First Student, Inc. ***and*** **Teamsters Local No. 449.** Case 3–CA–26584

November 28, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On September 3, 2008, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, First Student, Inc., North Tonawanda, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.[3]

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally, without notice to or bargaining with the Union, enforce our previously unenforced driving under the influence policy with regard to employees who are represented by Teamsters Local No. 449 in the following appropriate unit:

Included: All full-time and regular part-time school bus drivers, aides and mechanics employed by the Respondent at its 655 Walck Road, North Tonawanda, New York, facility.

Excluded: All office clerical employees, technicians-in-charge, dispatchers, guards, professional employees and supervisors as defined in the Act, and all other employees.

WE WILL NOT discharge any of you pursuant to the unilateral enforcement of our driving under the influence policy.

WE WILL NOT fail and refuse to meet and bargain with the Union regarding the discharge of any of you in the appropriate unit represented by the Union who have been discharged by our illegal enforcement of our driving under the influence policy.

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

WE WILL rescind the unilateral change that we made in the terms and conditions of employment of unit employees by enforcing our driving under the influence policy.

WE WILL, within 14 days from the date of the Board's Order, offer Matthew Raimondo, Carl Antholzner, and Shawn Kazmierczak full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful discharges of Matthew Raimondo, Carl Antholzner, and Shawn Kaz-

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

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

There are no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(5) by failing and refusing to meet and bargain with the Union regarding the discharges of employees Antholzner and Raimondo.

[3] The substitute notice reorders the notice paragraphs in accord with the Board's traditional practice of including all injunctive provisions prior to affirmative remedial provisions.

mierczak and WE WILL within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

FIRST STUDENT, INC.

Linda M. Leslie, Esq., for the General Counsel.
Vincent J. Tersigni, Esq., for the Respondent.
E. Joseph Giroux Jr. and *Catherine Creighton Esqs.* (on brief), for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Buffalo, New York, on July 16, 2008, pursuant to a complaint that issued on May 30, 2008.[1] The complaint alleges that the Respondent unilaterally began enforcing its policy relating to convictions for driving under the influence or while impaired by drugs or alcohol and, pursuant to that enforcement, terminated three employees in violation of Section 8(a)(5) of the National Labor Relations Act (the Act), and that the Respondent thereafter refused to meet and bargain with the Union regarding the termination of two of the three terminated employees in violation of Section 8(a)(5) of the Act. The Respondent denies that it violated the Act. I find that the Respondent did violate the Act substantially as alleged in the complaint.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, First Student, Inc. (the Company), is engaged in the business of providing bus transportation services from various facilities throughout the United States including its facility in North Tonawanda, New York. The Company annually derives gross revenues in excess of $250,000 and purchases and receives at its North Tonawanda, New York facility goods valued in excess of $5000 directly from points outside the State of New York. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that Teamsters Local No. 449 (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Company, as its name implies, is chiefly engaged in the transportation of school children. The managers of its multiple facilities report to superiors located in various locations. At the relevant times herein, the North Tonawanda, New York facility, was supervised by General Manager Mary Deschamps, the highest ranking official at that location, and Safety Coordinator and Assistant Manager Linda Malczewski. Malczewski, who is still employed by the Company, is currently the acting manager at another location. Deschamps reported on safety matters to Regional Safety Manager Nicholas DeSantis, who was located in North Haledon, New Jersey, as was Regional Vice President Frank Luciano. Company headquarters is located in Cincinnati, Ohio.

At the North Tonawanda facility, the Company has approximately 120 employees and operates a fleet of 41 vans and 31 buses. The facility serves several school districts and provides transportation for regular students as well as students with special needs.

The Company began providing bus service from its North Tonawanda facility in July 2006, following the acquisition of a predecessor in May 2006. The predecessor was identified as TNT Bus Service; which had been providing the bus service since 1992. It appears that another entity, Atlantic Express, had acquired TNT, but Atlantic Express did not alter the corporate identity or logos on the TNT buses. The foregoing is immaterial insofar as at all relevant times the Company, First Student, was the employer. In late May 2006, the Company informed the employees that it had acquired the predecessor and would begin operations in July. All current employees were invited to apply.

