bus care and maintenance. The memo also provided for a pay guarantee of only 1.5 hours per morning or afternoon shift, and 1 hour for midday routes. (Appendix 630, 643-44; 240-44.) Under the collective-bargaining agreement, drivers were guaranteed at least 4.5 hours of pay per day, and monitors were guaranteed 4.3. (Appendix 644; 18, 210, 231.)

E. First Student Hires Most of the Bargaining Unit, Ignores the Union's Requests To Bargain, and Issues a New Attendance Policy

On May 18, 2012, the Union sent First Student a letter requesting recognition and bargaining as the unit employees' representative. The Union followed up by email and phone, eventually reached First Student's counsel, and again requested bargaining. First Student's counsel replied that she did not know if First Student was subject to a bargaining obligation at that time and would know more after First Student's contract with the District became effective in July. (Appendix 644; 43-49, 310-11, 314-15.)

Over the summer, after receiving employment applications from the former District drivers and monitors, First Student conducted background investigations and held interviews. By August 1, First Student issued offer letters to 42 of the 55

unit employees, each with an official hire date of August 6. By August 17, First Student had hired 36 unit employees and only 2 new employees; by the time it started operations on August 27, it had hired 41 unit employees and 10 new employees.

On August 27, First Student held a kickoff meeting at which it distributed a new attendance policy, which it later revised. The new attendance policy contained changes to various provisions of the collective-bargaining agreement between the District and the Union, including the sick-leave and leave-of-absence policies. First Student started operations shortly thereafter, employing drivers and monitors under the new terms and conditions of employment it had announced on May 17. (Appendix 644-45; 19, 67-70, 213-15, 217-20, 245-309, 372-455, 457-517.)

F. First Student Temporarily Conditions Bargaining on the Union's Withdrawal of Its Unfair-Labor-Practice Charge; Union Files Additional Charges and General Counsel Issues Complaint

In the meantime, the Union called First Student's counsel several times regarding bargaining but did not receive a response. On August 29 and August 30, the Union wrote letters to a member of First Student's local management and to a colleague of First Student's counsel, again requesting recognition and bargaining. First Student did not reply. Finally, the Union got in contact with one of First Student's lawyers, who indicated on September 21 that he would be the Union's

contact while First Student's primary negotiator was on maternity leave.

(Appendix 645; 49-50; 316-19, 323-24.)

On September 21, the Union filed a charge, alleging that First Student was a perfectly clear successor to the District and was unlawfully refusing to bargain with the Union. First Student suggested bargaining dates in November but the Union did not agree to wait that long unless, in the interim, First Student would honor the collective-bargaining agreement between the District and the Union. First Student refused to do so. On October 1, First Student offered to meet and bargain in October if the Union withdrew its unfair-labor-practice charge. On October 5, the Union expressed disappointment that First Student had conditioned bargaining on withdrawal of the charge and requested to bargain in October. Later that day, First Student agreed to meet without withdrawal of the charge. The parties began bargaining over an initial contract on October 17. (Appendix 645; 320-23, 344.)

The Union withdrew its earlier charge and filed an additional charge on October 29 alleging that First Student violated the Act in several respects. Acting on that charge, the Board's General Counsel issued a complaint alleging that First Student violated the Act when it unilaterally set initial terms and conditions of employment for the unit employees that differed from those they had enjoyed when employed directly by the District, unilaterally implemented new attendance

policies, conditioned bargaining on the Union's withdrawal of an unfair-labor-practice charge, and delayed bargaining with the Union. (Appendix 636-37; General Counsel Exhibit 1(c).) After a hearing, an administrative law judge found that First Student had unlawfully implemented new attendance policies and delayed bargaining with the Union, but otherwise dismissed the complaint. (Appendix 636-53.) First Student and the Union each filed exceptions, and the General Counsel filed cross-exceptions, to the judge's decision. (Appendix 629-36.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Kaplan, Members Pearce and McFerran) unanimously adopted the judge's findings that First Student violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by delaying bargaining and by implementing new attendance policies without notifying the Union or giving it an opportunity to bargain. (Appendix 629, 651-52.) The Board further found that First Student independently violated Section 8(a)(5) and (1) by conditioning bargaining on the Union withdrawing an unfair-labor-practice charge. (Appendix 629 n.3.)

Reversing the judge, the Board (Members Pearce and McFerran; Chairman Kaplan, dissenting) found that First Student was a perfectly clear successor to the District. As such, the Board found that First Student's announcement and

implementation of changed initial terms and conditions of employment without giving the Union notice or an opportunity to bargain violated Section 8(a)(5) and (1). (Appendix 632-33.)

