UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FIRST STUDENT, INC.

and

OREGON SCHOOL EMPLOYEES ASSOCIATION

Cases 36-CA-10762
36-CA-10766
36-CA-10767
36-CA-10848
36-CA-10870

ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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I. OVERVIEW

Pursuant to Section 102.46 of the Regulations of the National Labor Relations Board (Board), Counsel for the Acting General Counsel submits this Answering Brief to the Exceptions filed by First Student, Inc. (Respondent), to the Decision of Administrative Law Judge John J. McCarrick (ALJ), issued on December 7, 2011, in the above-captioned cases (the ALJD) [JD(SF)-47-11].

As discussed in detail below, Respondent's Exceptions largely lack merit[1] and misinterpret well-established Board law. The ALJ's factual findings and legal conclusions are proper and supported by credible[2] record evidence. Accordingly, the

[1] Respondent's Exception 33 to the ALJ's proposed order and remedy for Rhandy Villanueva should be sustained. As there is no allegation in this matter referencing Villanueva, the ALJ's inclusion of him is clearly a ministerial oversight.

[2] Although Respondent does not specifically except to any of the ALJ's credibility determinations, many of its arguments essentially require the Board to overturn the ALJ's credibility determinations. Doing so, however, is inappropriate at this juncture, as Respondent has not met the evidentiary threshold required to overturn such determinations. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.*, 188 F.2d 362 (3d Cir. 1951) (finding that

Board should sustain the ALJD's findings of fact, conclusions of law, proposed remedy, and recommended order.

II. PROCEDURAL BACKGROUND

Judge John J. McCarrick heard the above-captioned case on August 9, 10, and 11, 2011, in Portland, Oregon. At hearing, Counsel for the Acting General Counsel developed a credible record of Respondent's unfair labor practices involving three different bargaining units - Gresham, Lake Oswego, and Molalla – two of which were bargaining for first contracts when the unfair labor practices occurred.[3] The ALJ properly found that Respondent had committed a "multitude of [...] unfair labor practices" (ALJD 24:18-19), including bargaining in bad faith, unilaterally cancelling or delaying wage increases and bonuses, failing and refusing to provide information, and making statements to employees in violation of §8(a)(1). In its Exceptions, Respondent raises many arguments already presented to the ALJ, which the ALJD correctly rejected as contrary to his reasoned analysis of fact and law.

III. ANALYSIS

Both at hearing and subsequently, Respondent has failed to proffer justification for its pattern and practice of undermining its collective-bargaining relationship with the Oregon School Employees Association (Union). To this end, Respondent has ignored the gravity of these unfair labor practices, and continues to insist that despite the myriad

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the Board will not overturn ALJ's credibility determinations absent a clear preponderance of the evidence to the contrary).

[3] Prior to hearing, the Lake Oswego and Molalla units reached and ratified collective bargaining agreements. However, at the time of hearing the Gresham unit had still not reached an agreement with Respondent. As a result, the Acting General Counsel requested, and the ALJ granted, an extension to the certification year, because the "Union is entitled to a period free from Respondent's failure to bargain in good faith." (ALJD 27:20-50) (citing *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962))

unfair labor practices committed, many are isolated and *de minimus*[4] – an argument that continues to hold no weight in view of the case as a whole. Respondent's Exceptions re-raise arguments already addressed and properly rejected by the ALJ, and misconstrue well-established Board Law. As shown below, the ALJ properly concluded that Respondent violated Sections 8(a)(1) and (5) of the Act.

A. The ALJ Properly Found that Respondent Unilaterally Cancelled Annual Wage Increases for Employees at Gresham, Lake Oswego, and Molalla (Resp. Exceptions 1-5, 10[5])

The ALJ correctly found that Respondent violated Section 8(a)(5) of the Act at Molalla, Lake Oswego, and Gresham, as Respondent misunderstood its "status quo" obligations under the Act and the *Stone Container* exception does not apply. Specifically, Respondent misapplied the concept of maintaining the "status quo" to its bargaining units, and ignored the requirements of proper notice and opportunity to bargain.

As the ALJD properly noted, "when employees are represented by a labor organization their employer may not make unilateral changes in their terms and conditions of employment," and thus must maintain the "status quo." (ALJD 14:29-31) (citing *NLRB v. Katz*, 369 U.S. 736, 747 (1962)). Maintaining the "status quo" requires continuing not only with benefits already granted to employees, but also with those that have become a condition of employment through past practice. (ALJD 14:39-42) (citing *Jensen Enterprises,* 339 NLRB 877, 877 (2003)). Such benefits include periodic wage increases regularly expected by employees. (ALJD 14:42-44) (citing *Daily News of Los*

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[4] Of Respondent's thirty-three Exceptions, five raise *de minimus* arguments.

[5] Although Respondent's Exception 10 cites to ALJD 16:36-37, Respondent excepts to the ALJ's finding that First Student ceased its annual wage increase and attendance bonus in violation of Sections 8(a)(1) and (5) of the Act, which is addressed at lines 26-27. As such, this Answering Brief will address what are believed to be the excepted lines.

Angeles, 315 NLRB 1236 (1994), *enfd.*, 73 F.3d 406 (D.C. Cir. 1996)). The ALJ specifically considered a case in which the Board held that, "by withholding customary increases during the potentially long period of negotiations [...], an employer, in effect, changes existing terms and conditions without bargaining to agreement or impasse." (ALJD 15: 3-6) (citing *Covanata Energy Corp.*, 356 NLRB No. 98, slip op. at 14-18 (Feb. 25, 2011)).

As a limited exception for changes made while bargaining for an initial contract, *Stone Container Corp.*, 313 NLRB 336 (1993), and its progeny provide:

> [I]f a term or condition of employment concerns a discreet recurring event, such as 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 of employment if it provides the union with a reasonable advance notice and an opportunity to bargain about the intended change.

