UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

FIRST STUDENT, INC.	)	
	)	Cases 36-CA-10762
and	)	36-CA-10766
	)	36-CA-10767
OREGON SCHOOL EMPLOYEES ASSOCIAITON.	)	36-CA-10848
	)	36-CA-10870

THE CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

1. Factual Background

First Student, Inc. ("First Student" or "Respondent") provides student transportation services for school districts throughout the United States. First Student contracts with individual school districts and independently employs bus drivers to transport students to and from schools and other destinations. The Oregon School Employees Association ("the Charging Party," "OSEA," or "the Union") represents First Student's drivers at the Molalla River School District, the Gresham-Barlow School District, and the Lake Oswego School District. First Student's actions in those three locations gave rise to the instant cases.

This case involves three units and many sets of facts. The facts have been repeated numerous times in previous briefs for both the Union and the General Counsel. The Union agrees with the ALJ's recitation of facts in his decision and in the interest of efficiency asks that the Board accept the ALJ's statement of facts to support the factual background for this brief.

2. Procedural Background

On February 17, 2011 the General Counsel filed a Consolidated Complaint against First Student alleging violations of Section 8(a)(1) and 8(a)(5) of the National Labor Relations Act. The above-referenced cases were consolidated for purposes of a hearing on June 30, 2011. A three-day hearing was held on August 9–11, 2011, before Administrative Law Judge John McCarrick. On December 7, 2011 Administrative Law Judge McCarrick issued a decision. First Student filed exceptions to Judge McCarrick's decision and a brief in support on January 11, 2011.

II. ARGUMENT

Judge McCarrick correctly found that Respondent committed numerous violations of Sections 8(a)(1) and 8(a)(5) of the Act. Judge McCarrick's credibility determinations are accurate and should be affirmed and his findings of fact accurately represent the events that gave rise to these unfair labor practices. Respondent's exceptions and supporting brief fail to provide any arguments that justify vacating Judge McCarrick's decision.

In an effort to efficiently respond to all of Respondent's exceptions, this brief is organized by exception. For each exception, the Charging Party has offered a brief response. Due to the overlapping nature of many of these exceptions, every effort has been taken to avoid duplicating arguments and analysis.

1. Response to Exception 1: The ALJ correctly found that the *Stone Container* exception does not apply to First Student's unilateral change in annual wage increases

The ALJ correctly found that First Student's actions do not fit within the *Stone Container* exception. It is widely accepted that an employer must maintain the status quo when employees are represented by a labor organization, and that "the duty to maintain the status quo imposes an obligation upon the employer not only to maintain what it has already given its employees, but also to implement benefits that have become conditions of employment by virtue of prior commitment or practice." *More Truck Lines, Inc.*, 336 NLRB 772 (2001) (quoting *Alpha Cellulose Corp.*, 265 NLRB 177, 178 n.1 (1982), *enfd. mem.* 718 F.2d 1088 (4th Cir. 1983)). First Student's reliance on *Stone Container Corp*., 313 NLRB 336 (1993), and its progeny, including *Neighborhood House Assn*, 347 NLRB 553 (2006), and *TXU Electric Co*., 343 NLRB 1404 (2004), is misleading. Under the *Stone Container* exception "if a term or condition of employment concerns a discrete recurring event, such as [an] annually scheduled wage review,

and that event is scheduled to occur during negotiations for an initial contract, the employer may lawfully implement a change in that term or condition if it provides the union with a reasonable advance notice and an opportunity to bargain about the intended change." *Covanta Energy Corp.*, 356 NLRB No. 98 (2011). As the ALJ correctly found, First Student's conduct does not fit within this exception for any of the units because First Student did not provide adequate or timely notice and did not show a willingness to bargain.

The evidence clearly establishes that employees were accustomed to receiving wage increases at the beginning of every school year at all three locations and attendance bonuses the pay period after concluding a month of perfect attendance in Lake Oswego. First Student stopped both of these practices at the beginning of the 2010–11 school year. First Student did not provide the required notice, and the Union learned of the decision to withhold wage increases and cease the attendance bonus program only after the decision had already been implemented. Furthermore, even if First Student had provided notice, the exception requires that the employer not simply "propose elimination of the annual practice," but rather "be willing to bargain over the amount of the annual payment for that particular year." *Id.* (citing *Neighborhood House Ass'n*, 347 NLRB 553, at n.4 and 556 (2006)). In other words, First Student was "obliged to maintain the fixed elements of the [practice or program] and to negotiate with the Union over the discretionary element of the [practice or program]—the amount." *Covanta*, (citing *Mission Foods*, 350 NLRB 336, 337–38 (2007)). First Student did not show a willingness to bargain and unilaterally eliminated the wage increase and attendance bonuses without notifying or bargaining with the union in violation of Section 8(a)(5) of the Act.

2. <u>Response to Exception 2:</u> The ALJ correctly found that First Student had a past practice of granting annual wage increases at the Lake Oswego location

The evidence clearly established that that Lake Oswego Unit drivers customarily receive a pay increase at the start of every school year. (R Exh 12; TR 323:17-324:22; GC Exh 43; TR 356:11-357:13). Daryl Jefferson, the Lake Oswego driver supervisor, testified that ever since he was hired by First Student, approximately 8 years ago, there was a wage scale in effect, and employees received increases every September 1st. In his decision, the ALJ correctly noted that "[p]rior to the Union's certification in January 2010, drivers received annual pay raises in September from 2006 to 2009 according to a pay scale that provide hourly wage increases based upon time in service." (ALJD p. 5, lines 9-12, relying on GC Exh. 42). The ALJ was correct in reaching the conclusion that First Student had a past practice of granting annual wage increases at the Lake Oswego Location.

