First Student Inc., A Division of First Group America *and* Local 9036, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW) AFL–CIO. Case 07–CA–092212

February 6, 2018

DECISION AND ORDER

BY CHAIRMAN KAPLAN AND MEMBERS PEARCE AND MCFERRAN

On December 13, 2013, Administrative Law Judge Mark Carissimi issued the attached decision. The Respondent filed exceptions and a brief in support, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed reply briefs. The General Counsel also filed cross-exceptions and a brief in support, and the Respondent filed an answering brief. Finally, the Charging Party filed exceptions and a brief in support, the Respondent filed an answering brief, and the Charging Party filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order, to amend his remedy, and to adopt the recommended Order as modified and set forth in full below.[2]

The Respondent admits that it is a legal successor to the Saginaw School District (School District) and, as such, obligated to recognize and bargain with the incumbent bargaining representative of a unit of bus drivers and monitors, a majority of whom formerly worked for the School District. For the reasons stated fully in the judge's decision, we affirm his findings that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a new attendance policy in August and September 2012 and by delaying bargaining from August 17 to October 17, 2012.[3] For the reasons set forth below, however, we find, contrary to the judge, that the Respondent was a "perfectly clear" successor employer and that it violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with notice and an opportunity to bargain before imposing initial terms and conditions of employment for the unit employees.

I. FACTS

Until 2012, the School District directly employed drivers and assistants to perform school bus transportation services. They were represented by the United Steel Workers International Union (USW) and Local 8410.[4] The most recent collective-bargaining agreement covering the School District's bus drivers was effective from August 27, 2010, through August 31, 2012.

In response to the School District's request for proposals for subcontracting out school bus transportation work for the 2012–2013 school year,[5] the Respondent

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

[2] In accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall include the requisite tax compensation and Social Security reporting remedy, and shall modify the judge's recommended Order and substitute a new notice to reflect this remedial change and to conform to the violations found and the Board's standard remedial language.

[3] Unlike the judge, we also find an independent 8(a)(5) violation for the Respondent's act of conditioning the commencement of bargaining on the Union's agreement to withdraw the unfair labor practice charge filed on September 21, 2012, alleging a refusal to recognize and bargain. The record clearly establishes, and the judge found, that the Respondent made this unlawful proposal on October 1, stating that if the Union did not withdraw the charge the Respondent would not be able to begin negotiations until the Board concluded its investigation. The Respondent reiterated its position on October 3. At this point, the Respondent had already unlawfully delayed bargaining from August 17. On October 5, the Respondent withdrew its withdrawal demand and agreed to begin negotiations on October 15. The judge, however, declined to find a separate violation for this conduct because "the Respondent raised the issue only briefly [and] did not insist to impasse on it . . . ." The issue here, however, is not whether a party may propose the withdrawal of an unfair labor practice during ongoing collective-bargaining negotiations. It is whether a party may condition the commencement of negotiations on a withdrawal. On this point, Board law is clear that "an employer may not condition bargaining on the withdrawal of unfair labor practice charges or other litigation." *Caribe Staple Co.*, 313 NLRB 877, 890 (1994); *United Brotherhood of Carpenters*, 195 NLRB 799, 806 (1972). Accordingly, we find that the Respondent's withdrawal precondition, even though it was maintained for only a few days, constituted a separate violation.

[4] In exceptions, the Respondent challenges the judge's findings that the USW and Local 8410 were the joint representatives of the unit employees from at least August 27, 2010, to June 5, 2013, and that the USW and Local 9036 were the joint representatives of the unit employees from June 5, 2013, to the present. For the reasons set forth in the judge's decision, we find no merit in the Respondent's challenges. We will refer to the USW and Local 8410 and the USW and Local 9036 collectively as "the Union" herein. We find no merit to the Respondent's exception to the judge's grant of the General Counsel's motions to amend the complaint to correct the references to the unions, or its exception to the judge's decision not to dismiss the complaint on Sec. 10(b) grounds, for the reasons stated by the judge.