The Company has a policy prohibiting employment as a driver of any individual who has been convicted of driving under the influence or while impaired due to drugs or alcohol within the past 15 years. There is no evidence that the predecessor had any such prohibition.

Employees Matthew Raimondo and Carl Antholzner, both of whom had been convicted of driving while impaired by alcohol and both of whom had been driving for the predecessor, applied for jobs as drivers with the Company and were hired. The offense in New York is driving with ability impaired (DWIA); however, the witnesses regularly used the acronym DUI, driving under the influence, and for consistency I shall use that acronym throughout this decision.

It is undisputed that Deschamps and Malczewski at North Towanda and Regional Safety Manager DeSantis and Regional Vice President Luciano in New Jersey were aware that employees Matthew Raimondo and Carl Antholzner had been convicted of DUI prior to their being hired by the Company and that both worked for over 18 months before being discharged.

Late in 2007, over a year after the Company assumed the operations at North Tonawanda, the Union conducted an organizational campaign and, following a representation election, was certified as the exclusive collective-bargaining representative of employees in the following appropriate unit on December 17, 2007:

> Included: All full-time and regular part-time school bus drivers, aides and mechanics employed by the Respondent at its 655 Walck Road, North Tonawanda, New York, facility.
>
> Excluded: All office clerical employees, technicians-in-charge, dispatchers, guards, professional employees and supervisors as defined in the Act, and all other employees.

[1] The transcript is hereby corrected to reflect the July 16 date of hearing. All dates are in 2008, unless otherwise indicated. The charge was filed on February 13, and amended on April 21.

B. Facts

Matthew Raimondo was hired by TNT in October 1999, following an interview with Linda Malczewski and filling out an application. Thereafter, in October 2000, he was convicted of a DUI and his license was suspended. Upon the reinstatement of his license in March 2001, he returned to work driving a bus. At the point that TNT was acquired by Atlantic Express, Raimondo spoke with Malczewski concerning the effect, if any, of his conviction upon his continued employment. He continued to work. He spoke with Malczewski again when the Company, First Student, began taking applications in May 2006. Malczewski said that she would check, and she did so. About 2 weeks after Raimondo spoke with her, Malczewski informed him that she and General Manager Deschamps had "good news for me and them, and that First Student is keeping me on." Although Raimondo signed for the company employee handbook, he was unaware of the policy relating to DUI convictions within 15 years.

On January 18, Raimondo was called into the office of General Manager Deschamps where she and Malczewski informed him that he was being released due to his DUI in 2000. Raimondo protested that they had to be "kidding me, . . . we had already discussed this." Deschamps and Malczewski confirmed that they had done so, that they knew it was "not fair, but that's what we have to do."

Carl Antholzner began working for TNT in December 2005. At the time he applied, Antholzner's license had been suspended due to a DUI conviction. He filled out an application and explained his situation to Malczewski. Malczewski called the New York Department of Motor Vehicles and learned that Antholzner would have his license reinstated and be cleared to drive a bus on January 12, 2006. He was hired and worked as a bus aide until his license was reinstated. On May 24, 2006, Antholzner filled out an application for the Company and was interviewed by a woman whose name he did not recall. They reviewed his application which reflected the DUI. Antholzner pointed out the DUI. The woman who was interviewing him shook her head and continued the interview. Antholzner recalls that the woman, in the interview, informed him that he was hired, but it appears that he may have been mistaken in that regard because all applications and driving records were reviewed in New Jersey before employees were placed on the company payroll. Antholzner continued to work until January 18. Antholzner received the company handbook but was unaware of the DUI within 15 years' prohibition.