3. <u>Response to Exception 3:</u> The ALJ correctly found that First Student failed to bargain with the Union over the amount to be paid under its wage programs

The ALJ correctly noted that the *Stone Container* exception requires that an employer provide notice and an opportunity to bargain before making a change in terms or conditions. The ALJ correctly found that First Student failed to bargain with the union over annual wage increases before unilaterally denying wage increases in 2010-2011 school year for all three units. As the analysis in Response to exception 1 above explains, in order to meet the requirements of the *Stone Container* exception, First Student must have provided the union with reasonable advance notice and an opportunity to bargain the intended change. *Neighborhood House Ass'n*, 347 NLRB 553, 554 (2006). First Student's announcement to employees that there would be no pay increases just prior to the start of the school year "is inconsistent with good-faith bargaining

and suggests a fait accompli, not a meaningful proposal." *Covanta Energy Corp*., 356 NLRB No. 98, slip op. at 17 (citing *Brannan Sand & Gravel Co*.. 314 NLRB 282 (1994) (distinguishing *Stone Container* because "[i]n this connection, we rely on the fact that by the time the Union was apprised of the contemplated changes, the Respondent had already announced them to the employees"). Thus by unilaterally eliminating wage increases in all three locations, First Student failed to bargain.

In Gresham, the annual pay increase goes into effect in August of each year, proximate to a mandatory in-service meeting held just prior to the start of the new school year. (GC Exh 44, pp. 1-31; TR 155:7-9; 155:25-156:25; 176:20-25; 188:16-18; 553:19-554:5). The Gresham Unit drivers learned that they would not be receiving their customary annual wage increase around August 19, 2010. (TR 157:8-21; 180:2-181:13; 190:15-191:8; 555:2-10). Here, failing to notify union members that they would not be receiving their annual pay increase until late August shows a failure on the part of First Student to bargain over this issue in Gresham.

First Student argues that Dr. Gapasin, OSEA's Gresham representative knew that First Student intended to eliminate the wage increase before the August 19, 2010 in-service. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces the Board that the resolutions are incorrect. *Standard Dry Wall Products, Inc*., 91 NLRB 544 (1950), *enfd*. 188 F.2d 362 (3d Cir. 1951). The Judge found that Dr. Gapasin's testimony was credible. Further, First Student provided no evidence regarding who advised Dr. Gapasin prior to August 19 of First Student's decision to eliminate wage increases or that Dr. Gapasin did in fact know of this information before August 19. Therefore, First Student's argument lacks merit and the Board should affirm Judge McCarrick's finding.

In Lake Oswego, the annual increase generally goes into effect on September 1. Daryl Jefferson testified that ever since he was hired by First Student, approximately 8 years ago, there was a wage scale in effect, and employees received increases every September 1st. Here, the Union was also not informed until the very end of August that drivers would not be receiving a pay increase. The Union did not learn that drivers would not be receiving a pay increase until late August 2010, when the Union's lead negotiator at Lake Oswego, Kim Bonner, received a phone call from driver Brian McLaughlin, informing her that Jefferson had told him that there would be no raises while the parties were bargaining. (TR 294:18- 296:19). In the negotiations between Respondent and the Union prior to this phone call, Respondent had not notified the Union that it would not be giving any raises while the parties were bargaining. (TR 296:15-23).

Respondent argues that the ALJ incorrectly found that First Student made a final decision to eliminate wage increases in Lake Oswego without first putting the Union on notice or bargaining over the issue. However, as described above, First Student did not put the Union on notice that wage increases would be eliminated. It was not until late August that Kim Bonner was informed of First Student's decision to eliminate the wage increase. The decision had already been made. The Board in *Jensen Enterprises*, 339 NLRB 877, 877 (2003) explains "[b]y withholding customary increases during the potentially long period of negotiations for an agreement covering overall terms and conditions of employment, an employer, in effect, changes existing terms and conditions without bargaining to agreement or impasse, in violation of Section 8(a)(5)."

In Molalla, according to the prior contract and First Student's practice, wage increases become effective on July 1st of each school year, or upon the first day thereafter that an individual employee works. GC Ex. 33 at Article 16. Once again, however, First Student unilaterally implemented a decision not to grant wage increases. First Student did not notify the

Union of its decision. The Union did not learn about the decision until after it had been implemented, when members first received their paychecks for the 2010–11 school year, sometime in September 2010. (TR 203:21-204:3). Tom Motko, the Union representative, himself learned of the issue in an October 2010 chapter meeting. (TR 204:4-19). Judge McCarrick correctly found that First Student unilaterally eliminated the wage increase without providing notice to the union.

Respondent specifically argues that First Student did not unilaterally eliminate the annual wage increase at the Molalla location. However, the evidence is clear that First Student eliminated the wage increase without given the union notice or bargaining over the issue. While there was a successor agreement in place at the Molalla location, First Student had an obligation to maintain the status quo, which under the circumstances included the granting of annual wage increases. The contract itself provides evidence that First Student has a past practice of granting annual wage increases.

Due to the complete lack of notice by First Student regarding the elimination of annual wage increases with all three units, Judge McCarrick correctly found that First Student's actions were a fait accompli and that First Student did not bargain with the Union over this issue.

4. <u>Response to Exception 4:</u> The ALJ correctly found that First Student did not provide the Union with notice and an opportunity to bargain over annual wage increases

For all of the reasons explained above in Response to Exceptions 1 through 3, the ALJ was correct in his finding that First Student did not provide the Union with notice and an opportunity to bargain over annual wage increases.

5. Response to Exception 5: The ALJ correctly found that First Student's refusal to give customary annual wage increases were not *de minimis* violations

The unilateral decision by First Student to deny drivers in three units their customary wage increases was neither a minimal nor an insignificant violation. Black's Law Dictionary defines *de minimis* as "1. Trifling; minimal. 2. (Of a fact or thing) so insignificant that a court may overlook it in deciding an issue or case." Black's Law Dictionary (9th ed. 2009). The Board has analyzed whether misconduct close to an election is *de minimis* by considering the following factors: the number of violations, their severity, the extent of their dissemination, and the number of employees affected. *Bon Appetit Mgt. Co*., 334 NLRB 1042, 1044 (2001). Here, First Student's violation impacted hundred of employees across the state and took place during the course of attempting to bargain for a first collective bargaining agreement. It did not just take place within one unit, but in all three locations. Respondent's support for finding that the violations were *de minimis* in Lake Oswego and Molalla is the fact that employees were eventually paid their annual increase. However, the record is still unclear as to whether First Student has actually made the employees whole. In Molalla, for example, First Student did not adequately pay members retroactively—-some have not received any retro pay, while there is a dispute as to whether others were paid the correct amount. In Lake Oswego, First Student did pay drivers retroactively but failed to provide interest for the retroactive payments. Focusing on First Student's overall conduct with respect to wages, it is impossible for the Board to find that unilaterally eliminating wage increases was a *de minimis* violation.