(ALJD 15:17-22) (citing *Neighborhood House Ass'n*, 347 NLRB 553, 554 (2006)). Under this exception, an employer is "obliged to maintain the fixed elements of the [practice or program] and negotiate with the Union over the discretionary element of the [practice or program] – the amount." (ALJD 15:26-28). As the ALJD found, and as will be addressed below, Respondent's contention[6] that it provided the Union with notice and an opportunity to bargain in a manner sufficient to meet the *Stone Container* exception is misguided, and raises no arguments not already considered and rejected by the ALJ. Thus, the ALJ correctly found that Respondent violated Section 8(a)(5) of the Act when it unilaterally cancelled annual wage increases at Gresham, Lake Oswego, and Mollala.

[6] As part of its *Stone Container* analysis, Respondent argues that substantially all cases finding unlawful unilateral changes after union certification also include a §8(a)(3), which is not present in the instant case. (Resp. Brief 11). Although Respondent has not filed a specific exception on this matter, the ALJ already considered and properly rejected "Respondent's novel argument that the unilateral changes in its annual wage increases were not material since there is no 8(a)(3) allegation [...as] unsupported in the law." (ALJD 16:6-7).

1. For Gresham, the ALJ Correctly Found a Past Practice of Annual Wage Increases, and that Respondent Failed to Provide Adequate Notice and Opportunity to Bargain[7]

At Gresham, where the Union and Respondent continue to bargain for a first contract, annual wage increases would have gone into effect at the beginning of the 2010-2011 school year. (ALJD 6:49-52) (citing testimony from Manager Michael Jourdan (Jourdan), who admitted that it is customary for Gresham drivers to receive annual wage increases). The ALJ properly examined and rejected Respondent's suggestion that there was a wage freeze at Gresham in 2009, correctly finding that Gresham drivers received a wage increase and that there was no documentary evidence of a wage freeze.[8] (ALJD 7:6-20).

With regard to notice, the ALJ correctly concluded that Respondent "first announced to employees they would be getting no annual raise while negotiations continued, suggesting a fait accompli, not a meaningful proposal." (ALJD 15: 48-50). However, Respondent contends that Manager Jourdan's announcement, made to employees and Union representative Dr. Fernando Gapasin (Gapasin) concerning annual wage increases at Gresham's annual in-service meeting served as sufficient notice to the Union. In support, Respondent attempts to discredit the ALJ's acceptance of Gapasin's testimony that he first learned of the cancellation of wage increases at the in-service meeting and to provide evidence of prior notice. Respondent cites the testimony of employee Jennie Seibel, who believed that she had heard that they were not getting a raise from a Union representative Gapasin, did not remember exactly

[7] Respondent only specifically excepts to the ALJ's finding that there was a past practice of wage increases at Lake Oswego, however it cites to lines 37-40, which concludes that there was a past practice of annual wage increases at all three facilities. However, Respondent's brief in support of exceptions does not put forth evidence or argument suggesting that it contests the ALJ's finding that there was a past practice of annual wage increases at Gresham.
[8] Respondent does not appear to except to the ALJ's findings on this matter.

when the Union meeting was, but believed it was within a few weeks of the meeting. (Resp. Brief 20-21). Again, although Respondent has not filed exceptions to the ALJ's credibility determinations, it is essentially asking the Board to overturn the ALJ's credibility determinations (Resp. Brief 21 "In light of this inconsistent testimony, Dr. Gapasin's testimony is highly suspect."). However, as Respondent merely re-raises vague *employee* testimony and cites to no independent evidence of Respondent providing notice to the Union, this hardly constitutes the clear preponderance of evidence required to overturn an ALJ's findings of fact based on credited testimony, even if Respondent had filed proper Exceptions on this matter. *Standard Dry Wall Products*, 91 NLRB 533 (1950). Even assuming proper notice to the Union, which there was not, the only bargaining over wages cited by Respondent and addressed in the ALJD relates to substantive contract bargaining.[9] The ALJ properly found that when Respondent announced its intent to maintain wages, "the employees were presented not with a proposal but a final decision" (ALJD 16:1-4), and that "Respondent utterly failed to bargain with the Union over the amount to be paid under its extant wage programs." (ALJD 15:46-47).

Respondent first contends that it "continues to maintain the status quo for drivers at the Gresham location." (Resp. Brief 21). The ALJ recognized Respondent's acknowledgment of its "status quo" obligation (ALJD 15:33-35), but correctly found that Respondent misunderstands the meaning of maintaining the "status quo" and rejected this argument as a defense. (ALJD 23:44-46) (finding that, although "Respondent contends the statements are lawful and truthful because Respondent cannot make

[9] Respondent notes that the Union's first proposal included a retroactive pay increase. Relying on the Union's proposal to show meaningful bargaining is insufficient, as the ALJ properly found that Respondent made its first economic proposal months later on August 2, 2011. (ALJD 17:3-4).

unilateral changes while in bargaining[,] Respondent is simply wrong in view of the above analysis of *Covanta Energy* and *Stone Container*"). Second, Respondent argues that any change fell within the lawful exception of *Stone Container*. In light of the §8(a)(5) violation related to refusal to bargain economics at Gresham, any argument that the parties meaningfully bargained over wage increases is specious at best. Because Respondent has provided no evidence that it met the requirements of *Stone Container*, the ALJ properly considered and rejected this argument. (ALJD 15:35). Finally, although Respondent argues that this violation is *de minimus*, in the context of the other unfair labor practices and bargaining for a first contract, the ALJ properly found a violation. (ALJD 16:8-9 "there is nothing de minimus about a unilateral change during the course of initial bargaining for a collective bargaining agreement").