On January 18, Antholzner was called into the office of General Manager Deschamps. Malczewski was present. Deschamps informed him that he was being released due to his driving record. Antholzner protested that they knew his driving record, that he "was upfront and honest." Deschamps and Malczewski agreed and stated that they explained the situation to the "main office and argued with them," but to no avail.

Shawn Kazmierczak had not worked for TNT. He was hired by the Company in September 2007. He applied and spoke with Linda Malczewski. In their interview he explained that he had a DUI some 7 years ago, in 2000, and that the DUI occurred when he and some friends with whom he was partying had an encounter with a police officer while riding bicycles. He had not been driving a motor vehicle. Malczewski, who thought the situation was "funny and crazy," stated that it would not be a problem but she would check. She left the room, and Kazmierczak observed her talking to another woman who he later learned was General Manager Deschamps. Malczewski returned and informed him that the DUI should not be a problem and that "as far as she knew that there was only a five year policy." Kazmierczak was hired, trained, qualified for a license, and began driving a bus.

On February 1, Kazmierczak was called to the office of General Manager Deschamps who informed him that he was being let go "because of your DUI." Kazmierczak responded that the Company knew that when they hired him, but had hired him and trained him.

Deschamps denied being aware of Kazmierczak's DUI conviction. I find that she forgot about the conviction. Kazmierczak credibly testified that after he informed Malczewski of the circumstances of the DUI he observed her consulting with Deschamps before she informed him that he could be hired. Malczewski, who is still employed by the Company, did not testify. The delay between the discharges of Raimondo and Antholzner and the discharge of Kazmierczak is immaterial. Assistant Manager Malczewski certified that she had reviewed a driver abstract dated December 11, 2007, which reports the conviction. Thus, the Company had notice of the conviction. Even assuming that Deschamps forgot the conversation with Malczewski, there can be no credible claim that the Company was not aware of the conviction at the time Kazmierczak was hired.

When Deschamps stated to Kazmierczak that he was being discharged because of his DUI, Kazmierczak responded that the Company knew that when he was hired. Deschamps did not deny that assertion, she simply stated that "this is not coming from me." She indicted that she was "very bothered" by having to let him go and gave him the number of the Union, telling him to call and "see what they can do for you." The Union amended the name of Kazmierczak into the charge on April 21. Kazmierczak also called the company headquarters in Cincinnati and explained to a human resources employee the circumstance regarding the DUI, just as he had to Malczewski when he applied for employment. The human resources representative told him to send a letter explaining the circumstances of the DUI. He did so. Ultimately, the representative told him that she was sorry, but she could not help him. Kazmierczak, having been told by Malczewski that the policy was 5 years, was unaware that it was 15 years.

In late May 2006, Regional Safety Manager DeSantis, Regional Vice President Luciano, and approximately eight other individuals came to the North Tonawanda facility to interview the employees who wished to submit applications to work for the Company when it took over. General Manager Deschamps and Safety Manager Malczewski, at that time, informed DeSantis and Luciano that they were aware of three current drivers who had DUI convictions on their records, Matthew Raimondo, Carl Antholzner, and employee Tamara Baldwin. Deschamps recalled that DeSantis informed her that "they were going to keep as many employees for First Student as they could." She had no recollection of any further comment.

Regional Safety Manager DeSantis acknowledged that Deschamps and Malczewski informed him of the DUI convictions of the three employees. He acknowledged that it was the intent of the Company to "keep as many employees as possible." He also acknowledged that he had "the authority to simply say no we can't hire these people, because we have this very strict policy," but did not do so. DeSantis initially testified that Vice President Frank Luciano "brought the information up to HR [Human Resources in Cincinnati] to see if there was anything we could do to retain these employees, but at the time there was no one—there was no approval given at the time of the acquisition." He immediately elaborated, stating, "We brought it up to the top person in Cincinnati, which was Rick Villines."