6. Response to Exception 6: The ALJ correctly found that First Student discontinued attendance bonuses

The record is clear that First Student discontinued attendance bonuses. In September of 2010, Lake Oswego driver Brian McLaughlin did not receive the attendance bonus he usually

receives for perfect attendance. The long-standing policy in Lake Oswego is that a driver with perfect attendance in a given month would receive a $60 bonus at the end of the pay period after such perfect attendance was completed. Under Respondent's attendance policy at that time, McLaughlin had perfect attendance in September and was thereby entitled to an attendance bonus of $60, which was to be paid around the middle of the following month, October 2010. (TR 332:19-333:16). McLaughlin did not receive that attendance bonus, however, until November 2010. (TR 333:17-19; 335:20-336:5). Additionally, supervisor Daryl Jefferson wrote a note on the chalkboard in the employee break room, which he customarily uses to communicate with drivers, stating: "Attendance bonus checks will not be issued due to negotiations." (TR 334:23- 335:19). At the hearing, Jefferson admitted that attendance bonuses earned in September 2010, were not timely paid, explaining that he had been "instructed not to pay the attendance bonuses until negotiations were done." (TR 607:2-24).

7. <u>Response to Exception 7:</u> The ALJ correctly found that a one month delay of providing attendance bonuses was a material change in a condition of employment

In reaching this conclusion, the ALJ relied not only on the failure to pay Mr. McLaughlin but also on Jefferson's statements to employees, and the declaration that he wrote on the chalkboard for all employees to see. First Student ignores the impact of telling drivers that the lack of payment was due to negotiations. To be found unlawful, the unilaterally imposed change must be "material, substantial, and significant" and impact the employees or their working conditions. *Toledo Blade Co*., 343 NLRB 385 (2004). The Judge correctly noted that the elimination of the bonus took place while the Union was bargaining for an initial agreement. First Student eliminated a term and condition of employment right as the Union was beginning its representation of these drivers. The change was material not just because it took away a

benefit, but because of the way First Student advised drivers of the loss of the benefit and because it had the effect of discouraging support for the Union.

8. Response to Exception 8: The ALJ correctly found that First Student did not repudiate the violation relating to the attendance bonus

Although attendance bonuses earned in September 2010 were ultimately paid in November 2010, and there were no further incidents of late bonus payments, the transcript is clear that respondent never repudiated its unlawful refusal to pay bonuses during negotiations. (TR 607:15-21). In order for a repudiation to be effective the repudiation:

> must be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct." *Douglas Division, The Scott & Fetzer Company*, 228 NLRB 1016 (1977), and cases cited therein at 1024. Furthermore, there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer's part after the publication. *Pope Maintenance Corporation*, 228 NLRB 326, 340 (1977). And, finally, the Board has pointed out that such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights. *See Fashion Fair, Inc., et al*., 159 NLRB 1435, 1444 (1966); *Harrah's Club*, 150 NLRB 1702, 1717 (1965).

Passavant Memorial Area Hospital, 237 NLRB 138, 138-39 (1978). Most importantly, First Student never repudiated Jefferson's statement to drivers. First Student failed to meet any of the requirements discussed above and therefore the ALJ correctly found that there was not an effective repudiation.

9. Response to Exception 9: The ALJ correctly found that the attendance bonus violation was not *de minimis*

Respondent's decision to eliminate the attendance bonus cannot be viewed in a vacuum. First Student unilaterally eliminated the bonus without notifying the union or bargaining the change, the bonus was eliminated around the same time First Student eliminated their annual

wage increase and both of these violations took place while the Union was negotiating an initial agreement with First Student. These facts in conjunction with the way First Student informed drivers of the elimination of the bonus and the lack of repudiation support the ALJ's finding that the violation was not *de minimis*.

10. Response to Exception 10: The ALJ correctly found that First Student violated section 8(a)(1) and 8(a)(5) by ceasing its annual wage increases and attendance bonus

The elimination of the annual wage increases in all three units and attendance bonuses in Lake Oswego without notifying and bargaining with the Union constituted violations of Section 8(a)(5). The related comments, made directly to bargaining unit members that the decision to freeze wage increases and monthly attendance bonuses was due to contract negotiations, constitute violations of 8(a)(1).

In all three units, the ALJ correctly concluded that First Student violated Section 8(a)(5) by failing to pay drivers the customary wage increase for the 2010-2011 school year. Section 8(a)(5) of the Act makes it "an unfair labor practice for an employer....to refuse to bargain collectively with the representative of his employees. . . ." 29 U.S.C.§ 158(a)(5). In unilaterally eliminating its custom and practice of granting its Unit employees a pay increase at the start of the school year, Respondent changed their terms and conditions of employment. The Board in *Jensen Enterprises*, 339 NLRB 877, 877 (2003) explains:

> Periodic wage increases become conditions of employment if they are "an established practice . . .regularly expected by the employees." *Daily News of Los Angeles*, 315 NLRB 1236 (1994), enfd., 73 F.3d 406 (D.C. Cir. 1996).
>
> Accordingly, following its employees' selection of an exclusive bargaining representative, an employer may not unilaterally discontinue a practice of granting periodic wage increases. By withholding customary increases during the potentially long period of negotiations for an agreement covering overall terms and conditions of employment, an employer, in

> effect, changes existing terms and conditions without bargaining to agreement or impasse, in violation of Section 8(a)(5).