2. For Lake Oswego, The ALJ Properly Determined that Respondent Had a Past Practice of Wage Increases, and Did Not Provide the Union with Adequate Notice or an Opportunity to Bargain

At Lake Oswego, where the parties were also bargaining for a first contract, the ALJ properly found a past practice of wage increases. While two managers "denied there was a wage increase in the 2009-2010 year, the wage stubs of employees as well as spreadsheets provided by Respondent belie this assertion." (ALJD 15: 38-40). Specifically, the ALJ noted, that from 2006 to 2009, drivers received wage increases based on time in service, and, after carefully analyzing the differences between the 2008-2009 school year pay rates and the practice continued for 2009-2010. (ALJD 5-6). It is uncontested that in September 2010,[10] during bargaining, the Lake Oswego drivers did not receive wage increases. (ALJD 5:43). Respondent now argues, as it did to the

[10] Respondent does not take exception to the ALJ's finding that wage increases at Lake Oswego did not occur in September 2010.

ALJ, that since it took over operations from Laidlaw Educational Services in 2008, one year of wage increases from Respondent at the beginning of the 2009-2010 school year does not constitute customary practice. Yet the ALJ focused his analysis of facts on the raise at the beginning of the 2009-2010 school year, which Respondent admits it was responsible for granting (Resp. Brief 15), in reaching the conclusion that there was a practice of wage increases at Lake Oswego.

With regard to notice and opportunity to bargain, like at Gresham, Respondent announced to employees its intent to not grant raises until negotiations were over. (ALJD 5:44-47; 6:1-4). Respondent went even further at Lake Oswego, saying that any increases would not be retroactive if employees struck. (ALJD 6:4; 24:13-16). With regard to opportunity to bargain, the ALJ found that "any suggestion that Respondent's announcements concerning annual wage increases [...] to employees at Lake Oswego constituted notice and an opportunity to bargain is specious since the employees were presented not with a proposal but a final decision." (ALJD 16:1-4). It is undisputed that the parties eventually reached and ratified an agreement that included a retroactive pay scale to September 1, 2010, however "only drivers who were employed as of the contract ratification date received retroactive pay increases around February or March 2011."[11] (ALJD 6:9-11).

Despite this lack of proper notice, Respondent contends, as it did for Gresham, that it maintained the status quo and was permissibly operating within the *Stone Container* exception. As both proper notice and bargaining are necessary in the context, and Respondent did not do either, the ALJ properly found that the *Stone*

[11] As with wages at Molalla, the Acting General Counsel still seeks that this violation be fully remedied by providing all employees with interest, and by providing back pay to Respondent's former employees affected by the change.

Container exception is inapplicable in this case. Finally, although Respondent again argues that any changes to wage increases are, at worst, *de minimus* violations, the ALJ properly rejected this argument. (ALJD 16:8-9) ("there is nothing de minimus about a unilateral change during the course of initial bargaining for a collective bargaining agreement.").

3. For Molalla, The Judge Properly Determined that Respondent Unilaterally Ceased Annual Wage Increases

At Molalla, the only Unit bargaining for a successor contract, it is undisputed that the expired June 2010 collective bargaining agreement included annual increases. (ALJD 3-4) (citing Article 16 of the Molalla Collective Bargaining Agreement). At the start of the 2010-2011 school year, drivers at the top step of the wage scale did not receive increases. (ALJD 4:33-35). During bargaining at Molalla,[12] Respondent "took the position that drivers would be given no raises in September 2010 because the expiring contract did not provide for raises after 2010 and because the parties were in negotiations to bargain for increases." (ALJD 4:37-40). After the initial cessation in wage increases, Respondent moved drivers up one pay grade step to settle an unfair labor practice charge. (ALJD 4:33-43). Finally, upon agreement over a successor contract in July 2011, Respondent "paid the wage increases set forth in the 2010 contract retroactively to July 1, 2010, without interest, but only for drivers who worked the entire 2010-2011 school year," and not for the "several" drivers who left Respondent's employment over the course of the year.[13] (ALJD 4:44-49).

[12] Respondent only cites to contract bargaining over wages in support of its position. (Resp. Brief 14-15).
[13] Respondent does not take exception to the ALJ's finding that it did not pay interest or pay drivers no longer in Respondent's employment at the time wage increases were made retroactive. Note that the Acting General Counsel still seeks that this violation be fully remedied by providing all employees with interest, and by providing back pay to Respondent's former employees affected by the change.

Respondent continues to rely upon the fact that this Agreement did not address wages for the 2010 school year in support of its argument that not only was it legally justified in maintaining wages as the purported "status quo," but also it would have been required to bargain over granting the wage increase. (Resp. Brief 14). Specifically, Respondent cites to *Mount Hope Trucking Co., Inc.*, 313 NLRB 262 (1993), to support its contention that it could not raise wages because when bargaining for a successor agreement, "the employer is required to maintain the status quo until the parties reach a new agreement or bargain to impasse." *Id.* Yet again, Respondent misunderstands the fundamental concept of "status quo," which requires it to "continue following the economic terms of the expired Molalla collective bargaining agreement which provided for annual step increases" and grant employees wage increases, rather than maintain the rate employees were paid at the time the agreement expired. (ALJD 15: 42-44). Thus, the ALJ applied the proper standard.

B. The ALJ Properly Determined that Respondent Unilaterally Cancelled or Delayed Payment of Monthly Attendance Bonuses at Lake Oswego (Resp. Exceptions 6-10, 13)

An employer whose employees are represented by a labor organization may not unilaterally change terms and conditions of employment. (ALJD 14:29-33) (citing *NLRB v. Katz*, 369 U.S. 736, 747 (1962). Specifically, an employer must maintain the "status quo," including "benefits that have become conditions of employment by virtue of prior commitment or practice." (ALJD 14:39-41) (citing *Jensen Enterprises*, 339 NLRB 877, 877 (2003)).