To remedy the violations found, the Board ordered First Student to cease and desist from failing and refusing to bargain with the Union, conditioning bargaining on the Union's withdrawal of an unfair-labor-practice charge, delaying the commencement of bargaining, and in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under the Act. (Appendix 633-34.) The Board also ordered First Student to: notify the Union, and bargain on request, before implementing any changes to employees' terms and conditions of employment; rescind the unilateral changes First Student implemented after May 17, 2012, on the Union's request; and make unit employees whole for any losses due to those changes. (Appendix 633-35.) Finally, the Board's Order requires First Student to post a remedial notice. (Appendix 635-36.)

SUMMARY OF ARGUMENT

Because First Student does not contest the Board's findings that it violated Section 8(a)(5) and (1) by unlawfully delaying bargaining, unilaterally implementing changes to its attendance policy, and conditioning bargaining on the Union's withdrawal of an unfair-labor-practice charge, the Board is entitled to

summary enforcement of the portions of its Order corresponding to those violations.

Substantial evidence supports the Board's finding that First Student also violated Section 8(a)(5) and (1) by changing the initial terms and conditions of employment under which it hired its predecessor's employees. A successor to a unionized employer who expresses an intent to hire the predecessor's employees without signaling that it will impose different terms and conditions of employment is a "perfectly clear successor" and must bargain with the incumbent union before setting initial terms and conditions of employment. As the Board found, First Student qualified as such.

Specifically, First Student told unit employees at March and May meetings that it usually hired 80-90% of employees, intended to hire as many of them as possible, and had no hiring requirements that were different from the District's requirements. It did not condition those statements with any announcement of changed employment terms, instead simply saying that it would need to negotiate employment terms with the Union, which is required of all successors, perfectly clear or otherwise. First Student has not identified any statement it made that would have warned employees that it would offer employment only under changed terms and conditions. First Student's May 17 announcement of changed employment terms came too late to avoid perfectly clear successor status. This

Court has made clear that a successor must signal its intent to change employees' terms and conditions of employment concurrently with, or before, communicating its intent to hire enough unit employees to form a majority of its workforce. First Student's claims that statements it made before it issued formal job offers to the employees, or before it had a contract with the District, are meritless under this Court's law.

The rule First Student proposes would defeat the policy behind the perfectly clear exception by allowing employers to lull employees into not seeking alternative work, then unexpectedly implement diminished employment conditions. The Board's doctrine and decision here adequately balance the burden of the successor employer's bargaining obligation with employees' interests in stability and their reliance on an employer's promise of continued employment.

STANDARD OF REVIEW

The Board's interpretation of the Act must be upheld if reasonably defensible. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984). As the Supreme Court has observed, "Congress made a conscious decision" to delegate to the Board "the primary responsibility of marking out the scope of the statutory language." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979); *see also Care One at Madison Ave., LLC v. NLRB*, 832 F.3d 351, 357 (D.C. Cir. 2016) (court

“will uphold Board’s legal determinations so long as they are neither arbitrary nor inconsistent with established law”) (internal quotation marks omitted).

The Board’s factual findings “shall be conclusive” if they are “supported by substantial evidence on the record considered as a whole.” 29 U.S.C. § 160(e); *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2012). Evidence is substantial when “a reasonable mind might accept [it] as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). A reviewing court may not displace the Board’s choice between two fairly conflicting views, even if the court “would justifiably have made a different choice had the matter been before it *de novo*.” *Id.* at 488; *accord UFCW, Local 204 v. NLRB*, 506 F.3d 1078, 1080 (D.C. Cir. 2007). “Indeed, the Board is to be reversed only when the record is so compelling that no reasonable fact finder could fail to find to the contrary.” *Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011).

ARGUMENT

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees.” 29 U.S.C. § 158(a)(5). “[A]n employer who violates [S]ection 8(a)(5) also, derivatively, violates [S]ection 8(a)(1),” which bans employer interference with, coercion, or restraint of employees’ rights under the Act. *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004). The duty to bargain includes an

obligation to “meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” 29 U.S.C. § 158(d).