The facts stated above in Response to Exceptions 1 through 3 show that wage increases were an established practice. For the reasons previously explained in this brief, the ALJ correctly found that First Student does not meet the *Stone Container* exception, therefore making First Student's unilateral denial of wage increases a violation of Section 8(a)(5) in all three units. The implementation of these decisions without notifying and bargaining with the Union constituted violations of section 8(a)(5). The related comments, made directly to bargaining unit members, constitute violations of 8(a)(1). The *Covanta* Board summarized the relevant cases:

> the Board in *First Student*, [341 NLRB 136 (2004)], found that the employer's announcement to employees that there would be no wage increase during negotiations (notwithstanding the history of providing annual wage increases) violated Section 8(a)(1) of the Act. Along the same lines, as set forth in *Jensen Enterprises*, 339 NLRB 877 (2003), and quoted approvingly in *Wal-Mart Stores, Inc*., 352 NLRB 815, 816 (2008): ". . . an employer's statement that wages will be frozen until a collective-bargaining agreement is signed violates Section 8(a)(1) of the Act if the employer has a past practice of granting periodic wage increases. Such an announcement suggests to employees that the employer intends to unilaterally take away benefits and require the union to negotiate to get them back."

Covanta Energy Corp., 356 NLRB No. 98 (2011); *see also, Illiana Transit Warehouse Corp*., 323 NLRB 111, 114 (1997) (in the context of a practice of an annual wage increase "the statement that wages would be frozen until a contract is negotiated [is] an unlawful threat of loss of benefits and less favorable treatment if the Union were voted in").

The evidence in the instant case matches almost exactly the facts of *Covanta*. Therefore, as in *Covanta*, First Student violated section 8(a)(1) by telling bargaining unit members that benefits they had previously enjoyed would be frozen unless and until negotiations with the union were concluded.

11. Response to Exception 11: The ALJ correctly found that First Student's "hard bargaining strategy" was not a defense to refusing to bargain over economic items

The ALJ correctly concluded that First Student's refusal to discuss economic terms before resolving all non economic terms during its bargaining with Gresham was unlawful. Regardless of how First Student choses to categorize its "strategy," the decision to refuse to bargain over economic terms completely frustrates the bargaining process and is not a defense to unlawful conduct.

While First Student in its supporting brief claims that it bargained an economic impact as early as March 2011, this assertion is false. Specifically, First Student claims that the parties "discussed and agreed upon" items as early as March 22, 2011. Dr. Gapasin testified at the hearing that on March 22, 2011, when asked about language items that involved economic ramifications, Mr. Briggs, First Student's chief negotiator for the Gresham location, declined to speak about it because it was an economic issue. (Tr. 143:23-25). Further, the language in Item #6 does not negate the impact of First Student's refusal to bargain over economic issues as memorialized in Item #2: "It is the intent of the Company that non-economic discussions will be concluded before any economic talks will be entertained. The union's intent is to the contrary." (GC Ex. 17.) First Student's "strategy" defense for its conduct lacks merit and the Board should affirm the ALJ's finding on this issue.

12. Response to Exception 12: The ALJ correctly found that First Student bargained in bad faith from January 6 to August 2, 2011 in violation of sections (8)(a)(1) and (8)(a)(5) of the Act by refusing to discuss economic items until non economic items were resolved

As the ALJ noted in his decision, First Student refused to discuss economics during bargaining with the union in Gresham from January 6 to August 2, 2011. First Student's refusal

to bargain over economic issues for 7 months prevented the union from reaching a contract and frustrated the entire bargaining process.

As recently as August, 2011, the Board made clear that "[i]t is black letter Board law that an employer may not condition bargaining over economic issues upon resolution of all non-economic issues." *Erie Brush & Manufacturing Corp*., 357 NLRB No. 46 (NLRB 2011). First Student's refusal to negotiate economics pending agreement on all non-economic issues violates Sections 8(a)(1) and (5). *See United Technologies*, 296 NLRB 571 (1989) (bad faith bargaining where employer engaged in a lengthy pattern of delaying tactics including the failure to make an economic proposal after a year of bargaining); *Eastern Maine Med. Ctr.*, 253 NLRB 224, 244-45 (1980) (bad faith bargaining where employer, inter alia, made first economic proposal 5 months after the union's first economic proposal, where employer "refused even to discuss economic issues until there was resolution of noneconomic matters"), *enfd*., 658 F.2d 1 (1st Cir. 1981); *Southside Electric Coop*., 243 NLRB 390 (1979) (bad faith bargaining where employer limited the frequency and duration of meetings and "refused for 7 months to submit an economic proposal" in response to the union).

13. <u>Response to Exception 13:</u> The ALJ correctly found that as a whole, Respondent failed to act in good faith in its interactions with the Union

In exception 13, Respondent miscategorizes the ALJ's argument. In analyzing Respondent's conduct for purposes of a bad faith bargaining allegation, the ALJ looked not only to the Respondent's actions related to meetings in Gresham, but also to Respondent's conduct as a whole throughout the three units. In that analysis, the ALJ noted that "this case did not occur in a vacuum" and that Respondent's lack of good faith went beyond failing to schedule meetings but also encompassed its failure to provide annual wage increases and attendance bonuses to unit members. The ALJ correctly noted that Respondent's lack of good faith was not isolated.

14. <u>Response to Exception 14:</u> The ALJ correctly focused his analysis on the period from April 15, 2011 to August 2, 2011 in finding that First Student refused to meet at reasonable times in violation of Section 8(a)(5)

At the hearing, the ALJ correctly ruled that Respondent was not allowed to introduce evidence regarding the Union's alleged unavailability for a period of time outside of the scope of the charges in this case. Respondent argues that the ALJ failed to consider evidence regarding Respondent's allegations of the Union failing to respond to requests to meet in October 2010. The complaint in this case alleged that between April 15, 2011 and August 2, 2011, First Student failed to meet at reasonable times and places for bargaining with the Union concerning employees at the Gresham location. The focus of the ALJ's inquiry was on the Respondent's refusals to meet and bargain between April and August 2011. ALJ was correct to disregard the Union's alleged actions that took place outside the period of time of Respondent's alleged unlawful conduct.