The ALJ correctly found that Respondent had a practice of paying drivers a $60 good attendance bonus if they had perfect attendance for the prior month.[14] (ALJD 6:15-16; ALJD 16:15). When, in October 2010, an employee did not receive his September 2010 attendance bonus, he complained to manager Jefferson, who told him "that while the parties were in negotiations there would be no bonuses paid" and then wrote this announcement on the break room board. (ALJD 6:18-22). Respondent provided the Union no notice or opportunity to bargain, and there is no evidence of contact with the Union on this matter.[15] (ALJD 16:16-17). At hearing, Manager Jefferson admitted that "he had been 'instructed not to pay the attendance bonuses until negotiations were done.'" (ALJD 6:26-28). It is uncontested that the employee was paid his September bonus in November 2010. (ALJD 6:30).

Respondent now argues, as it did to the ALJ, that failed payment was merely a delay, rather than a cancellation, and did not constitute a material change. However, the ALJ considered this argument and properly concluded that "the bonus is a term and condition of employment whose cessation occurred while in the first year of bargaining for an initially agreement, [making] Respondent's discontinuance of the bonus *for one month* a material change." (ALJD 16:18-21, emphasis added).

Despite Respondent's contention to the contrary, the ALJ properly found that "Respondent never repudiated its unlawful refusal to pay bonuses during negotiations." (ALJD 30-32). While it is true that Respondent paid attendance bonuses the next

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[14] Respondent argues that the ALJ credited the testimony of Kim Bonner in his findings, and that her testimony is based on hearsay (Resp. Brief 17-18). However, the ALJ's findings of fact on the attendance bonus do not mention Kim Bonner (ALJD 6:15-32). Further, any reliance on this would be akin to requesting that the Board improperly overturn the ALJ's credibility determinations in reaching his findings of fact.

[15] Respondent did not file exceptions relating to notice or opportunity to bargain for the attendance bonus at Lake Oswego. Further, absent evidence of notice or bargaining, Respondent falls well outside of the exception established in *Stone Container*.

month, there is no evidence that Respondent communicated its repudiation to employees, as required by *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), in a way that would alleviate finding a violation.

Finally, and consistently with other violations, Respondent argues that any violation is *de minimus*. As with the other unilateral changes, the ALJ properly rejected this argument because the change was material and not repudiated. (ALJD 16:22-23).

C. The ALJ Correctly Found that Respondent Failed and Refused to Provide the Union with Information Relevant to Bargaining (Resp. Exceptions 19-24)

The Board has recognized that Section 8(a)(5) requires an employer to provide information necessary and relevant to a union so that it may carry out its statutory obligations as the employees' representative, including negotiations over collective bargaining agreements. (ALJD 20-21) (citing *Day Automotive Group*, 348 NLRB 1257, 1257, 1262 (2006); *Newcor Bay City Division*, 345 NLRB 1229, 1237 (2005)). As the ALJ properly noted, "information about bargaining unit employees' terms and conditions of employment is presumptively relevant." (ALJD 21: 3-5) (citing *Boston Herald-Traveler Corp.*, 110 NLRB 2097 (1954), *enfd.*, 223 F.2d 58 (1st Cir. 1955)). Further, the Board has found that collective bargaining is frustrated if a party asserts a claim and then fails to provide requested information to substantiate it. *Leland Standard Junior Univ.*, 262 NLRB 136, 145 (1982), *enfd.*, 715 F.2d 473 (9th Cir. 1983). As explained below, Respondent's contention that it lawfully withheld requested information runs contrary to the ALJ's well-reasoned findings of fact and conclusions of law.

1. The ALJ Properly Determined that Respondent Violated the Act by Refusing to Provide Wage Sheets to the Union

The ALJ properly found that the Union at the Gresham facility clearly and repeatedly[16] requested step up raise sheets and all of Respondent's related policies, that this information was presumptively relevant because it relates to wages, and that the information was never supplied, thus violating 8(a)(5) of the Act. (ALJD 21: 27-30). Respondent contends simultaneously, albeit inconsistently, that these policies do not exist,[17] and that the necessary information was already provided to the Union.[18] (Resp. Brief 33-34). However, the ALJ considered and properly rejected these arguments.

First, the ALJ found that although Respondent's Lead Negotiator Peter Briggs claimed there was no information on pay increases available, Manager Jourdan showed that such information not only exists, but also is stored on a computer and in hard copy at the facility.[19] (ALJD 9-10). Further, Respondent proved the existence of the information when, on the third and final day of hearing, after requests from the Union and receipt of subpoena from Counsel for the Acting General Counsel, Respondent belatedly offered to produce the wage scales, which the ALJ properly rejected.[20] (ALJD 10: 5-24).

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[16] The ALJ's findings of fact note that the Union requested this information on August 23, August 31, and October 14, 2010, all without response from Respondent. (ALJD 7-8).

[17] Respondent focuses its argument on "policies." (Resp. Brief 33). However, the Union's request was for "step up raise sheets that have been issued to Payroll for the past 5 years [...] and all First Student Policy's regarding this matter." (ALJD 7:37-39).

[18] Respondent's brief also mentions that wages are considered proprietary. (Resp. Brief 33). However, this argument does not appear to be a specific exception for the Board and, accordingly, will not be addressed in this Answering Brief.