[5] The judge's decision details, and then references, the School District's initial request for subcontracting proposals for the 2011–2012 school year and the Respondent's communications related thereto. We

submitted a bid proposal on February 3, 2012.[6] Thereafter, the School District entered into negotiations with the Respondent for the transportation services contract. While those negotiations were pending, the School District arranged for a meeting between representatives of the Respondent and School District unit employees. Approximately 40 unit employees attended the meeting, which took place on March 2.

At this meeting, the Respondent's area general manager Douglas Meek told the unit employees that, if the Respondent and the School District agreed to a contract, the Respondent would offer employment to current employees who submitted an application and met the Respondent's hiring criteria, which included a background check, physical examination, drug screen, and training. The record establishes that these requirements were consistent with the School District's hiring criteria and the general eligibility requirements for bus drivers in the industry. In response to a question regarding how many current employees would be hired, Meek stated that the Respondent typically hires 80 to 90 percent of an existing workforce when it assumes operations. Meeks further stated that if the workforce is represented and the Respondent hires 51 percent of the employees, it will recognize the union and negotiate a new contract. When asked about guaranteed hours for employees, Meek responded that the Respondent would use the School District's routing system and would not be able to provide information regarding hours until the routes were established. He also indicated that other terms and conditions of employment would be subject to negotiations.

In early May, the School District and the Respondent reached agreement on the terms of a transportation services contract. Thereafter, at a public meeting held on May 16, the Board of Education took up the issue of whether to approve the contract. USW representative Tonya DeVore and at least five unit employees attended the meeting, at which Daniel Kinsley, the Respondent's development manager, answered questions from the Board. Kinsley stated that the Respondent would hire the current School District employees if they submitted applications and met the Respondent's hiring criteria, which included a background check, a drug screen, an interview, and dexterity tests. He indicated that the Respondent would hire the applicants at the same rate of pay they had been receiving from the School District and that, if 51 percent or more of the existing workforce was hired, the Respondent would recognize the Union. The Board voted to approve the contract between the Respondent and the School District.

Immediately following the meeting, Kinsley spoke with union representative DeVore and several unit employees, clarifying that the Respondent would recognize the Union if it hired 50 percent "plus one" of the existing School District employees. Kinsley also stated that the Respondent's goal was to hire as many of the existing employees as possible who met the hiring criteria, and that the Respondent would maintain the existing wages.

On May 17, almost all of the School District's unit employees attended a meeting with several representatives of the Respondent. At the meeting, Meek briefly discussed the Respondent's operation and management structure. Thereafter, the Respondent distributed a memo to the School District employees, inviting them to apply for employment. The memo stated that "[a]ll current Saginaw Public School drivers and monitors who successfully pass the [Respondent's] hiring criteria will be offered an employment opportunity with First Student." The memo also set forth several terms and conditions of employment that were different from the employment terms set forth in the School District collective-bargaining agreement under which the unit employees had worked. For example, the memo stated that employees would retain the same pay for transportation duties but would receive a lower rate for other duties, such as training and clerical work. Under the collective-bargaining agreement, employees had received the same hourly wage rate for all work performed. Similarly, the memo set forth a lower number of guaranteed hours than had been in place under the collective-bargaining agreement and provided a different method for paying employees for participating in training.

II. DISCUSSION

In *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 281–295 (1972), the Supreme Court held that a successor is not bound by the substantive terms of a collective-bargaining agreement negotiated by the predecessor and is ordinarily free to set initial terms of employment unilaterally. However, it recognized that "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit," and in those circumstances, the successor is required to "initially consult with the employees' bargaining representative before he fixes terms." Id. at 294–295. In *Spruce Up Corp.*, 209 NLRB 194 (1974), enfd. mem. 529 F.2d 516 (4th Cir. 1975), the Board considered the scope of the *Burns* "perfectly clear" successor exception and held that it "should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they

find it unnecessary to rely on the judge's analysis of the parties' communications relating to that initial request for proposals, which the School District ultimately withdrew.