15. <u>Response to Exception 15:</u> The ALJ correctly found the from the date of certification to August 2, 2011, the parties met on average less than once per month

From the date of certification in June 2010 to August 2, 2011, the ALJ correctly found that the parties met 11 times to bargain during a 14 month period. The ALJ correctly pointed out that there were 15 sessions scheduled, but that Respondent refused to meet without justification on four of those occasions. Looking at these figure in their entirety, its is an accurate statement that if the parties only met 11 times in 14 months, they met on average less than once a month. While the ALJ may not have used the most ideal wording in reaching his point, the facts speak for themselves. From as early as the first scheduled bargaining session, First Student took opportunities to cancel or frustrate the bargaining process. For example, on December 2, 2010, the first date set for bargaining, First Student showed up but refused to bargain due to the number

of observers at the meeting. Additionally, the complaint alleges unlawful conduct from April 15, 2011 to August 2, 2011. The ALJ appropriately focused his analysis on First Student's failure to bargain during that particular time in finding an 8(a)(5) violation.

16. <u>Response to Exception 16:</u> The ALJ correctly found that between April 15 and August 2, 2011 First Student failed to meet at reasonable times in violations of Section 8(a)(5) of the Act

The parties failed to meet between April 15 and August 2, 2011, and from early on in the bargaining relationship, First Student refused to set any bargaining dates between April 15 and June 21, 2011. As early as February 2011, the Union tried numerous times and offered numerous ideas to engage First Student in bargaining between April and June, but to no avail. Respondent not only refused, it never offered any alternative bargaining dates between April 15 and June 21, 2011. (TR 431:22-432:3). Specifically, on April 24, having no economic proposal from Respondent and with no bargaining dates scheduled until after the expiration of the certification year, the Union requested more bargaining dates prior to June 21, even offering to bargain by teleconference. (GC Exh 25). Respondent, through Briggs, denied this request the following day, stating that the June 2011 dates were "established in good faith" and "there are no other dates available for us to meet[.]" (GC Exh 25). On May 19, the Union again repeated its request for bargaining dates prior to June 21 and Respondent again did not provide any dates. (GC Exh 27; TR 99:17-100:1). The Union also sought the assistance of the Federal Mediation and Conciliation Service ("FMCS"), which offered to mediate bargaining any time during the week of June 6, 2011. (GC Exh 26; TR 99:4-16). Respondent declined to utilize the services offered by FMCS.

Section 8(d) requires the parties to "meet at reasonable times and confer in good faith with respect to" mandatory subjects of bargaining. 29 USC § 158(d); *see also Vincci USA, D/B/A*

Avalon, 2006 WL 1895044, Case No. 2-CA-36910 (NLRB Div. of Judges, July 6, 2006) (refusal to meet for several months constitutes violation of section 8(a)(5)). An employer's obligation to bargain in good faith includes a duty to make its authorized representative available for negotiations at reasonable times and places. *Nursing Center at Vineland*, 318 NLRB 901, 905 (1995), *enfd*, 1996 WL 199152 (3d Cir. 1996). *See also Milgo Indus., Inc*., 229 NLRB 25, 31 (1977), *enfd*, 567 F.2d 540 (2d Cir. 1977) (six meetings in six months can scarcely be said to be regular intervals).

Respondent argues that following an email exchange in January between Dr. Gapasin and Mr. Briggs, the Union did not propose any additional dates to meet. (Respondent's Supporting Brief at 27). This statement misconstrues the facts, since the Union on multiple occasions reached out to First Student to try to schedule additional bargaining dates. (*See* GC Exh 25 and 27). Respondent also argues in its brief that between April and June First Student "continued to communicate" via email with the Union. Even if emails were exchanged between the parties this is no defense to refusing to meet in person or over the phone to bargain over the contract. Without having provided any viable justification for failing to meet at reasonable times between April 15 and June 21, First Student has violated section 8(a)(5).

17. <u>Response to Exception 17:</u> The ALJ correctly found that First Student did not effectively repudiate the cancellation of the June 21, 2011 bargaining meeting and refusal to bargain

Respondent failed to effectively repudiate the cancellation of the June 21, 2011 bargaining meeting. Briggs' quick reversal of his decision to cancel bargaining sessions does not remedy the cancelation—the parties were not able to schedule another bargaining session until over a month later. The factors the Board determines to decide whether or not a repudiation is effective are described above in Response to Exception 8, which cites *Passavant Memorial*

Hospital, 237 NLRB 138, 138 (1978) (holding that in "certain circumstances an employer may relieve himself of liability for unlawful conduct by repudiating the conduct"). Here, Respondent never repudiated its unlawful announcement, made on June 21, that it would not bargain with the Union until after the decertification election due to the fact that the Union's "status" had been "questioned." Briggs testified at the hearing that he chose to reschedule the June 21 bargaining meeting because of "male intuition" and in an effort to "build[] positive relations." (TR 436: 20-25, TR437:1; TR 436: 8-9.) This is certainly not an "unambiguous" repudiation. First Student never acknowledged that they had failed to bargain unlawfully based on the filing of a decertification petition or made any acknowledgment that they had done anything wrong. First Student's communications to the Union were not "specific in nature to the coercive conduct" and it did not publish to employees assurances that First Student would not interfere with their exercise of Section 7 rights in the future. While Respondent argues that the ALJ's reasoning is inconsistent, it fails to provide evidence to rebut the ALJ's ultimate finding. Simply retracting its refusal to meet does not establish a repudiation. First Student did not meet the standards set forth in *Passavant* and therefore the ALJ correctly found that the attempt to reschedule the June 21-23 bargaining session did not constitute an effective repudiation.

18. <u>Response to Exception 18:</u> The ALJ correctly found that First Student failed to bargain in good faith by canceling the June 21-23, 2011 bargaining sessions without good cause in violation of Section 8(a)(5) of the Act

There was simply no lawful justification for canceling the three June bargaining dates. The Respondent's justification for cancelling the June 21-23, 2011 bargaining dates was that Briggs felt he had a reasonable belief that the union had lost majority support due to the filing of a decertification petition. However, he did not call the regional Board office to determine what percentage of the bargaining unit had signed the petition, and therefore there was no reason to

believe that more than 30% of the bargaining unit had supported the petition. In fact, he testified at the hearing that when he cancelled the bargaining sessions he had "no idea" how many employees supported the decertification petition. (TR 433:5-11.)