[19] Counsel for the Acting General Counsel notes that, although Respondent did not specifically except to any of the ALJ's credibility determinations, many of its arguments essentially require the Board to question and overturn these determinations. It is well established that the Board will not overrule an ALJ's credibility findings absent a clear preponderance of the evidence to the contrary. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.*, 188 F.2d 362 (3d Cir. 1951).

[20] The ALJD notes that Counsel for the Acting General Counsel requested that an adverse inference be drawn for the failure to produce the documents. (ALJD 10: 17-24)

Alternatively, Respondent argues that the ALJ merely alludes to a spreadsheet of information that Manager Jourdan had already provided to the Union on several occasions,[21] from which the Union could have extrapolated a wage scale. (Resp. Brief 34). This argument misses the point. Respondent was in possession of the requested, relevant, information, but chose not to provide it. Therefore, the finding of a violation was proper.

2. The ALJ Correctly Found that the Gresham Revenue Agreement[22] Is Relevant, Was Not Provided, and Does Not Constitute a *De Minimus* Violation

The ALJD properly found that Respondent made relevant the Gresham Revenue Agreement, portions of which "deal with discipline of bargaining unit employees," (ALJD 21:36-41), when it incorporated it through the management rights clause. However, Respondent failed to provide the Agreement, but rather "expected the Union to trust [its] representations as to what the Gresham Revenue Contract provided" despite a lack of familiarity with it. (ALJD 11:27-30).

First, Respondent contends that the Gresham Agreement was not relevant at the time initially requested, and even if it became relevant, was eventually requested after-the-fact. However, Respondent "interjected" this Agreement into bargaining when it incorporated the Agreement into its Management's Rights Clause "in each of its contract proposals through April 14, 2011." (ALJD 21:36-41; 11:26-27). Because the Agreement discusses discipline and, thus, employees' terms and conditions of employment, the ALJD correctly determined that the Gresham Agreement became presumptively

[21] Again, Respondent's argument regarding the credibility of Jourdan's testimony calls for the Board to overturn the ALJ's credibility determinations.
[22] As explained in the ALJD, Revenue Agreements are contracts between Respondent and the school districts to which Respondent provides services.

relevant. (ALJD 21:37-41). Second, Respondent argues that any relevance of the Gresham Agreement was rendered moot at the bargaining session on April 15, 2011, and relieved Respondent of its obligations towards the Union. (Resp. Brief 35). The ALJ considered this argument and appropriately determined that the fact that the Management's Rights Clause was eventually withdrawn "does not obviate the relevance of the document at the time of the demand [as] no final agreement has been reached [...] and there is nothing to prevent Respondent from renewing its previous management rights language." (ALJD 22:27-30).

Again, Respondent contends that any refusal to provide the Gresham Agreement constitutes at best a *de minimus* violation because it was relevant for only a short period of time, the Union failed to obtain the contract as a public record, and the Union obtained a copy elsewhere. (Resp. Brief 35). This argument ignores Respondent's basic obligations towards the Union as the employees' collective bargaining representative, as well as "the plethora of other violations of the Act Respondent has committed." (ALJD 22:34-35). As a result, it cannot be considered merely a *de minimus* violation.

3. The ALJ Correctly Determined that the Sandy and West Linn-Wilsonville Revenue Agreements Were Relevant, Not Provided, and Not a *De Minimus* Violation

Although the Sandy and West Linn-Wilsonville Agreements became relevant to bargaining, Respondent nonetheless failed to provide them to the Union. The ALJ determined that Respondent had made the Sandy and West Linn-Wilsonville Agreements relevant by representing at the bargaining table that its proposed management rights language was required in all collective bargaining agreements,

which was an assertion the Union wished to verify. (ALJD 22: 44-48). Respondent, at length, again contends that the Agreements were not relevant because they did not relate to the Gresham bargaining unit and never became relevant, as Lead Negotiator Briggs "credibly" testified that he did not rely on the Agreements and only made general, industry-related rhetorical statements at the table. (Resp. Brief 36). However, as the ALJ properly determined, Respondent, by asserting a claim during bargaining related to management's rights clauses, and then, undisputedly, failing to provide requested information to substantiate it, frustrated collective bargaining efforts. *Leland Standard Junior Univ.*, 262 NLRB 136, 145 (1982).

Further, the ALJ considered and correctly rejected Respondent's proposition that it was justified in failing to provide the Agreements because they are proprietary.[23] (ALJD 21-22). The ALJ properly cited to the Board's test for accommodating employers' claims of confidential information from *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1005-06 (1991), which requires balancing "the union's need for the information against 'any legitimate and substantial confidentiality interests established by the employer." (ALJD 22:1-2) (citing *Pennsylvania Power*, 301 NLRB 1104). Specifically, the Board found that the party asserting confidentiality had the burden of proof and a duty to seek accommodation. *Id.* As with the Gresham Agreement, Respondent did not establish either the proprietary nature of the agreements, or that it attempted to accommodate the Union. (ALJD 23:1-4). In this light, the ALJ properly concluded that confidentiality did not serve as a defense for failing to provide the requested, relevant information. (ALJD 23:7-8).

[23] The ALJ considered and rejected Respondent's proprietary concerns for the information requested with the Gresham Agreement (ALJD 21-22). However, in its Exceptions, Respondent does raise a proprietary or confidentiality argument with regard to the Gresham Agreement (Resp. Brief 33-34).

Respondent contends that any violation was rendered moot because the Union admits that it obtained copies of the Sandy and West Linn-Wilsonville Revenue Agreements. However, like with the Gresham Agreement, this does not obviate Respondent's obligation to provide the Union with the requested information; rather it caused the Union to doubt Respondent's contentions even more.