[6] All dates hereafter will refer to 2012, unless otherwise noted.

would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." Id. at 195 (footnote omitted).

In *Nexeo Solutions, LLC*, 364 NLRB No. 44 (2016), the Board recently reviewed cases subsequent to *Spruce Up* that more specifically defined the parameters of the "perfectly clear" exception with respect to the timing and clarity of the announcement of new terms of employment. The *Nexeo* decision explains that, in those cases,

> the Board clarified that the exception is not limited to situations where the successor fails to announce initial terms before extending a formal invitation to the predecessor's employees to accept employment. Rather, the bargaining obligation attaches when a successor expresses an intent to retain the predecessor's employees without making it clear that employment will be conditioned on acceptance of new terms. *Canteen Co.,* 317 NLRB 1052, 1053–1054 (1995) [enfd. 103 F.3d 1355 (7th Cir. 1997)]. To avoid "perfectly clear" successor status, a new employer must clearly announce its intent to establish a new set of conditions prior to, or simultaneously with, its expression of intent to retain the predecessor's employees. *Spruce Up,* 209 NLRB at 195; *Canteen,* 317 NLRB at 1052–1054.

Nexeo, 364 NLRB No. 44, slip op. at 5–6 (footnote omitted).[7] Applying this established law, we find, contrary to the judge, that the Respondent was a "perfectly clear" successor to the School District and, therefore, violated the Act by unilaterally changing unit employees' terms and conditions of employment without first bargaining with the Union.

From the very beginning of the transition process, well before the formal hiring process began, the Respondent clearly and consistently communicated its intent to retain the School District's unit employees. At the March 2 meeting, the Respondent stated that it would offer employment to all existing employees who completed applications and met its hiring criteria which, the record establishes, are consistent with the School District's hiring criteria and industry-wide standards.[8] The Respondent underscored this intent by informing the employees that it typically hired "80 to 90 percent" of an existing workforce when taking over transportation duties from another employer. The Respondent also stated that it planned to recognize the employees' existing union representative, so long as "51 percent" of the existing workforce was hired by the Respondent. Thereafter, in comments during and following the May 16 Board of Education meeting, the Respondent reaffirmed its intention to retain the unit employees and further stated that it would be maintaining their existing wages.

Having established that the Respondent first expressed its intent to retain employees on March 2, the next question is whether the Respondent "clearly announc[ed] its intent to establish a new set of conditions" prior to or simultaneously with its expression of intent to retain the unit employees. Contrary to the judge, we find that it did not. In reaching his conclusion, the judge misinterpreted the import of statements made at the March 2 meeting that matters such as paid time off, vacation pay, and sick pay "would be subject to negotiations." In the judge's view, this statement indicated "that the Respondent would not be adopting the School District's collective-bargaining agreement and that new working conditions would be implemented." The problem with this reasoning is that it is based on an incorrect premise. Even "perfectly clear" successors are not required as a legal matter to adopt their predecessor employer's collective-bargaining agreement. Rather, their statutory bargaining obligation is only to maintain the status quo conditions of employment under the predecessor until it bargains to agreement or impasse with the representative union over terms of a new collective-bargaining contract for the successor workforce. Therefore, a successor's announcement that it will not be adopting the predecessor's bargaining agreement and that certain terms of employment would be subject to negotiations conveys nothing more than a statement of law--that the status quo may change as a result of negotiations, but not in advance of them.[9]