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE UNCHALLENGED PORTIONS OF ITS ORDER

The Board found that First Student violated Section 8(a)(5) and (1) by unilaterally implementing attendance policies on August 27 and September 4, 2012, without first notifying the Union and giving it an opportunity to bargain; by conditioning bargaining on the Union’s withdrawal of an unfair-labor-practice charge; and by delaying bargaining from August 17 until October 17, 2012. (Appendix 633.) First Student expressly declines to challenge those findings in its opening brief. (Br. 8 n.2.) By so doing, it has waived any such challenge, and the Board is entitled to summary enforcement of the portions of its Order corresponding to those violations. *See Fallbrook Hosp. Corp. v. NLRB*, 785 F.3d 729, 735-36 (D.C. Cir. 2015) (Board entitled to summary enforcement of uncontested findings); *see also* Fed R. App. P. 28(a)(8)(A) (argument in brief before the Court must contain party’s contentions with citation to authorities and the record); *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (issues not raised in opening brief are waived).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT FIRST STUDENT WAS A PERFECTLY CLEAR SUCCESSOR TO THE DISTRICT, AND THUS VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY CHANGING UNIT EMPLOYEES’ TERMS AND CONDITIONS OF EMPLOYMENT

First Student twice indicated that it intended to offer employment to the District’s existing employees after taking over for the District. It did not qualify those statements with any hint that it intended to change their employment terms. In such circumstances, as explained below, the Board’s and this Court’s law make clear that First Student was not just a successor but a “perfectly clear successor” and, as such, had a duty to bargain with the Union before making any changes to the unit employees’ working conditions. Because First Student did not do so, its unilateral implementation of new working conditions violated Section 8(a)(5) and (1) of the Act.

A. A Successor Employer That Promises Employees Continued Employment, Without Indicating that It Will Change Their Terms and Conditions of Employment, Must Bargain over Any Such Changes

When a successor employer takes over from a unionized employer and employees “find themselves in essentially the same job after the employer transition,” the employees have a legitimate expectation that their union will continue to represent them. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41-43 (1987). Thus, to avoid labor unrest during such transitions, “the union certified as the collective bargaining representative of the predecessor

employer's employees presumptively retains its certification if the majority of employees after the change of ownership worked for the predecessor employer.” *Pa. Transformer Tech. v. NLRB*, 254 F.3d 217, 222 (D.C. Cir. 2001) (citing *NLRB v. Burns Int’l Sec. Servs., Inc.*, 406 U.S. 272, 279 (1972)). Because the composition of the successor’s workforce determines whether it has a duty to bargain with the union, the bargaining obligation is typically not established until the successor has hired “a substantial and representative complement” of employees. *Fall River*, 482 U.S. at 46-52. Successor employers often begin operations before hiring that substantial and representative complement. Accordingly, a successor employer is “ordinarily free to set initial terms on which it will hire the employees of a predecessor,” without bargaining with the incumbent union. *Burns*, 406 U.S. at 294 (emphasis added).

Nevertheless, the Supreme Court has recognized that “there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit.” *Burns*, 406 U.S. at 294-95. In such circumstances, because the incumbent union’s eventual majority is certain, “it will be appropriate to have [the successor employer] initially consult with the [incumbent union] before he fixes terms.” *Burns*, 406 U.S. at 295. That “perfectly clear” exception applies when a successor has communicated its intent to retain “all or substantially

all” of a predecessor’s employees. *Int’l Ass’n of Machinists & Aerospace Workers v. NLRB*, 595 F.2d 664, 673 n.35 (D.C. Cir. 1978).

In *Spruce Up Corp.*, 209 NLRB 194 (1974), *enforced mem.* 529 F.2d 516 (4th Cir. 1975), the Board interpreted the exception as applying where the new employer has “actively or, by tacit inference, misled employees into believing they would be retained without changes” or where it “has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.” *Id.* at 195; *accord Machinists*, 595 F.2d at 674; *Nexeo Solutions, LLC*, 364 NLRB No. 44, slip op. at 5 (2016); *see also Creative Vision Resources, LLC v. NLRB*, 882 F.3d 510, 525 (5th Cir. 2018) (holding perfectly clear exception is not limited to “situations where employees are actively misled”). More recently, this Court has held that it is sufficient, to avoid perfectly clear successor status, that an employer “porten[d] . . . employment under different terms.” *S & F Market St. Healthcare LLC v. NLRB*, 570 F.3d 354, 360 (D.C. Cir. 2009); *see also id.* at 361 (disagreeing with Board’s requirement that successor “specifically announce” changes to “core” terms and conditions; holding “employer must simply convey its intention to set its own terms and conditions”).