Upon questioning by Charging Party's counsel, DeSantis testified that he, not Luciano, had attempted to contact Rick Villines in human resources at company headquarters:

> Q. [BY ATTORNEY GIROUX] Now despite the strict policy, you decide you're not going to invoke it. Instead you call Mr. Velintes [sic]?
> A. [BY MANAGER DESANTIS] Villines.
> Q. Villines, correct?
> A. Yes.
> Q. And you talked to him, correct?
> A. At that point it was a message.
> Q. It was a message. You left him a voice mail?
> A. Uh-huh.
> Q. Okay. Did he call you back?
> A. No.
> Q. He never called you back?
> A. No.
> Q. Okay. You went through this hiring process for the next month and a half to close to two months, . . . and you never revisited that issue during that time frame?
> A. No[,] I did not.

DeSantis explained that after the files of the applicants were reviewed, and if they were not disqualified, the applicants were hired by the Company by "sending the file back [to North Tonawanda] and entering them into the payroll." DeSantis did not testify to any conversation between himself and the woman who interviewed Antholzner, whose application clearly reflects his DUI conviction. Nor did DeSantis testify to any conversation with any employee who reviewed the driving abstracts of Raimondo and Antholzner, abstracts that reflected their convictions. Regardless of interviews, reviews, or alleged voice mail messages to which there was no response, the Company did not disqualify Raimondo and Antholzner from employment.

In late 2007, the Company acquired Laidlaw Transit, Inc., a competitor. In October 2007, the chief executive officer of First Student was coming to give assurances to the First Student employees, "talking to the employees about the new acquisition; [and telling them] not to be threatened by it." About this same time, the Union began its organizational campaign.

Also in October 2007, employee Tamara Baldwin was selected for a random drug test. Contemporaneously, DeSantis learned that her license was about to be suspended for failure to pay a ticket for an unspecified traffic offense. DeSantis, upon review of Baldwin's file, claims that he was reminded that she was one of the three employees who Deschamps and Malczewski had informed him had past DUIs on their record.

On this occasion, DeSantis testified that he called and spoke directly with Rick Villines, who informed him that all three employees must be terminated consistent with Company policy. When asked by counsel for the Respondent whether he would call his failure to have followed up in 2006 an "oversight," DeSantis answered, "Yes."

The Company's policy manual provides that "[a]ny of the following *may* disqualify a driver: . . . c. Conviction for driving while intoxicated or substance abuse during the past 15 years." (Emphasis added.) As the Charging Party points out in its brief, the 2006 employee handbook provided that "no applicant or employee" with a DUI conviction within 15 years could drive for the Company whereas the 2007 handbook applies the qualifications only to "applicants." Notwithstanding the foregoing inconsistencies, it is undisputed that a DUI conviction within the past 15 years policy was the basis for the termination of the three employees at issue here.

DeSantis claims that he called Deschamps and informed her of what she had to do, terminate all three because they had DUIs within the past 15 years. Deschamps claims that she protested, but to no avail. She further testified that "Linda Malczewski was a part of that conversation as well." Thereafter, Deschamps testified that "Linda Malczewski and myself weren't real happy about the situation" and called DeSantis explaining that "it was going to be hard to terminate these employees." Deschamps stated that Malczewski was also involved in that conversation and that DeSantis repeated his instruction, telling them that they "still had to follow directions for [from] First Student."

When asked whether, consistent with the purported directive from DeSantis, she discharged Baldwin for the DUI, Deschamps testified, "No, because she was terminated for something else . . . [s]he failed a random drug test." DeSantis knew that Baldwin went for the drug test "after I had given the directive" to discharge employees who had DUIs, and that Baldwin's drug test came back positive "after the conversation I had with Mary [Deschamps]." He also knew that the basis for Baldwin's termination was "for having a positive result on a random drug test." Deschamps claims that she took no action with regard to Raimondo or Antholzner because there were "too many things going on," including the union's organizational campaign and the anticipated visit by the Company CEO, and that she just thought that it "wasn't a good time to terminate these employees . . . [t]here was too many things going on at that time." Deschamps did not claim that her inaction related to concern about interference with the organizational campaign. She was not asked and did not address why, having discharged Baldwin, albeit not pursuant to the purported directive regarding the DUI, she did not also take the action that she claims she was directed to take against Raimondo and Antholzner.