[7] See also *Creative Vision Resources, LLC*, 364 NLRB No. 91, slip op. at 2–3, enfd. 872 F.3d 274 (5th Cir. 2017); *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 3 (2016), enfd. 871 F.3d 358, 373 fn. 6 (5th Cir. 2017); *Elf Atochem North America, Inc*., 339 NLRB 796, 807 (2003); *DuPont Dow Elastomers LLC*, 332 NLRB 1071, 1074 (2000), enfd. 296 F.3d 495 (6th Cir. 2002); *Helnick Corp*., 301 NLRB 128, 128 fn. 1 (1991); *Fremont Ford Sales*, 289 NLRB 1290, 1297 (1988); *C.M.E., Inc.*, 225 NLRB 514, 514–515 (1976); *Roman Catholic Diocese of Brooklyn*, 222 NLRB 1052, 1055 (1976), enf. denied in relevant part sub nom. *Nazareth Regional High School v. NLRB*, 549 F.2d 873 (2d Cir. 1977).

[8] Because these employees had all been hired under similar industry standards by the School District, it follows that the employees had no reason to doubt that they would be hired by the Respondent.

[9] See *Road & Rail Services*, 348 NLRB 1160, 1162 (2006). In *Road & Rail*, the Board found that the respondent was a "perfectly clear" successor and that it therefore did not violate Sec. 8(a)(2) and (3) of the Act by recognizing and entering into negotiations with the union that represented its predecessor's employees before hiring its work force and commencing operations. Id. The Board rejected the argument that it was not clear that the union would have majority status in the new work force because the respondent informed the union that it desired to negotiate different terms and conditions of employment simultaneously with its expression of intent to retain the predecessor's employees. Id.

The judge also erred in finding that the Respondent's statements about the employees' hours and routes at the March 2 meeting were sufficiently clear to put them on notice that there would be changes in the initial terms and conditions of their employment. Specifically, the Respondent stated that it did not know how many hours would be guaranteed the employees because employee hours would depend on the routes established by the School District's routing system. This assertion does not constitute an affirmative statement that terms and conditions will be changed; rather, the Respondent merely indicated that it would continue to use the School District routing system (presumably the same system that had been in place when the School District employed the unit employees) but did not have information regarding routes at that time. The statement was therefore not sufficient to fulfill the obligation, under *Spruce Up*, that a new employer clearly announce its intention to establish new conditions.[10]

We further find that the judge misapplied well-established precedent in finding that the Respondent's subsequent announcement of new initial terms and conditions of employment on May 17 was a timely exercise of the *Burns* successor's right to unilaterally establish initial terms and conditions of employment. The Board has consistently held that a subsequent announcement of new terms, even if made before formal offers of employment are extended, or before the successor commences operations, will not vitiate the bargaining obligation that is triggered when a successor expresses an intent to retain the predecessor's employees without making it clear that their employment is conditioned on the acceptance of new terms.[11]

Our dissenting colleague's more restrictive interpretation of the "perfectly clear" caveat is inconsistent with the express language of the Supreme Court in *Burns*. Moreover, it does not take into account the significant reliance employees may place on statements of intent to hire, to the exclusion of other employment opportunities. Holding a successor to its initial statements of intent, even when those statements are made before formal offers of employment are extended or the transfer of ownership or operations is complete, prevents prospective employers from inducing such reliance, only later to reveal that the employees' terms of employment will be changed.[12] It also serves the important statutory policy of fostering industrial peace in what the Supreme Court has recognized may be an unsettling transition period for unions and employees alike. See *Fall River Dyeing & Finishing Corp.*, 482 U.S. 27, 39–40 (1987).[13]

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at 1162–1163. Contrary to the judge, *Road & Rail* is not distinguishable on the grounds that it "did not involve the issue of whether the employees' continued employment was contingent on their acceptance of a successor's unilateral implementation of the initial conditions of employment." The Board directly addressed the question that is before the Board in this case—whether a successor's expression of intent to negotiate new terms and conditions of employment with the representative union renders the "perfectly clear" caveat inapplicable.