Either way, an employer that was “silent about its intent with regard to the existing terms and conditions of employment” before, and when, it “clearly

indicated it would be hiring the predecessor’s employees” is a perfectly clear successor. *Canteen Corp.*, 317 NLRB 1052, 1053 (1995), *enforced*, 103 F.3d 1355 (7th Cir. 1997). As this Court has observed, announcements that a successor intends to retain employees “engender expectations . . . that prevailing employment arrangements will remain essentially unaltered.” *Machinists*, 595 F.2d at 674. That is the case because “[e]ven when incumbents are not affirmatively led to believe that existing terms will be continued, unless they are apprised promptly of impending reductions in wages or benefits, they may well forego the reshaping of personal affairs” that they would have otherwise taken. *Machinists*, 595 F.2d at 674-75. The perfectly clear exception thus prevents employers from lulling employees “into not looking for other work” then offering them employment only under worsened terms. *S & F Market St. Healthcare, LLC v. NLRB*, 570 F.3d 354, 359 (D.C. Cir. 2009); *accord Machinists*, 595 F.2d at 675.³

³ First Student (Br. 22-25) and amicus (Amicus 6-8) claim that, in *Nexeo*, the Board materially changed its interpretation of *Burns* by stating that the bargaining obligation “attaches when a successor expresses an intent to retain the predecessor’s employees without making it clear that employment will be conditioned on acceptance of new terms,” rather than when an employer issues formal employment offers. *Nexeo*, 364 NLRB No. 44, slip op. at 6. But the *Nexeo* Board relied on longstanding case law to support that proposition and did not purport to change the *Spruce Up* test. Indeed, in *Burns*, the Supreme Court described the perfectly clear exception as applying when the successor “plans to retain” unit employees and, in *Machinists*, this Court stated that the exception

B. On Both March 2 and May 16, First Student Announced Its Intent To Retain Most Unit Employees Without Suggesting It Would Alter Their Terms or Conditions of Employment

As the Board found, First Student “clearly and consistently communicated its intent to retain the [District]’s unit employees.” (Appendix 631.) As described below, it first did so at the March 2 meeting that the District arranged specifically for First Student to explain the expected transition, from one employer to another, to unit employees. And it did so again both during and after the May 16 School Board meeting at which its contract was approved. First Student made no statement before or during those meetings that suggested to employees that it would change their terms and conditions of employment. Substantial evidence thus supports the Board’s finding that First Student was a perfectly clear successor to the District.

On March 2, First Student told employees that it would offer employment to all of them who met its hiring criteria, which were consistent with industry-wide standards, including the District’s requirements. Thus, “it follows that the employees had no reason to doubt that they would be hired by [First Student].” (Appendix 631.) Moreover, First Student dispelled any possible uncertainty when it told them that it typically hired 80-90 percent of the existing workforce when

applies when the successor “has indicated a purpose to retain incumbents.” *Burns*, 406 U.S. at 294-95; *Machinists*, 595 F.2d at 674.

assuming transportation services. Such a high rate of retention forecasts ordinary attrition, not mass replacement of current employees. *See Hilton's Environmental, Inc.*, 320 NLRB 437, 438 (1995) (new employer expressed an intent to retain incumbent employees when it solicited applications and assured employees that they would all be hired absent problems with information disclosed on their applications or in interviews); *Fremont Ford*, 289 NLRB 1290, 1296-97 (1988) (new employer expressed an intent to retain incumbent employees when it indicated that it had few doubts about retaining most employees).

At the same meeting, First Student also represented that it would recognize the Union if it hired 51 percent of the unit. It later told employees that their terms and conditions of employment would be “subject to negotiations.” (Appendix 641.) Taken together, those statements reinforced its earlier message of retention: First Student anticipated it would need to recognize and bargain with the Union, which would only be the case if it hired most of the unit employees. First Student thereby signaled its “inten[t] to retain a sufficient number to continue the union’s majority status,” which satisfies the perfectly clear exception’s retention requirement. *Adams & Assocs., Inc.*, 363 NLRB No. 193, slip op. at 4 (2016), *enforced*, 871 F.3d 358 (5th Cir. 2017).

Finally, on May 16, First Student reiterated that it would hire all current employees who met its hiring criteria and that it would recognize the Union if it

hired a majority of the unit. It added that its goal was to hire as many unit employees as possible. By such statements, First Student once again unambiguously “expressed its intent to retain employees[.]” (Appendix 631.)

Substantial evidence supports the Board’s further finding that when First Student told unit employees it would hire them, it did not give any indication that it would change their terms and conditions of employment. In First Student’s most specific statement about a term of employment, its representative told a group of employees and a union representative, just after the May 16 meeting, that “wages would be maintained.” (Appendix 643; 157.) Stating that it would maintain employees’ wages, as opposed to their wage rates, necessarily implies that First Student was not contemplating a large cut to employee hours. And the same representative then suggested a more general continuity of terms and conditions by asserting that the employees “shouldn’t have anything to worry about in coming to work for our Company.” (Appendix 643; 156-57.)