Deschamps claims that she had no further contract with her superiors and, notwithstanding the absence of further directives, discharged Raimondo and Antholzner on January 18, because she "knew I had to do it under the directive. I had put it off long enough."

The acquisition of Laidlaw resulted in DeSantis being assigned different duties shortly after October 2007. He had no further responsibility for North Tonawanda and did not follow up to assure that Deschamps had carried out the directive that he claims to have given in October 2007. Neither Malczewski, Luciano, nor Villines testified.

The Union received no notice of the discharges. Richard Zak, business agent and president of the Union at all times relevant herein, learned of the discharges of Raimondo and Antholzner and called Deschamps. She acknowledged to him that they were both excellent employees, stated that she was "surprised that this had even happened," and told him that the matter was "in the attorney's hands," and that "she'd be getting back to me." On January 23, Zak wrote Deschamps pointing out that "we," the Union, had been certified and requesting "a meeting with you and Human Resources so that we can resolve a problem that has developed with the firing of" Raimondo and Antholzner. Deschamps admitted that she never responded to the Union. Thereafter, Zak telephoned John Folcarelli, who he had learned was director of labor relations for First Student, regarding arrangements for contract negotiations and noting that the Union "had a problem with the two discharge[s]." Folcarelli informed Zak that "another attorney will be contacting us [the Union]." Despite the assurance, "no one had contacted us." Zak retired in late February.

C. Credibility

The Respondent, relying upon the testimony of Deschamps and DeSantis, argues that the decision to discharge was made in October 2007, before the Respondent had a bargaining obligation. There is no documentation of any directive to discharge. As hereinafter discussed, I do not credit the testimony of Deschamps and DeSantis in that regard.

The testimony of DeSantis regarding contact with Human Resources Director Villines in 2006 was contradictory. After first testifying that Vice President Luciano contacted Villines and that "[w]e brought it up to the top person in Cincinnati, which was Rick Villines," DeSantis claimed that he, not Luciano, made the contact and that he left an unreturned voice mail. The foregoing contradictory testimony establishes that nothing was brought up "to the top person in Cincinnati." I do not credit the testimony of DeSantis that he left an unreturned voice mail message. If he had sought to bring up anything, he would have followed up. There was no "oversight." No unreturned voice mail message was left in 2006.

Contrary to the testimony of DeSantis, I further find that no conversation with Villines occurred in October 2007. Villines did not testify. I do not credit the testimony of DeSantis that, after being informed of the Baldwin situation, he directed Deschamps to discharge all employees who had DUIs within the past 15 years. DeSantis knew that Baldwin went for the drug test "after I had given the directive" to discharge employees who had DUIs, and was thereafter discharged "for having a positive result on a random drug test." If there had been a directive to discharge all employees with DUIs, there would have been no reason to have sent Baldwin for a "five panel drug test," and DeSantis would certainly have questioned General Manager Deschamps regarding why she had not immediately obeyed his order to discharge the employees who had DUIs within 15 years. If he had given her that order, Deschamps would have done so. According to Deschamps, Assistant Manager Malczewski was involved in the conversations regarding that directive, and she did not testify. Malczewski is still employed by the Company, serving as acting manager at a different facility.

I agree with the argument of the Charging Party that General Manager Deschamps, a competent and reliable supervisor, would not ignore "the clear mandate of a superior." She would not disobey a direct order to terminate specific employees, those who were working notwithstanding their DUI convictions. Although claiming that she received a direct order in October 2007 to discharge those employees, Deschamps did not do so. I find that incredible. The fact that Deschamps did not immediately terminate Baldwin, but did so after she failed the random drug test, is virtually conclusive evidence that no directive to discharge employees with DUIs was given. Further, confirmation of the foregoing finding is established by the fact that Deschamps terminated Baldwin after she failed the random drug test for that reason, with no reference to the DUI policy. She took no action with regard to Raimondo and Antholzner or to Kazmierczak, about whose conviction she had apparently forgotten.