[10] See *Creative Vision Resources*, supra, 364 NLRB No. 91, slip op. at 4, fn. 12 (explaining that "to avoid 'perfectly clear' successor status, a new employer must 'clearly announce its intent to establish a new set of conditions'" and "[a]lthough the announcement need not be made in any particular form, it must be sufficiently clear that a reasonable employee in like circumstances would understand that continued employment is conditioned on acceptance of materially different terms from those in place under the predecessor"). See also *Nexeo*, supra, 364 NLRB No. 44, slip op. at 7, 9, 11–12 fn. 33 (successor's statements that it would provide "equivalent salaries and benefits comparable in the aggregate" to those provided by the predecessor and that it was "working hard to flesh out final plans for our new company's compensation and benefits program" were not sufficiently clear or definite to put employees on notice of new terms); *Elf Atochem*, supra, 339 NLRB at 796, 808 (successor's statement that it would provide "equivalent salaries and comparable benefits" to those provided by the predecessor did not signal a material change in terms and conditions of employment).

Contrary to the judge's finding, *Banknote Corp. of America*, 315 NLRB 1041, 1043 (1994), enfd. 84 F.3d 637 (2d Cir. 1996), cert. denied 519 U.S. 1109 (1997), does not support a different result. In that case, the Board found that the new employer was not a "perfectly clear" successor because "simultaneous with its stated intention to retain the predecessor's employees, the Respondent announced new terms and conditions of employment." See also *Planned Building Services*, 318 NLRB 1049 (1995) ("perfectly clear" successor not established where "during its very first contact with [the predecessor's] employees," the employer made clear that its offer to retain the employees was "based on changed terms and conditions of employment"). No such simultaneous announcement was made in the instant case. We further note that, contrary to the Respondent's exceptions, *Fremont Ford*, supra, 289 NLRB 1290, supports, rather than contradicts, our holding. In that case, the employer was found to be a "perfectly clear" successor at the time when it first indicated that it intended to retain the predecessor's employees, which is consistent with our holding here.

[11] See *Creative Vision*, supra, 364 NLRB No. 91, slip op. at 3 and cases cited at fn. 10.

[12] *Nexeo*, supra, 364 NLRB No. 44, slip op. at 9, citing *S & F Market Street Healthcare LLC v. NLRB*, 570 F.3d 354, 359 (D.C. Cir. 2009); *International Assn. of Machinists and Aerospace Workers, AFL–CIO v. NLRB*, 595 F.2d 664, 674–675 (D.C. Cir. 1978), cert. denied 439 U.S. 1070 (1979). The Fifth, Sixth, and Seventh Circuit have also approved this reasoning. *Creative Vision*, supra, 872 F.3d at 283; *DuPont Dow Elastomers*, supra, 296 F.3d at 506; *Canteen*, supra, 103 F.3d at 1364.

[13] Contrary to the Respondent's argument in its answering brief, there is no impediment to holding that the Respondent's bargaining obligation attached on March 2, notwithstanding that the transportation services contract between the Respondent and the School District was not approved until months later. See *Nexeo*, supra, 364 NLRB No. 44 (finding "perfectly clear" successor based on purchase agreement and statements evincing intent to employ existing workforce made 5 months before sale was consummated); *Elf Atochem*, supra, 339 NLRB 796 (finding "perfectly clear" successor status based on letter of intent to purchase predecessor and statements promising to employ existing work force made 4 months before sale was consummated); *Spitzer Akron, Inc. v. NLRB,* 540 F.2d 841, 843–845 (6th Cir. 1976) (finding that it was "perfectly clear" in early August that the successor intended to rehire a sufficient number of employees to maintain the union's

For the reasons set forth above, we find that the General Counsel has met his burden of proving that the Respondent became a "perfectly clear" successor, with an obligation to bargain over initial terms, on March 2, when it first expressed an intent to retain the predecessor's employees without clearly announcing an intent to establish different initial terms of employment. The Respondent therefore violated Section 8(a)(5) and (1) of the Act by announcing and implementing unilateral changes in the unit employees' terms and conditions of employment on and after May 17, 2012.

AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. At least from August 27, 2010, to June 5, 2013, the United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), AFL–CIO and Local 8410, the United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), AFL–CIO was the exclusive bargaining representative of the following appropriate unit:

> All full-time and regular part-time drivers and monitors employed by First Student Inc., a Division of First Group America at its Saginaw, Michigan location, but excluding substitutes and temporary drivers and monitors, dispatchers, confidential employees and supervisors as defined in the Act.

3. Since June 5, 2013, the United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), AFL–CIO and Local 9036, the United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), AFL–CIO (the Union) has been the exclusive representative of the employees in the above-described appropriate unit, for the purposes of collective bargaining with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment.

4. The Respondent, a "perfectly clear" successor employer to the Saginaw School District, violated Section 8(a)(5) and (1) of the Act on May 17, 2012, by unilaterally changing the terms and conditions of initial employment for bargaining unit employees, including their rate of pay and guaranteed hours, without first notifying the Union and giving it an opportunity to bargain.

5. By unilaterally implementing attendance policies on August 27, 2012, and September 4, 2012, without first notifying the Union and giving it an opportunity to bargain, the Respondent violated Section 8(a)(5) and (1) of the Act.

6. By conditioning bargaining on the Union's withdrawal of an unfair labor practice charge, the Respondent violated Section 8(a)(5) and (1) of the Act.

7. By delaying bargaining from August 17, 2012 to October 17, 2012, the Respondent violated Section 8(a)(5) and (1) of the Act.

8. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

AMENDED REMEDY

We amend the judge's proposed remedy to address the additional Section 8(a)(5) and (1) violations that we have found. Having found that the Respondent is a "perfectly clear" successor to the School District and that it violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union to agreement or impasse prior to changing existing terms and conditions of employment for the unit employees, we shall require the Respondent, on request by the Union, to retroactively restore the terms and conditions of employment established by its predecessor and rescind the unilateral changes it has made. The Respondent shall also be required to make employees whole for any loss of wages or other benefits they suffered as a result of the Respondent's unilateral changes in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In addition, we shall order the Respondent to remit all payments it owes to employee benefit funds, including any additional amounts due the funds on behalf of the unit employees in accordance with *Merryweather Optical Co.,* 240 NLRB 1213 (1979). Further, the Respondent shall be required to reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons*, supra, com-

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majority status, even though the purchase of assets was not consummated until September; in those circumstances, moreover, "a duty to bargain . . . preceded the formal rehiring" of employees), enfg. 219 NLRB 20 (1975).

Even assuming, moreover, that no bargaining obligation could arise until after the Respondent's contract was approved, we would find that the Respondent became a "perfectly clear" successor on May 16, when it reiterated its previously expressed intent to retain the predecessor's employees without simultaneously clearly announcing an intent to establish different initial terms of employment. See, e.g., *Elf Atochem North America*, supra, 339 NLRB at 796; *Canteen,* supra, 317 NLRB at 1052–1053.

pounded daily as prescribed in *Kentucky River Medical Center*, supra.

Finally, the Respondent shall be required to compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

ORDER

The National Labor Relations Board orders that the Respondent, First Student, Inc., A Division of First Group America, Saginaw, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with the United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), AFL–CIO and Local 8410, USW, AFL–CIO, and with the USW and Local 9036, USW, AFL–CIO (altogether, the Union), in the following appropriate unit, by changing the terms and conditions of employment of unit employees, including their rate of pay and guaranteed hours, benefits, and attendance policies, without first providing notice to and bargaining in good faith with the Union to agreement or to impasse. The bargaining unit is:

> All full-time and regular part-time drivers and monitors employed by First Student Inc., a Division of First Group America at its Saginaw, Michigan location, but excluding substitutes and temporary drivers and monitors, dispatchers, confidential employees and supervisors as defined in the Act.

(b) Conditioning bargaining on the Union's withdrawal of an unfair labor practice charge.