4. The ALJ Properly Concluded that Respondent Violated the Act by Failing to Provide the Union with Information Relating to the Number of Employees in Certain Job Categories

The ALJ correctly determined that Respondent unlawfully failed to provide information relating to the number of employees in specific job categories at Gresham. (ALJD 23:24-26). It is undisputed that the requested information is presumptively relevant, as it relates to the wages of bargaining unit employees.[24] (ALJD 23:15-16).

Rather, Respondent contends that it complied with the request because the requested information does not exist, and it provided information to the extent possible when Manager Jourdan gave the Union updated employees lists that included routes, hours, and wages. Again, this argument has already been considered and properly rejected by the ALJ, who found that "the list provided by Jourdan did not contain the information requested [...] nor could it be extrapolated from the list[,] nor was the information request vague or ambiguous in any manner." (ALJD 23:19-22). In fact, Manager Jourdan showed that the information does exist, and that "Respondent's payroll department should be able to generate the information requested." (ALJD 10:35-37). As the evidence shows and the ALJ found, the relevant information existed but was not provided; thus, the ALJ properly concluded that Respondent violated the Act.

[24] Respondent does not take exception to the ALJ's finding that the number of employees per category is presumptively relevant.

D. The ALJ Properly Found that Respondent Failed to Bargain in Good Faith with the Union at Gresham (Resp. Exceptions 11-18)

After careful examination of the facts and law, the ALJ correctly concluded that Respondent violated Section 8(a)(5) of the Act by failing to negotiate economic issues, failing to meet at reasonable times from April to August 2011, and canceling bargaining sessions in June 2011. The Board has long held that whether an employer is bargaining in good faith encompasses Respondent's conduct both at and away from the bargaining table. (ALJD 16:39-41) (citing *Hardesty Co., Inc.*, 336 NLRB 258, 259 (2001), *enfd*, 308 F.3d 859 (8th Cir. 2002). As shown below, Respondent's arguments regarding bargaining raise issues already considered and properly rejected by the ALJ. In light of the totality of circumstances of Respondent's conduct at Gresham at and away from the table, the Board should uphold the ALJ's findings.

1. The ALJ Correctly Determined that Respondent Unlawfully Refused to Bargain Economic Matters Until the Parties Reached Agreement on All Non-Economic Issues

The ALJ properly stated that "it has long been settled that an employer may not condition bargaining over economic issues upon resolution of all non-economic issues." (ALJD 16:41-44) (citing *Erie Brush & Manufacturing Corp.*, 357 NLRB No. 46, slip op. at 11 (2011); *John Wanamaker Philadelphia*, 279 NLRB 1034 (1986)).

Respondent's contentions do not hold weight and ignore the facts considered by the ALJ, who properly found that Respondent refused to bargain economic items from January 2011 until the conclusion of bargaining in August 2011. (ALJD 16:49-50). The ALJ noted that Respondent's position was embodied in its ground rules proposal, which required "all non economic issues be resolved before economic issues would be

discussed" (ALJD 12:3-4), a proposal to which the Union never agreed despite Respondent's continued insistence. Throughout negotiations, the Union continued to present both economic and non-economic proposals; however, Respondent "steadfastly refused to discuss economics" (ALJD 17: 6-7), and did not provide economic proposals. (ALJD 12:31-32; ALJD 17:13-15 "the record is clear that Respondent never submitted an economic proposal or discussed economic items until August 2011").

Respondent again raises arguments already properly considered and rejected by the ALJ. First, Respondent continues to argue that negotiating language items prior to economic items was essential to its hard bargaining strategy. However, the ALJ properly found that "this is no defense since it is well established that such conduct is unlawful," (ALJD 17:11-12), and Respondent failed to show any evidence to the contrary. Second, Respondent contends that it did negotiate economics early on in the context of economic ramifications of language proposals (Resp. Brief 26-27), and that, because there were still unresolved language items at the time of Respondent's first economic proposal, it did not fail to bargain economics. Again, the ALJ considered and rejected these arguments as "simply not supported by the record. The record is clear that Respondent never submitted an economic proposal until August 2011." (ALJD 17:13-15).

2. The ALJ Was Correct in Finding that Respondent Failed to Meet at Reasonable Times and Places

As part of the duty to bargain in good faith, an employer must "make its authorized representative available for negotiations at reasonable times and places." (ALJD 17:43-45) (citing *Nursing Center at Vineland*, 318 NLRB 901, 905 (1995)). Being busy does not serve as a defense, and an employer "acts at its peril" in choosing a busy

bargaining representative. (ALJD 17: 45-47; 18:1-2) (citing *Caribe Staple Co.*, 313 NLRB 877, 893 (1994); *Lawrence Textile Shrinking Co.*, 235 NLRB 1178, 1179 (1978)).

First, Respondent argues that it was only unavailable on the dates from April to June 2011 proposed by the Union, that it continued to communicate with the Union, and that its negotiator had prior commitments. (Resp. Brief 27-28). Yet "the Union requested more bargaining dates prior to the next scheduled June dates, offering to meet via teleconference," which Respondent duly rejected despite the Union's repeated requests. (ALJD 18:31-36). Respondent even declined to meet with the Federal Mediation and Conciliation Service during this time, again despite the request of the Union. (ALJD 18:38-41). It is undisputed that "the parties did not meet for bargaining from April 15, 2011, to August 2, 2011." (ALJD 18:31). After a detailed examination of the Union's repeated requests for bargaining dates and Respondent's continual rejection thereof,[25] the ALJ properly considered and rejected Respondent's "busy negotiator argument," as one repeatedly rejected by the Board. (ALJD 19-20).