Those statements reinforced the impression conveyed by First Student’s representations at the earlier March 2 meeting with employees, which failed to “put them on notice that there would be changes in the initial terms and conditions of their employment.” (Appendix 632.) For example, when asked about how many hours employees would be guaranteed, First Student’s representative replied that “we don’t know what the routes are going to be for next school year. It’s an hourly

job based upon hours of work, and we'll know more about that when we do the bus routes.” (Appendix 124.) He then clarified that First Student would use the District’s routing system. As the Board found, those statements presumed that First Student would use “the same system that had been in place when the [District] employed the unit employees.” (Appendix 632.) On hearing that they would continue to be hourly employees, scheduled according to the same routing system, employees would have been reassured that First Student planned to stick to the District’s scheduling practices and that they would thus continue to work the same hours.

At the March 2 meeting, as noted, First Student also acknowledged its likely obligation to recognize the Union and bargain with it over unit employees’ terms and conditions of employment. As discussed above, those statements reinforced the message that it intended to hire most of the unit employees. And ample evidence supports the Board’s conclusion that they did nothing to suggest that First Student would do so on different initial terms than the District. Specifically, First Student told the District’s employees that matters such as paid time off, vacation pay, and sick pay “would be subject to negotiations” and declared its intention to negotiate a new collective-bargaining agreement. (Appendix 631; 123-24.) As the Board found, neither statement sheds light on whether First Student intended to

implement different *initial* conditions from those under which the District’s employees worked. (Appendix 631.)

All unionized employers—including both ordinary and perfectly clear successors—have a duty under Section 8(d) of the Act to meet and confer with the union representing their employees, and to execute a contract reflecting any agreement reached. *See* 29 U.S.C. § 158(d). A perfectly clear successor is “not required as a legal matter to adopt [its] predecessor employer’s collective-bargaining agreement.” (Appendix 631.) Instead, the Board treats perfectly clear successors as if they were working under an expired agreement; they must bargain with their employees’ union before making any changes to terms and conditions of employment. In other words, as the Board found, a putative successor’s announcement that it expects to hire a majority of employees and recognize their union, and that “certain terms of employment would be subject to negotiations, conveys nothing more than a statement of law—that the status quo may change as a result of negotiations, but not in advance of them.” (Appendix 631.)

Contrary to First Student’s contention, the relevant case law does not “teach that a successor can avoid perfectly clear successor status by simply communicating that it is not going to adopt or be bound by the predecessor’s collective bargaining agreement.” (Br. 29.) The cases First Student cites in support of that proposition each involved statements communicating an intent to

institute changes well beyond negotiating a new agreement. *See S & F Market*, 570 F.3d 354, 356 (2009) (successor offered employees temporary jobs only for a 90-day period, in contrast to indefinite employment under predecessor's collective-bargaining agreement, and referred them to new terms and conditions in employee handbook); *Ridgewell's*, 334 NLRB 37, 37 (2001) (successor told employees it would hire them as independent contractors, not as employees under the Act), *enforced*, 38 F. App'x 29 (D.C. Cir. 2002); *Bekins Moving & Storage Co.*, 330 NLRB 761, 761 n.1, 762 (2000) (successor's first communications notified employees that they would have "new and different terms and conditions of employment"; earlier communications by predecessor not attributable to successor); *Planned Bldg. Serv.*, 318 NLRB 1049, 1049 (1995) ("during its very first contact with" predecessor's employees, successor told them "that the[ir] benefits would not be the same"); *Marriott Mgmt. Servs.*, 318 NLRB 144, 144 (1995) (before stating it would not adopt existing collective-bargaining agreement, successor told employees it would not be willing to continue their existing health, welfare, and pension plans); *Henry M. Hald High School Ass'n*, 213 NLRB 415, 415, 419 (1974) (successor told employees "it wasn't in any way clear" what their employment terms would be and that "union contract [w]as null and void").

Moreover, the Board has specifically held that a successor's expressed desire to negotiate new terms and conditions of employment does not suffice to warn

employees that it would unilaterally implement new initial terms. *See Road & Rail Serv.*, 348 NLRB 1160, 1162 (2006).