(c) Delaying the commencement of bargaining with the Union.

(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) Before implementing any changes in the bargaining unit employees' wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit described above.

(b) To the extent it has not already done so, on request by the Union, rescind any changes in the terms and conditions of employment for the unit employees that were unlawfully unilaterally implemented on and after May 17, 2012, including but not limited to the changes to unit employees' rates of pay, guaranteed hours, benefits, and attendance requirements.

(c) Make the unit employees whole, with interest, for any losses sustained as a result of the unilateral changes in terms and conditions of employment in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

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

(f) Within 14 days after service by the Region, post at its Saginaw, Michigan, facility copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 7, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 this proceeding, the Respondent shall duplicate and mail, at its

[14] 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."

own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 17, 2012.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 7 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.

Dated, Washington, D.C. February 6, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN KAPLAN, dissenting in part.

Contrary to my colleagues, I would affirm the judge's finding that Respondent First Student Inc. was *not* a "perfectly clear" successor to the Saginaw, Michigan School District (School District), its predecessor. As the judge found, the Respondent gave the School District's employees notice of different initial employment terms on May 17, 2012, which was more than a month before the Respondent extended employment offers to the School District's employees. Therefore, under the standards set forth in *Spruce Up Corp.*, 209 NLRB 194 (1974), enfd. 529 F.2d 516 (4th Cir. 1975), the Respondent had the right under *Burns* to implement initial employment terms without consulting or bargaining with the predecessor's union. Accordingly, although I agree with other aspects of my colleagues' decision,[1] I respectfully dissent from their finding that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (NLRA or Act) by unilaterally implementing initial employment terms that differed from the employment terms of its predecessor.

Further, to the extent that my colleagues' analysis in this case relies on *Creative Vision Resources, LLC,* 364 NLRB No. 91 (2016), enfd. 872 F.3d 274 (5th Circ. 2017), *Nexeo Solutions, LLC*, 364 NLRB No. 44 (2016), and *Canteen Co.*, 317 NLRB 1052 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997), and the interpretations of *Spruce Up* articulated therein, I note that I do not believe that those cases were correctly decided. Specifically, I do not agree that "perfectly clear" successorship attaches if and when "a successor *expresses an intent* to retain the predecessor's employees without making it clear that employment will be conditioned on the acceptance of new terms." *Nexeo*, 364 NLRB No. 44, slip op. at 6 (citing *Canteen Co.*, 317 NLRB at 1053–1054) (emphasis added). The "expresses an intent" standard cannot be reconciled with the principles of successorship set forth in *Burns*,[2] *Fall River Dyeing*,[3] and their progeny. However, in the absence of a Board majority to overrule *Nexeo*, *Canteen*, and *Creative Vision*, I agree for institutional purposes that that precedent is applicable here.

Dated, Washington, D.C. February 6, 2018

Marvin E. Kaplan, Chairman

NATIONAL LABOR RELATIONS BOARD

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 refuse to bargain in good faith with the United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), AFL–CIO and Local 8410, USW, AFL–CIO, and with the USW and Local 9036, USW, AFL–CIO (altogether, the Union) in the following

[1] The facts regarding the Union's requests to bargain and the Respondent's delayed response to those requests are recounted in full in the judge's decision and more briefly in my colleagues' opinion. I agree with my colleagues and the judge that, once it was obligated to bargain, the Respondent violated the Act by delaying the commencement of negotiations. I also agree with my colleagues that the Respondent violated the Act by conditioning the commencement of negotiations on the Union's withdrawal of an unfair labor practice charge and by unilaterally implementing, and unilaterally revising, an attendance policy.

[2] *NLRB v. Burns International Security Services*, 406 U.S. 272 (1974).