Respondent also contests the ALJ's finding that Respondent met with the Union less than once per month between certification in June 2010 until August 2011. The ALJ properly concluded that the parties were scheduled for 15 bargaining sessions, actually met eleven times during the eight-month stretch between December 2010 and August 2011, and had no meetings from June to December 2010. (ALJD 18:18-23). Thus, even looking at a mathematical average, there is no possibility that eleven meetings could average out to more than once a month over a fourteen-month period, even if the

[25] Respondent submits in its brief that the ALJ should have considered evidence of the Union's schedule from fall 2010 (Resp. Brief 29). However, even if relevant, this would not serve as an excuse for Respondent's failure to schedule meetings in Spring 2011.

meetings were not grouped together by date. Further, the dates of meeting are uncontested, regardless of the actual frequency with which the parties met at the table.

3. The ALJ Properly Concluded that Respondent Unilaterally Cancelled Bargaining Sessions and Did Not Repudiate the Cancellation

The Board has held that the mere filing of a decertification petition "does not provide a reasonable ground for an employer to refuse to recognize a bargaining representative or to withdraw from bargaining." (ALJD 19:37-39) (citing *Dresser Industries,* 264 NLRB 1088 (1982)). Specifically, absent evidence of majority support, "such a petition in no way reflects or purports to reflect, the sentiment of the unit majority." (ALJD 19:46-49) (citing *Dresser Industries*, 264 NLRB 1088).

Here, it is uncontested that the parties were scheduled to meet for bargaining on June 21 to 23, 2011, and that Respondent announced, based on the filing of a decertification petition, that it refused to meet on June 21. (ALJD 19:50-53). Then, the following day, Respondent withdrew its refusal to bargain and offered to schedule bargaining for the following week "in the interest of attempting to continue to build positive relations." (ALJD 13:29-39; 19:50-52).

Respondent argues, as it did to the ALJ, that although it did initially fail to meet with the Union on June 21, it repudiated its actions. However, the ALJ examined the Board's requirements for repudiation under *Passavant Memorial Area Hospital*, 327 NLRB 138, 138 (1978), which requires that effective repudiation be "timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed conduct." (ALJD 20:17-18) (citing *Douglas Division, The Scott & Fetzer Company*, 228 NLRB 1016 (1977)). Here, the ALJ properly considered this argument and rejected it,

as "the so called repudiation was not free of other proscribed illegal conduct[... and] Respondent's repudiation was not published to employees with assurances that in the future it would not interfere with the exercise of their Section 7 rights." (ALJD 20:30-32). Respondent argues that there is no relationship between unfair labor practices at other locations and bargaining at Gresham,[26] yet there are many violations at Gresham alone, which points to a violation under the totality of the circumstances merely at that location. Cancelation of long-scheduled bargaining dates based on a decertification petition, when viewed in the context of Respondent's conduct, verifies that the ALJ's conclusion that Respondent failed to bargain in good faith with the Union was correct.

E. The ALJ Correctly Concluded that Respondent Violated Section 8(a)(1) of the Act at Lake Oswego and Gresham Through Statements Relating to Wage Increases, Bonuses, and the Pension Plan (Resp. Exceptions 25-32)

The ALJ properly determined that Respondent made numerous statements that violated Section 8(a)(1) of the Act. (ALJD 23-25). The Board has found that statements similar to those made by Respondent constituted unlawful threats to change the status quo. (ALJD 23: 40-42) (citing *First Student*, 341 NLRB 136, 141 (2004); *Covanta Energy Corp.*, 356 NLRB No. 98, slip op. pages 9-11 (2011)). An employer similarly violates Section 8(a)(1) "if it tells employees they will lose a benefit because they are represented by a union." (ALJD 24:27-29) (citing *Goya Foods of Florida*, 347 NLRB 1118, 1131 (2006); *VOCA Corp.*, 329 NLRB 591 (1999)). Although Respondent argues that its statements were truthful, thus lawful, or at most *de minimus* violations, these arguments run contrary to the ALJ's credited findings of fact and established Board law.

[26] Respondent excepts to the ALJ's reliance on Respondent's refusal to grant wage increases and monthly attendance bonuses in examining the bargaining circumstances at Gresham. While it is true that the attendance bonus occurred only at Lake Oswego, the refusal to provide wage increases also occurred at Gresham. Further, given the plethora of unfair labor practices at Gresham alone, even without reliance on the attendance bonus, Respondent's conduct taken as a whole supports upholding the ALJ's finding of failure to bargain in good faith.

1. The ALJ Properly Found that Respondent's Statements at Lake Oswego Regarding Wage Increases and Attendance Bonuses Violated the Act

The ALJ correctly concluded that statements made to employees in the Lake Oswego unit regarding wage increases and bonuses were neither accurate nor *de minimus*, and thus violated the Act. (ALJD 23-24). It is uncontested that on August 25, 2010, Manager Jefferson told every driver in one-on-one meetings "that there would be no pay increases 'until the negotiations were done.'" (ALJD 5:45-47). Specifically, the ALJ determined that Jefferson told one driver that "he would not get a pay raise because the parties were under contract negotiations." (ALJD 5:44-45). About a week later at a bargaining session with Lake Oswego unit employees present, as the ALJ found, Human Resources Director Kim Mingo stated "that there would be no raises while bargaining was ongoing but raises would be paid retroactively when the contract was signed" but that "if employees struck there would be no raises." (ALJD 6:1-4). Then, on October 15, 2010, Manager Jefferson told Lake Oswego employees "that monthly attendance bonuses would not be paid due to contract negotiations." (ALJD 24:22-23). The ALJ found that it was not only admitted that Respondent's manager made this statement to an employee, but also that Manager Jefferson wrote a note on the break room chalk board that read "attendance bonus checks will not be issued due to negotiations." (ALJD 6:19-26).