In Dresser Industries, 264 NLRB 1088, 1089 (1982) the Board held that the filing of a decertification petition alone does not provide a reasonable ground for an employer to refuse to recognize a bargaining representative or to withdraw from bargaining. Based on these facts, Respondent did not have good cause to arbitrarily cancel the bargaining session and therefore failed to bargain in good faith in violation of Section 8(a)(5).

19. <u>Response to Exception 19:</u> The ALJ correctly found that First Student violated Section 8(a)(5) of the Act by refusing to provide wage sheets to the Union

The ALJ was correct in his finding that failing to provide wage sheets violated Section 8(a)(5). Section 8(a)(5) of the Act mandates that employers must provide unions, upon request, with information which is relevant for the purpose of contract negotiations. *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435-36 (1967). The general rule regarding information requests was summarized by the Board in *McCarthy Construction Co*., 2009 WL 1514598, Case No. 7-CA-51474 (NLRB Division of Judges, May 27, 2009):

> It is well established that an employer has an obligation to supply requested information which is reasonably necessary to the exclusive collective-bargaining representative's responsibilities. This duty to provide information includes information relevant to contract negotiations and administration. If the information is relevant or arguably relevant, meeting a liberal "discovery type standard," such information must be provided. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956). Information which is presumptively relevant must be provided within a reasonable time or, if not provided, there must be a timely explanation of why the request cannot be met. *FMC Corp*., 290 NLRB 483, 489 (1988). An unreasonable delay in furnishing requested information is, in and of itself, a violation of Section 8(a)(5) of the Act. *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989).

The union in *McCarthy Construction Co*., 2009 WL 1514598, Case No. 7-CA-51474 (NLRB Division of Judges, May 27, 2009) requested similar information, "concerning the identity and status of unit employees, and information regarding wages, hours and other terms and conditions of employment of unit employees." Id. The Board found the information to be "presumptively relevant." Id. (citing *Maple View Manor*, 320 NLRB 1149, 1151 (1996)). There is no reason in this case to diverge from the Board's conclusion in *McCarthy Construction*.

There is no question that First Student had wage sheets and refused to provide them to the Union following the union's request. Gresham drivers held an executive board meeting with their union representative in early August 2010 and attendees discussed whether it was legal for Respondent to fail to provide drivers their annual pay increase. (TR 40:13-41:20). The attendees decided that they needed information from Respondent to determine whether wage increases were the status quo. (TR 43:18-44:9). For that reason and in preparation for bargaining the Union prepared an information request. (GC Exh 2; TR 43:18-44:23). On August 23, 2010, Gresham Unit President Cory Blacksmith sent a letter to Gresham manager Michael Jourdan requesting "the step up raise sheets that have been issued to Payroll of the past 5 years (2004-2005 thru 2009-2010 school years) and all First Student's Policy's regarding this matter." (GC Ex. 2.) In requesting Respondent's "step up raise sheets," Blacksmith sought the wage scale for Gresham Unit drivers. (TR 159:17-160:23).

Respondent's wage scales were undeniably relevant, as they relate to the core issue of whether Respondent unlawfully ended its practice of granting Gresham Unit drivers a pay increase at the start of every school year

Respondent's argument that the step-up information did not exist is without merit, as not only was such information partly produced in response to the General Counsel's subpoena, but

the Company's own witness testified that he keeps such information on his work computer. (TR 558:21-559:8).

First Student's argument that they had already provided the Union with the requested information should also be disregarded. Respondent gave the Union information showing the current wage rates of the Gresham Unit drivers, but it never gave the Union the corresponding wage scale, which would have also shown the preceding years' wage scale. (TR 583:20-21). Providing only one year of information did not meet the original request which asked for information over a 5 year period and was not sufficient to ascertain the underlying issue, whether there was a change in wages over the years. Since the information was necessary and relevant to the issue of wages and to the Union in performing its duty as the exclusive bargaining representative Respondent violated Section 8(a)(5) of the Act by failing to provide the wage sheets.

20. <u>Response to Exception 20:</u> The ALJ correctly found that First Student violated Section 8(a)(5) of the Act by refusing to provide the Gresham Revenue Contract to the Union

The Gresham Revenue Contract was necessary and relevant to the Union for bargaining because it was referenced to specifically by Respondent in regards to discipline. Respondent's proposed management rights clause specified that the "relevant" portions of the Gresham Revenue Contract would be incorporated into the collective-bargaining agreement. The proposed language suggested that the Gresham Revenue Contract prevails in the event of a conflict with the collective-bargaining agreement. Since drivers are employed subject to the consent of the School District, if such consent is withdrawn the driver will have no recourse to the grievance or arbitration procedures in the collective-bargaining agreement. (GC Exh 18). The Company never asserted that the requested information was irrelevant or that the requests

were overly burdensome. Now, in its exceptions, Respondent has asserted that the Gresham Revenue Contract was in fact not relevant to the Gresham Bargaining. While respondent did revise its management rights proposal on April 15, the revised management rights article still provided that drivers could be removed at the request of the Gresham-Barlow School District, and that a driver discharged for that reason would not have recourse to the grievance or arbitration provision in the contract. (GC Exh 23). As a result, the Union still needed to know the circumstances in which the School District could demand removal of a driver. (TR 110:23-112:12). Thus, the contract was still relevant to the Union. As the Union requested the Gresham Revenue Contract on multiple occasions and the contract was relevant, based on the legal precedent cited above in Response to Exception 19, Respondent's repeated failure to provide this requested information violated section 8(a)(5) of the Act.

21. <u>Response to Exception 21:</u> The ALJ correctly found that the refusal to provide the Gresham Revenue Contract was not a *de minimis* violation

Respondent's violations for failure to provide information were not isolated. Respondent failed to provide wage sheets, the Gresham Revenue Contract, the Sandy Revenue Contract and the West-Linn Revenue Contract. Additionally, while these violations were ongoing, Gresham drivers unilaterally had their wage increases eliminated by Respondent. Respondent's violations were ongoing and numerous. Based on the legal precedent provided above in Response to Exception 5, the ALJ correctly found that the failure to provide the Gresham Revenue Contract was not a *de minimis* violation.