I do not credit the testimony of Deschamps that she heard nothing in January regarding the employees who were working notwithstanding their DUI convictions. There was not "too much going on" after the visit of the CEO and certification of the Union on December 17, 2007. If the directive had been given in October 2007, Deschamps, who claims that she had "put it off long enough," would not have spontaneously stated to Business Agent Zak that she was "surprised that this had even happened." There would have been no "surprise" if she had been carrying out a 3-month old directive. Nor would she have permitted the employees whom she knew she was going to discharge to resume work after the Christmas vacation. Fairness to the employees would dictate that they be informed that they were being "released" rather than allowed to resume working in January with no hint of their impending discharges. As already noted, Assistant Manager Malczewski, who was present when Raimondo and Antholzner were discharged, did not testify. I do not credit the testimony of Deschamps that she discharged these employees in mid-January because of an alleged directive that she had received in October and knew that she "had put it off long enough."

D. Analysis and Concluding Finding

The complaint alleges that the Respondent unilaterally began enforcing its policy relating to driving under the influence, that such enforcement resulted in the termination of three employees, and that the Respondent thereafter refused to meet and bargain with the Union regarding the termination of two of the three terminated employees in violation of Section 8(a)(5) of the Act.

It is undisputed that there was no notice to or bargaining with the Union prior to the discharges. The Respondent argues that there was no material change, "just a delay in enforcement of a previously existing, nationally enforced driver qualification

policy." I disagree. DeSantis acknowledged that he had the authority to have denied employment to Raimondo, Antholzner, and Baldwin because of their DUI convictions, and he did not do so. All were hired. Having permitted these employees to apply and hiring them notwithstanding the Respondent's policy, the failure of the Respondent to enforce its policy was not an "oversight." I have not credited the testimony of DeSantis that a contemporaneous telephone call was made to Cincinnati in 2006. DeSantis was fully aware of the Respondent's policy. If he had sought an exception to that policy, he would have followed up. There was no "oversight." There was no telephone call.

The Respondent argues, citing various cases, that the decision to discharge was made prior to its bargaining obligation. Those cases are inapposite insofar as I have not credited the testimony of Deschamps that she was directed to discharge the employees in October 2007. The directive to discharge the employees and the effectuation of that directive by Deschamps occurred in January 2008.

Accepting, arguendo, the claim of an October 2007 directive, this case does not involve an economic decision that was held in abeyance in order to assure that there was no interference with a union organizational campaign or an upcoming representation election. See *Starcraft Aerospace, Inc.*, 346 NLRB 2006 (2006). There is no claim here that the failure of Deschamps to act was to avoid potential interference. Any such claim would be rebutted by the fact that she discharged Baldwin in October, albeit not for a violation of the DUI policy.

Even if I were to have found that the directive was given in October 2007, the discharge decision was made by Deschamps in January 2008. The Respondent, in its brief, argues that the delay in discharging Raimondo and Antholzner was "due to Ms. Deschamps own personal decision not to follow Mr. DeSantis' direct order until January." Accepting that argument, it cannot be found that the directive was the operative decision. Deschamps did not rely on the directive when discharging Baldwin. She discharged Baldwin for failing a random drug test. Deschamps made her "own personal decision" not to comply with the October 2007 directive and thereafter made the decision to discharge the employees who had DUI convictions in January, after the Respondent was obligated to bargain with the Union. Precedent establishes that, with regard to discharges, the operative date is the date of notification to the employee. As pointed out in *Timsco, Inc. v. NLRB*, 819 F.2d 1173, 1181 (D.C. Cir. 1987):

> A commonsense understanding of when a discharge "happens" suggests that notice to the discharged employee is the operative event. Moreover, the Board itself chose the date of notice (rather than the date of decision) as the date of discharge in *Mt. Carmel Hospital*, 255 NLRB 833 fn. 2 (1981). We thus conclude that . . . [the employee's] discharge occurred post-certification and that the Company therefore is obliged to bargain with the certified union on this issue.