The ALJ correctly determined that these statements violated Section 8(a)(1) of the Act (ALJD 24:13-16), as they linked changes in the status quo to union representation. Respondent nonetheless argues, as it did to the ALJ, that these statements were accurate and reflections of its bargaining position. For example,

Respondent argues that Jefferson's statement regarding wages was merely in response to an employee's question and that he explained that wage increases were a negotiated item, thus would only go into effect after the parties reached a contract (Resp. Brief 39-40). However, the ALJ has already found that "Respondent is simply wrong in view of the [ALJD's] analysis of *Covanta Energy* and *Stone Container*" (ALJD 23:44-46) and that these actions constituted unlawful unilateral changes and bad faith bargaining. Thus, Respondent's statements do not reflect a legal bargaining strategy.

Alternatively, Respondent again contends that these statements were isolated incidents constituting a *de minimus* violation, and that the ALJ's findings should be vacated. (Resp. Brief 43-44). In support of this argument, Respondent points to the fact that these statements were made in response to employee questions and did not hinder or negatively impact bargaining sessions, as the parties reached an agreement soon after. (Resp. Brief 43). However, taken in context, the ALJ properly rejected Respondent's *de minimus* argument, which "flies in the face of the multitude of other unfair labor practices that Respondent has committed." (ALJD 24: 18-19).

2. Respondent's Statements at Gresham About Wage Increases Violated Section 8(a)(1)

The ALJ properly determined that statements about wage increases violated Section 8(a)(1) and are not *de minimus*. The ALJ accurately determined, based upon the credible record evidence, that there was "no dispute" that at a Gresham in-service meeting prior to the start of the school year, an employee asked a question about whether there would be a pay raise, to which Manager Jourdan replied "no, due to the Union and settling on a committee in Cincinnati." (ALJD 6:44-46). When the employee asked what needed to happen in order to obtain a wage increase, Manager Jourdan

responded "that's the way it is till things are settled and pay rates decided upon." (ALJD 6:46-47). Then, less than a week later, Manager Jourdan told an employee "that drivers would not be receiving a raise unless and until the parties reached a collective-bargaining agreement." (ALJD 24:42-44).

Respondent points to the testimony of other employees, as well as the testimony of Manager Jourdan, in arguing that Jourdan did not attribute the lack of wage increase to the Union.[27] (Resp. Brief 41). However, this evidence runs contrary to the ALJ's finding of fact based on his credibility determinations at hearing. Further, in light of the myriad of unfair labor practices committed by Respondent, these statements cannot be viewed as isolated incidents, and the ALJ properly found that Jourdan's statements regarding wage increases violated the Act.

3. The ALJ Correctly Found that Respondent's Letter Regarding Employee Pensions Conditioned a Benefit on Represented Status and Violated Section 8(a)(1)

Respondent also violated the Act at Gresham (ALJD 25:29-30), as the ALJ properly determined, by sending a letter stating that "All non-union participants will receive an employer matching contribution [...]" (ALJD 25:9-10).

Respondent again argues, as it did to the ALJ, that it mistakenly sent the letter and that it did not run afoul of *Niagara Wires, Inc.*, 240 NLRB 1326 (1979), because all employees were eligible to make contributions, with matching contributions available at Respondent's discretion or per the terms of a collective bargaining agreement. (Resp. Brief 44-45). In *Niagra Wires, Inc.*, the Board found that "the promulgation, maintenance, and publication of an employee benefit plan whose benefits are

[27] Again, Respondent does not specifically except to the ALJ's credibility determinations. However, in arguing that "Jourdan credibly testified" about his response, Respondent is essentially asking the Board to overturn the ALJ's credibility findings.

conditioned on the unrepresented status of the employees are themselves sufficient for finding an 8(a)(1) violation." (ALJD 25:16-20) (citing *Niagra Wires*, 290 NLRB 1326). However, the ALJ already considered and rejected these arguments, and he failed to see how the letter did not constitute "a limitation on employer pension benefits conditioned on unrepresented status" (ALJD 25:23-25), and thus indistinguishable from *Niagra Wires*. Further, it is the statement itself, rather than whether or not the underlying policy is true or a mistake, that coerces employees' Section 7 rights, and violates the Act.

Yet again, Respondent contends that the letter was isolated and insignificant, and should be dismissed as *de minimus*. In light of the quantity of violations, many of which are argued to be *de minimus* by Respondent, the ALJ properly found that the letter "cannot be viewed in isolation as a de minimus violation." (ALJD 25:25-27).

F. The Board Should Overturn the Remedy Regarding Rhandy Villanueva, as It Appears to be a Ministerial Oversight (Resp. Exception 33)

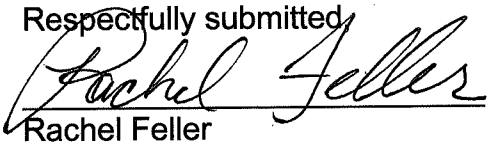
The ALJ included a remedy for Rhandy Villanueva (ALJD 28:1-6), but Villanueva does not appear in the Amended Consolidated Complaint or the ALJD's Findings of Facts and Conclusions of Law. Respondent contends that the Board should remand issues pertaining to Villanueva in order to take evidence on and render a proper decision. As this appears to be a ministerial oversight rather than a substantive issue, remand is inappropriate and the Board should overturn the remedy related to Villanueva.

IV. CONCLUSION

Based upon the foregoing, it is respectfully submitted that the Board should adopt the ALJ's findings of fact and conclusions of law that Respondent violated §§8(a)(1) and (5) of the Act.

Dated at Seattle, Washington, this 1st day of February 2012.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Acting General Counsel's Answering Brief to Respondent's Exceptions to Administrative Law Judge's Decision was served on the 1st day of February, 2012, on the following parties:

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