22. Response to Exception 22: The ALJ correctly found that First Student made the Sandy and West Linn-Wilsonville Revenue Contracts relevant while bargaining with the Union

The two revenue contracts were relevant to the Union for bargaining in order to test Respondent's representations made at the bargaining table. Respondent made outside revenue contracts relevant in bargaining when it told the Union that the proposed management rights language with the Gresham unit was required in all of its revenue contracts. (TR 81:19-83:10). The ALJ found that the Union's witness, Dr. Gapasin, credibly testified that First Student told the Union in bargaining that the proposed language was required in all of its revenue contracts. (ALJD 22, lines 44-47.) The management rights language that Respondent said was in all of its revenue contracts is the language regarding discipline and discharge of drivers described above in Response to Exception 20. The Union needed the Sandy and West Linn-Wilsonville Revenue contracts to verify that assertion. The Revenue contracts from other districts are relevant because the Company relied upon them in justifying its position that its proposal incorporating the Gresham Revenue Contract was necessary.

23. Response to Exception 23: The ALJ correctly found that First Student violated Section 8(a)(5) of the Act by refusing to provide the Sandy and West Linn-Wilsonville Revenue Contracts to the Union

The ALJ correctly found that the Sandy and West Linn-Wilsonville Revenue Contracts were relevant to the Union and because Respondent refused to provide this relevant information to the Union Respondent violated section 8(a)(5) of the Act. Respondent's argument that the Union was informed that contracts are public record and that they could be obtained via other means are not founded in the law. The ALJ correctly cited the established board precedent that an employer may not refuse to furnish relevant information to a union on the grounds that the union has an alternative source or method of obtaining that information. *Hospitality Care Center*,

307 NLRB 1131, 1135 (1992); *Public Service Corp of Colorado*, 301 NLRB 238 (1991); *Washington Hospital Center*, 270 NLRB 396, 401 (1984); *Kroger Co*. 226 NLRB 512-14 (1976). Therefore the ALJ correctly found that failure to provide this information to the Union was a violation of Section 8(a)(5).

24. <u>Response to Exception 24:</u> The ALJ correctly found that First Student violated Section 8(a)(5) of the Act by failing to provide information regarding the number of employees in each of several job classifications

As the ALJ correctly found, Respondent failed to provide the Union with information that included the number of employees in each of several job classifications in the Gresham facility. Specifically, the union requested: "the number of employees and their work hours per day that fit into the following categories: Driver/trainer, Special Education driver, Bus washer, Cover driver and Translator..." (GC Exh 10, Item #4). This information was both relevant and necessary so that the Union could make wage proposals for the different categories of employees. The request was not ambiguous or overbroad. While Respondent did provide a list of employees to the Union it did not provide information regarding the number of employees in each job classification. In fact Dr. Jourdan testified that Respondent's Payroll department should be able to generate the information requested in Item #4 of the Union's March 22 request. (TR 561:8-562:10). Yet, Respondent refused to provide this information, and told the Union that it did not have those categories of workers and the Union had received all it was going to get. (TR 88:9-89:1). Therefore, because this information was relevant and Respondent failed to provide it to the union, the ALJ correctly found that Respondent violated Section 8(a)(5).

25. Response to Exception 25: The ALJ correctly found that Darryl Jefferson's statement to drivers on August 25, 2010 that there would be no pay increases until negotiations were done violated Section 8(a)(1) of the Act

Board precedent is clear that employer's announcement to employees that there would be no wage increase during negotiations violates Section 8(a)(1). (See supporting analysis of *Covanta* above at Response to Exception 10). Daryl Jefferson admitted that during one on one meetings with drivers on August 25 he told every driver that there would be no pay increases "until the negotiations were done." (TR 603:1 -11; 327:3-328:8; 358:4 359:19). Jefferson's statements to drivers that there would be no wage increases until negotiations were done is a violation of Section 8(a)(1) of the Act.

26. Response to Exception 26: The ALJ correctly found that Kim Mingo's statement on August 31, 2010 that there would be no raises while bargaining was going on violated Section 8(a)(1) of the Act

The evidence is undisputed that on August 31, 2010, Kim Mingo told the Union and others at the bargaining table that drivers would not be receiving wage raises while the parties were bargaining. During that same meeting, Mingo stated that retroactive pay would remain on the table so long as "there were no work stoppages." (Tr. 514:4.) For the same reasoning expressed in Response to Exception 25 and legal precedent cited in Response to Exception 10, the ALJ was correct in finding a violation of Section 8(a)(1). Respondent again argues that this type of action is lawful because it is based on a "bargaining strategy." Relying on strategy does not make unlawful actions lawful.

27.* Response to Exception 27: The ALJ correctly found that statements made by Mingo, Jourdan and Jefferson were not *de minimis

Due to the quantity of similar violations that took place within three separate locations, the statements made by Mingo, Jourdan and Jefferson were not *de minimis*. Additionally, in at

least two of the locations, the statements were made while attempting to bargain an initial contract with First Student. The ALJ correctly found that due to the multitude of violations taking place at the same time, these violations are not *de minimis*.

28. Response to Exception 28: The ALJ correctly found that Darryl Jefferson's statement on October 15, 2010 that monthly attendance bonuses would not be paid due to contract negotiations violated Section 8(a)(1) of the Act.

On October 15, 2010, Darryl Jefferson told Lake Oswego Drive Brian McLaughlin that attendance bonuses would not be paid due to contract negotiations. (TR 334:5-13, 609:7-14). Following that statement to McLaughlin, Jefferson wrote the same information on the chalkboard for all drivers to see. The ALJ's finding that Jefferson's statement was unlawful was correct for the same reasoning listed in Response to Exceptions 10 and 25, above.