On March 2 and May 16, First Student failed to give employees any indication that it would change their terms and conditions of employment *without* bargaining with the Union. Therein lies the crucial distinction between this case and *Banknote Corp. of America*, 315 NLRB 1041 (1994), *enforced*, 84 F.3d 637 (1997), which First Student cites (Br. 28) as the most analogous case. In that case, the successor employer sent employees a letter stating that it intended to hire them but simultaneously disavowing the “notion that the [successor] had agreed to be bound by the terms and conditions of the [predecessor’s] collective-bargaining agreements and declaring that the [successor] had ‘not made any such commitments.’” *Id.* at 1043. By contrast, First Student only told employees that “a new contract would be negotiated” (Appendix 128) while professing its expectation that it would recognize and bargain with the Union. It never signaled that it did not intend to adhere to the District’s agreement in the interim.

First Student makes much of the Court’s disagreement in *S & F Market* with the Board’s requirement of a specific announcement of intent to change terms and conditions. But the Court fundamentally agreed with the Board that an employer who reassures its predecessor’s employees of its intent to hire them must also at least “portend” an intent to set new terms to avoid inducing employees to rely on

continued employment under existing terms. Aside from its misguided passing reference (Br. 29) to renegotiating the collective-bargaining agreement, First Student does not contend that it made any statement satisfying that standard before May 17, and substantial evidence supports the Board’s finding that it did not.⁴

C. First Student’s May 17 Announcement of Changed Employment Terms Was Not Timely Under *Spruce Up*

It is undisputed that First Student announced new terms and conditions of employment on May 17. But that announcement came too late; under *Spruce Up*, the successor employer must “clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.” 209 NLRB at 195. More specifically, under the Board’s and this Court’s law, the time by which the successor must signal its intent to establish new employment terms is when the successor initially induces the employees to rely on continued employment by communicating its intent to hire enough unit employees to form a majority of its workforce. Thus, as shown below, First Student and the amicus’ view that a successor can avoid perfectly clear status so long as it announces new employment conditions at the same time or before making formal employment

⁴ Contrary to the amicus’ argument (Amicus 7-8), all that needs to be perfectly clear is that the successor will hire a sufficient number of the predecessor’s employees to become a legal successor. An employer’s expression of an intent to hire employees must only make clear that its new workforce will mostly include the predecessor’s employees, triggering a bargaining obligation, and First Student’s proclamations here are more than sufficient to so establish.

offers, regardless of what it may have previously said, is meritless. And First Student's focus on the timing of its contract with the District is similarly misplaced.

Extant Board law is to the contrary. As the Board stated, "a subsequent announcement of new terms, even if made before formal offers of employment are extended, or before the successor commences operations, will not vitiate the bargaining obligation that is triggered when a successor expresses an intention to retain the predecessor's employees without making it clear that their employment is conditioned on the acceptance of new terms." (Appendix 632, citing *Creative Vision Resources, LLC*, 364 NLRB No. 91, slip op. at 3 (2016), *enforced*, 882 F.3d 510 (5th Cir. 2018).) Because the May 17 announcement of new terms came after the March 2 and May 16 meetings, it could not undo First Student's previous, unambiguous expressions of intent to retain employees, which were unqualified by any suggestions that their terms and conditions would be altered.

Contrary to First Student's contention (Br. 30-31), *S & F Market* does not stand for the proposition that an announcement of changed terms and conditions of employment is necessarily timely when made with the formal job offer or will undo a successor's previous statements. In that case, the successor gave no indication that it intended to retain employees before inviting them to apply for employment, and the Court found that it adequately notified employees of changes

to their terms and conditions of employment as part of that same invitation. 570 F.3d at 359-60. The Court simply was not confronted with a situation like this one, where a successor had previously expressed an unqualified intent to retain employees in their existing jobs but later attempted to undo or qualify that expression.

Earlier in *Machinists*, however, the Court discussed just such a scenario. There, it held that a successor's announcement of new terms of employment is timely only if issued when the employer "has indicated a purpose to retain incumbents" or employees "are informed of the availability of employment with the successor entity." *Machinists*, 595 F.2d at 674-75. As the Court explained, "[if] the successor indicates that he intends to reemploy his predecessor's workforce a month hence, and when employees arrive to submit applications two weeks later he informs them that substantially different terms will be instituted, [. . .] a duty to bargain with respect to the proposed changes could possibly be properly imposed." 595 F.2d at 675 n.49.