Thus, even if it be assumed that the directive was given in October 2007, as pointed out in the brief of the General Counsel, the Respondent, by General Manager Deschamps at North Tonawanda, "condoned the violation of its policy" by allowing the employees to continue to work. The enforcement of the policy with regard to unit employees at the North Tonawanda facility and the decision to discharge by the individual who effectuated the discharges was made in January after the Respondent's bargaining obligation attached.

Notwithstanding the foregoing discussion, I reiterate that I find that both the directive to discharge and the effectuation of that directive occurred in January. The unilateral enforcement of the DUI policy constituted a change in the working conditions of the unit employees and violated the Act. "[T]he vice involved in [a unilateral change] . . . is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge." *Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997) (quoting *NLRB v. Dothan Eagle*, 434 F.2d 93, 98 (5th Cir. 1970)). (Emphasis in the original.) This is true even when the policy is written because the enforcement of the policy constitutes the change. "Thus, despite the Respondent's written policy . . . the Respondent ha[d] not previously enforced this requirement." *Flambeau Airmold Corp*., 334 NLRB 165, 166 (2001). See also *Vanguard Fire & Security Systems*, 345 NLRB 1016, 1017 (2005).

The bargaining obligation in this proceeding is the bargaining obligation for the unit at the North Tonawanda facility. Despite its overall corporate policy, the Respondent knowingly hired employees with DUI convictions within 15 years at North Tonawanda. As the General Counsel's brief correctly points out, bringing a facility into compliance with an overall written corporate policy is no defense to failure to bargain with the exclusive collective-bargaining representative of the employees in the affected unit. *United Rentals*, 350 NLRB 951, 952 (2007). The enforcement of its previously unenforced DUI policy with regard to the North Tonawanda unit constituted a change in policy that affected those employees' terms and conditions of employment. By unilaterally enforcing the DUI policy with regard to the North Tonawanda unit after the certification of the Union without notice to or bargaining with the Union, the Respondent violated Section 8(a)(5) of the Act.

The Respondent's unilateral enforcement of the DUI policy resulted in the discharge of three employees. "If the Respondent's unlawfully imposed rules or policies were a factor in the discipline or discharge, the discipline or discharge violates Section 8(a)(5)." *Great Western Produce*, 299 NLRB 1004, 1005 (1990). The unilateral enforcement of the DUI policy resulted in the discharge of Matthew Raimondo, Carl Antholzner, and Shawn Kazmierczak. I find that those discharges violated Section 8(a)(5) of the Act.

The Union was not informed that the Respondent was going to begin enforcing its policy thereby resulting in three discharges. When the Union learned of the discharges of Raimondo and Antholzner, Business Agent Zak spoke with Deschamps. He thereafter sent her a letter requesting that the Respondent meet to resolve the matter. Deschamps admitted that she did not respond to that letter. Zak also spoke with director of labor relations, John Folcarelli, regarding arrangements for contract negotiations and "the two discharge[s]." Although Folcarelli informed Zak that "another attorney will be

contacting us [the Union]," no contact occurred. The Union filed the charge herein on February 13.

The Respondent argues that the General Counsel has failed to carry the burden of proof with regard to this allegation because no other business agent or witness testified "as to what happened" after Business Agent Zak retired, which occurred in late February. Contrary to that argument, the General Counsel established that the Union made both a written and a verbal request to meet and bargain, but "no one . . . contacted us." The Respondent presented no evidence of any response. If the Respondent did respond, its response would have refuted the uncontradicted evidence that "no one . . . contacted us." Failure to meet and bargain with regard to mandatory subjects of bargaining violates the Act. "Termination of employment constitutes such a mandatory subject." *N.K. Parker Transport*, 332 NLRB 547, 551 (2000), citing *Ryder Distribution Resources*, 302 NLRB 76, 90 (1991). By failing to meet and bargain with the Union regarding the discharges of Raimondo and Antholzner, the Respondent violated Section 8(a)(5) of the Act.