Respondent argues that Jefferson's statements were lawful because he was simply responding to questions posed by drivers. However, the fact that the unlawful statements were prompted from drivers' questions does not make the statements lawful. Regardless of what prompted him to make his statement, the act of withholding bonuses is a violation Section 8(a)(5) and contributing the reason for withholding the bonus to negotiations with the union is a violation of section 8(a)(1).

29. Response to Exception 29: The ALJ correctly found that Michael Jourdan told employees that they were not getting a raise due to the Union

The evidence in the record supports the ALJ's findings that Jourdan told employees they would not be getting raises due to the union. When asked about pay raises at a meeting on August 19, 2010, Jourdan told drivers that they would not be receiving a pay raise, and clearly linked the absence of a pay raise to the Union's certification. (TR 39:14-40:12; 157:8-158:2; 180:2-181:13; 190:15-191:8; 555:2-10). At the hearing drivers Blacksmith, Nordstrom, and

Seibel consistently testified that Dr. Jourdan remarked that drivers were not receiving a pay raise because of the Union, because of negotiations with the Union, or because Respondent had to negotiate a contract with the Union first. (TR 157:8-158:19; 180:2-181:13; 190:15-191:8). On August 24th, during a meeting between Jourdan and Blacksmith, Jourdan stated that that drivers would not be receiving a raise unless and until the parties reached a collective-bargaining agreement. (TR 163:21-165:5). The ALJ correctly found the Union's witnesses' testimony to be credible and therefore, the ALJ's finding that Jourdan made these statements should be affirmed.

30. Response to Exception 30: The ALJ correctly found that Michael Jourdan's statements on August 19 and August 24, 2010 violated Section 8(a)(1) of the Act

The ALJ's finding that Jourdan's statements were unlawful was correct for the same reasoning listed in Response to Exceptions 10 and 25, above.

31. Response to Exception 31: The ALJ correctly found that the November 10, 2011 letter was sent to Gresham drivers and that it was not a *de minimis* violation

On November 10, 2010, Respondent sent Gresham Unit drivers a letter regarding Respondent's "Retirement Savings Plan." (GC Exh 31; TR 165:19-166:15). The letter advised drivers that "[a]ll non-union participants will receive an employer matching contribution of 100% of the before tax savings contributions that the participant contributes to the Plan… (GC Exh 31). Respondent in their brief claims that the letter was mistakenly sent to Cory Blacksmith and that other drivers did not receive the letter. However, at the hearing Blacksmith testified that other Gresham drivers received the letter because after receiving letters people came to him with questions regarding why union members were not going to receive this benefit. (TR 165:19-166:15). The ALJ found that Blacksmith testified credibly and the Board should accept the ALJ's finding of fact that Gresham drivers were sent the November 10 letter. Since the letter

was not an isolated incident and was instead sent to all employees, advising them that they would lose a benefit through representation with the union, the sending of the letter right at the beginning of the Union's representation was not a *de minimis* violation.

32. <u>Response to Exception 32:</u> The ALJ correctly found that sending the November 10, 2011 letter to Gresham drivers was a violation of Section 8(a)(1)

There is no dispute that Gresham drivers received the letter included at General Counsel's Exhibit 31. That letter states that only non-union members are eligible for the Company's matching contribution policy for its 401(k) plan. This action—denying a benefit to certain employees because they have chosen to join a union—is a classic 8(a)(1) violation. The Board in *Covanta Energy Corp*., 356 NLRB No. 98 (2011) so held, citing several other cases in support:

> It is settled that it is a violation of Section 8(a)(1) for an employer to tell employees that they will be losing a benefit because their status as union represented makes them ineligible for the benefit. *Goya Foods of Florida*, 347 NLRB 1118, 1131 (2006) (comments that employees would be unable to participate in the company's pension plan if they were union members); *VOCA Corp*., 329 NLRB 591 (1999) (employer violates Section 8(a)(1) by announcing corporate bonus program that automatically excludes union-represented employees); *Niagara Wires, Inc*., 240 NLRB 1326, 1327 (1979) (it is a per se violation of Section 8(a)(1) for employer to maintain pension plan that by its terms excludes from coverage employees who are "subject to the terms of a collective bargaining agreement").

In its brief Respondent argues that union members were eligible for the contribution and attempt to clarify that the contribution were either at the discretion of First Student or paid pursuant to the terms and conditions of a collective bargaining agreement. However, when the letter was sent, the union had just been certified and no bargaining or negotiations had taken place. Sending out this letter at this time was an attempt by Respondent to tell employees that

they will lose a benefit if they are represented by the union. The ALJ correctly found that sending out the November 10 letter was an 8(a)(1) violation.

33. Response to Exception 33: The ALJ made a typographical error by including in his order information about Rhandy Villanueva

Since the record is completely void as to any mention of Mr. Villanueva, it is obvious that the inclusion of his name was a typographical error on the part of the ALJ. The Union takes no position on how the Board choses to resolve this issue.

III. CONCLUSION

First Student has committed violations of sections 8(a)(1) and (5) of the National Labor Relations Act through a series of deliberate actions based on long-term and widespread Company policies that show no sign of changing. Judge McCarrick correctly concluded that First Student's actions constituted violations of Sections 8(a)(1) and (5). Respondent's exceptions fail to provide any justification to vacate Judge McCarrick's conclusions or orders. Accordingly, the Union respectfully requests that the Board affirm Judge McCarrick's decision in its entirety.

Dated this 1st day of February, 2012.

Respectfully submitted,

/s/ Julie Falender

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CERTIFICATE OF FILING

I hereby certify that I filed the foregoing CHARGING PARTY'S BRIEF by electronically filing a true copy of the same using the NLRB's electronic filing system for the Office of the Executive Secretary on February 1, 2012.

CERTIFICATE OF SERVICE

I certify that I served the foregoing CHARGING PARTY'S BRIEF upon:

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by electronically filing a true copy of the same using the NLRB's electronic filing system for the Regional Offices on February 1, 2012.

I further certify that I served the foregoing CHARGING PARTY'S BRIEF upon:

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by electronically mailing a true copy of the same on February 1, 2011.

DATED this 1st day of February, 2012.

/s/ Julie Falender
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Of Attorneys for the Charging Party