As the Board explained here, it and courts have long relied on this Court's reasoning in *Machinists* to hold that, to avoid perfectly clear status, some portent of new terms and conditions of employment must come before the successor's clear expression of an intent to retain employees. (Appendix 632 n.12.) *See Nexeo*, 364 NLRB No. 44, slip op. at 9; *see also Creative Vision*, 882 F.3d at 518 ("a

communication of new employment terms through offer letters and employment agreements [is] untimely because the communication occur[s] after the successor evinces an intent to retain its predecessor's employees"); *Canteen Corp. v. NLRB*, 103 F.3d 1355, 1364 (7th Cir. 1997) (successor's announcement of new terms and conditions of employment at job interviews came too late to avoid perfectly clear status); see generally *Burns*, 406 U.S. at 294-95 (linking perfectly clear status to successor's evident "plans to retain" predecessor employees). Although the Sixth Circuit suggested otherwise in *Peters v. NLRB*, 153 F.3d 289, 298 (6th Cir. 1998) (suggesting that announcement of new employment terms "before or immediately after commencing operations" would be timely), that court subsequently reaffirmed the Board's rule and clarified that taking its statement from *Peters* out of context, as First Student does here (Br. 31), "cannot be reconciled with the *Burns* caveat" or binding circuit precedent. *Dupont Dow Elastomers, LLC v. NLRB*, 296 F.3d 495, 506 (6th Cir. 2002) ("To the extent that the second circumstance articulated in *Peters* conflicts with *Spitzer*, it cannot be the law of this Circuit.").

Two important statutory policies support the requirement that any announcement of new employment terms accompany the initial expression of an intent to retain the predecessor's employees. First, the rule prevents successors from inducing reliance on continued employment "only later to reveal that the

employees' terms of employment will be changed." (Appendix 632.) *See Machinists*, 595 F.2d at 675 n.49 (if an employer initially expresses interest in retaining incumbent employees but later notifies them of changed terms, "incumbents might be forced to continue in the jobs they held under the successor employer, notwithstanding notice of diminished terms" due to insufficient time to rearrange their affairs) Second, holding employers to their initial commitments fosters industrial peace in "an unsettling transition period for unions and employers alike." (Appendix 632.) *See Fall River*, 482 U.S. at 43 (when employees' expectations of retaining their union "are thwarted, their dissatisfaction may lead to labor unrest").

That well-established requirement, that caveats cannot retroactively limit successor's expressions of intent to hire, does not put any undue burden on the successor. All the successor need do to avoid perfectly clear status is convey to employees that it intends to change their terms and conditions of employment when it initially indicates an intent to retain them. As this Court clarified in *S & F Market*, the successor will avoid perfectly clear status if it signals that employees' terms and conditions would not be materially identical. 570 F.3d at 359. First Student could have met the requirement by telling employees that it intended to make some changes, even if it did not know what those changes would be. But it did not do so, and instead told employees that their employment conditions would

be, as they had been under the District, subject to negotiations. Even at the May 16 School Board meeting, when First Student must have known the changes it intended to implement in the detailed memo it gave employees the following morning, it still chose not to mention them—and indeed affirmatively represented that wages would remain the same, other conditions of employment would be subject to negotiations, and employees need not worry about working for First Student.

The key factor in determining when an employer becomes a perfectly clear successor is employees' reliance on continued employment. *S & F Market*, 570 F.3d at 359. As this Court has stated, “a prospective employment relationship may be presumed when a successor has boldly declared an intention to retain incumbents but has not concurrently proposed substantially reduced benefits,” regardless of the employer’s “revelation of employment terms after the employer’s initial announcement but before actual hiring commences.” *Machinists*, 595 F.2d at 675 n.49. Under First Student’s (Br. 30-31) and its amicus’s (Amicus 15-16) views, a successor should be able to lead employees to believe for months that they will retain their existing employment under new management, then issue formal employment offers with changed employment terms. Allowing employers to do so would eviscerate the reliance policy behind the perfectly clear exception. Under the Board’s current rule, based on this Court’s reasoning in *Machinists*, successors

are not faced with a “Hobson’s choice” (Amicus 15) between foregoing a contract to purchase a predecessor and losing valuable staff. Instead, if a successor induces employees to stay by promising them continued employment, it must either notify them that it will offer employment on different terms or it must bargain with their union before implementing any changes. If, as the amicus suggests (Amicus 15), forbidding successor employers from leading employees into remaining for longer than they would have had they understood the true nature of the jobs being offered makes it more difficult for those employers to retain “irreplaceable staff,” that is a feature, not a bug.