The Charging Party argues that, in view of the failure of the Respondent to respond to the request to meet regarding the discharges of Raimondo and Antholzner, that any request to meet with regard to Kazmierczak, who was not discharged until February 1, would have been futile. I agree. However, Business Agent Zak acknowledged that he was unaware of the discharge of Kazmierczak. Furthermore, there is no complaint allegation relative to a failure to meet regarding his discharge. Thus, I shall make no finding regarding an unalleged violation.

CONCLUSIONS OF LAW

1. By unilaterally enforcing its previously unenforced driving under the influence policy with regard to North Towanda, New York unit employees without notice to or bargaining with the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

2. By discharging Matthew Raimondo, Carl Antholzner, and Shawn Kazmierczak pursuant to its unilateral enforcement of its driving under the influence policy, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

3. By failing and refusing to meet and bargain with the Union regarding the discharge of employees pursuant to its unilateral enforcement of its driving under the influence policy, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

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

The Respondent must rescind its unilateral change in the enforcement of its driving under the influence policy with regard to the North Tonawanda, New York unit.

Having unlawfully discharged Matthew Raimondo, Carl Antholzner, and Shawn Kazmierczak pursuant to enforcement of its previously unenforced driving under the influence policy, the Respondent must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from January 18, 2008, in the cases of Raimondo and Antholzner, and from February 1, 2008, in the case of Kazmierczak, to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Counsel for the General Counsel has proposed a notice that includes an obligation to meet and bargain regarding the discharges of Raimondo and Antholzner. My recommended Order will direct that the unilateral change and discharges pursuant to that change be rescinded. Therefore the predicate for an affirmative order to bargain with regard to the discharges no longer exists; the discharges will have been rescinded.

I am mindful that the underlying reason for the policy of the Respondent relates to safety. This decision does not address the merit of that policy. The foregoing remedy addresses only the unilateral change that altered the status quo pursuant to which the Respondent operated for over a year and a half.

The General Counsel requests compound interest upon any backpay due. Consistent with the decision of the Board in *Glen Rock Ham*, 352 NLRB 516 1 fn. 1 (2008), not to deviate from its current practice of awarding simple interest, I deny that request.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, First Student, Inc., North Tonawanda, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally, without notice to or bargaining with the Union, enforcing its previously unenforced driving under the influence policy with regard to employees represented by Teamsters Local No. 449 in the following appropriate unit:

> Included: All full-time and regular part-time school bus drivers, aides and mechanics employed by the Respondent at its 655 Walck Road, North Tonawanda, New York facility.
>
> Excluded: All office clerical employees, technicians-in-charge, dispatchers, guards, professional employees and supervisors as defined in the Act, and all other employees.

(b) Discharging employees pursuant to its unilateral change in enforcement of its driving under the influence policy.

(c) Failing and refusing to meet and bargain with the Union regarding the discharges of employees pursuant to its unilateral enforcement of its driving under the influence policy.

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

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

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

(a) Rescind the unilateral change made in the terms and conditions of unit employees by enforcement of its driving under the influence policy.

(b) Within 14 days from the date of this Order, offer Matthew Raimondo, Carl Antholzner, and Shawn Kazmierczak full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make whole Matthew Raimondo, Carl Antholzner, and Shawn Kazmierczak for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter, notify Matthew Raimondo, Carl Antholzner, and Shawn Kazmierczak in writing that this has been done and that the discharges will not be used against them in any way.

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

(f) Within 14 days after service by the Region, post at its facilities in North Tonawanda, New York, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 18, 2008.

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

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