Similarly, because employees’ reliance is the key factor, First Student is incorrect when it contends (Br. 18-23) that the timing of its contract with the District is dispositive. As the Board found, the fact that First Student did not enter into a contract with the District until late May “is no impediment to holding that [First Student’s] bargaining obligation attached on March 2[.]” (Appendix 632 n.13.) The Board has consistently found that perfectly clear successorship can attach before a successor has signed a contract. *See Elf Atochem N. Am., Inc.*, 339 NLRB 796, 799, 807 (2003) (statements leading to perfectly clear successor status came concurrently with *nonbinding* letter of intent to purchase predecessor, months before actual sale); *Spitzer Akron, Inc.*, 540 F.2d 841, 843-45 (6th Cir. 1976) (relying on August statements to support perfectly clear successorship where

purchase agreement was not consummated until September). None of the cases First Student cites (Br. 19-21) are to the contrary. In *Hilton's Environmental*, 320 NLRB at 438 and *Morris Healthcare & Rehabilitation Center*, 348 NLRB 1360, 1367 (2006), the Board relied on statements made both before and after the formal transfer from the predecessor to the successor to establish perfectly clear status. The existence of later statements does not mean that the prior ones were insufficient on their own, and nothing in either of those cases suggests otherwise. Similarly, in *Fremont Ford*, the Board found that the employer was a perfectly clear successor based on the successor's unqualified statements before finalizing its purchase of the business that it had doubts about only a few of the unit employees and that "nothing was going to change," despite its later, post-purchase announcement in individual employee interviews that it would apply different initial terms and conditions of employment. *Fremont Ford*, 289 NLRB at 1297.⁵

Finally, contrary to First Student's contention (Br. 22), putting the focus on employees' reliance rather than on the successor's contractual obligations does not, and could not, saddle First Student with an unduly burdensome bargaining obligation. If the District backed out of its agreement with First Student, First

⁵ First Student misleadingly claims that the Board in *Fremont Ford* determined that the employer "could not be found to be a successor before it had a written agreement to acquire the [predecessor]." (Br. 20.) Not so: the Board rejected the theory that the putative successor could voluntarily recognize the Union before it took over, which is an entirely different legal issue.

Student would no longer be a successor and would not have a duty to bargain. To say that First Student was a perfectly clear successor, as opposed to an ordinary successor, means only that it could not lawfully change employees' terms and conditions of employment without first bargaining with the Union. There is thus no way for a successor to violate the Act due to perfectly clear status if the successor does not yet control the unit's terms and conditions of employment.

Notably, the Board found that First Student was a perfectly clear successor as of March 2 but found that First Student unreasonably delayed bargaining only as of August 17, when it had hired a substantial complement of its workforce.

(Appendix 633.) Thus, First Student's bargaining obligation on March 2 did not mean that it was required to immediately negotiate a collective-bargaining agreement with the Union; it could wait until it had hired employees. Moreover, the Board has recognized that a perfectly clear successor can negotiate changes to initial terms and conditions of employment before it hires any employees. *See Road & Rail*, 348 NLRB at 1162. In short, First Student could have negotiated with the Union over any changes it intended to make to initial employment terms before signing a contract, starting operations, or making any offers of employment, and later started long-term contract negotiations once it had hired employees.

CONCLUSION

In seeking the contract to assume the District's transportation services, First Student repeatedly represented that it would retain the unit employees. While doing so, it gave the employees no reason to expect that it would change their terms and conditions of employment, much less dramatically cut their hours the day after the School Board voted to approve the contract. In such circumstances, First Student was a perfectly clear successor, bound to maintain current employment conditions pending negotiations. Its declaration of new terms of employment when it solicited formal employment applications came too late to avoid that obligation. The Board therefore respectfully requests that the Court deny First Student's petition for review and enforce the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board
February 2019

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

FIRST STUDENT, INC., A DIVISION OF FIRST)	
GROUP AMERICA)	
)	
Petitioner/Cross-Respondent)	Nos. 18-1153, 18-1091
)	
)	
v.)	Board Case No.
)	7-CA-092212
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	
)	
and)	
)	
UNITED STEEL, PAPER AND FORESTRY,)	
RUBBER, MANUFACTURING, ENERGY,)	
ALLIED INDUSTRIAL & SERVICE WORKERS)	
INTERNATION UNION, AFL-CIO/CLC,)	
LOCAL 9036)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its proof brief contains 8,451 words of proportionally spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

s/ David Habenstreit _____
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Dated at Washington, DC
this 15th day of February, 2019

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LOCAL 9036)	
Intervenor)	

CERTIFICATE OF SERVICE

I certify that on February 15, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify the foregoing document was served on all parties' counsel of record through the CM/ECF system.

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