[3] *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987).

appropriate unit by unilaterally changing your terms and conditions of employment, including but not limited to changes to your wages, your guaranteed hours, benefits, and attendance policies, without first providing the Union with notice and an opportunity to bargain. The bargaining unit is:

> All full-time and regular part-time drivers and monitors employed by First Student Inc., a Division of First Group America at its Saginaw, Michigan location, but excluding substitutes and temporary drivers and monitors, dispatchers, confidential employees and supervisors as defined in the Act.

WE WILL NOT condition bargaining on the Union's withdrawal of an unfair labor practice charge.

WE WILL NOT delay the commencement of bargaining with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of your employment, notify, and on request, bargain with the Union as your exclusive collective-bargaining representative.

WE WILL, to the extent we have not already done so, on request by the Union, rescind any changes in the terms and conditions of employment for the unit employees that we unlawfully unilaterally implemented on and after May 17, 2012, including, but not limited to, the changes to our unit employees' rates of pay, guaranteed hours, benefits, and attendance requirements.

WE WILL make our unit employees whole for any losses they sustained due to the unlawfully imposed changes to their terms and conditions of employment, with interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

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

The Board's decision can be found at www.nlrb.gov/case/07-CA-092212 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington DC 20570, or by calling (202) 273–1940.

Jennifer Brazeal, Esq. for the General Counsel.
David Kadela and *Erik Hult, Esqs.* for the Respondent.
Emma Rebhorn and Stuart Israel, Esqs. for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Saginaw, Michigan, on July 24–26, 2013. Local 9036, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW) AFL–CIO (Local 9036), filed the charge on October 29, 2012, and the Acting General Counsel issued the complaint on April 30, 2013.

On the entire record, including my observation of the demeanor of the witnesses,[1] and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with offices and places of business within the State of Michigan, including Saginaw (the Respondent's Saginaw facility) has been engaged in the business of providing student transportation. Annually, the Respondent, in conducting its business operations described above, derives gross revenues in excess of $250,000. During this same period of time, the Respondent purchased and received at its Michigan facilities goods valued in excess of $5000 directly from points located outside the State of Michigan.

The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

As amended at the hearing paragraph 8 of the complaint al-

[1] In making my findings regarding the credibility of witnesses, I considered their demeanor, the content of the testimony, and the inherent probabilities based on the record as a whole. In certain instances, I credited some but not all, of what the witness said. I note, in this regard, that "nothing is more common in all kinds of judicial decisions than to believe some and not all" of the testimony of a witness. *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). See also *J. Shaw Associates*, LLC, 349 NLRB 939, 939-940 (2007).

leges that since 1981 through June 2013, the Saginaw School District (School District) recognized the United Steel Workers International Union (USW) and USW, Local 8410 as the collective-bargaining representative of the following employees:

> All regular full-time and regular part-time hourly rated bus drivers and bus assistants employed by the Board of Education of the city of Saginaw, but excluding substitutes and temporary drivers and bus assistants, dispatchers, supervisors, confidential employees, and all other employees.

Paragraph 8 of the complaint also alleges that this recognition has been embodied in a series of collective-bargaining agreements with the School District, the most recent of which by its terms was to be effective from August 27, 2010, to August 31, 2012. Paragraph 8 of the complaint further alleges that since June 2013 the USW designated USW, Local 9036 to represent the employees in the unit described above, along with the USW. (GC Exh. 19.)

In his posthearing brief the General Counsel[2] moves to amend paragraph 9(b) of the complaint to allege "From about February 19, 1981 through June 2013 Local 8410, a USW affiliate and USW were the exclusive collective bargaining representatives of the unit employed by Respondent. Since June 2013, Local 9036, a USW affiliate and USW were the exclusive collective bargaining representatives of the unit employed by Respondent." The General Counsel further moved to amend paragraph 9(c) of the complaint to allege "During the relevant time periods described in paragraph 9(b), USW, Local 8410, and Local 9036, based on Section 9(a) the Act have been the exclusive collective bargaining representatives of the Unit employed by Respondent." (GC brief at 3 fn. 2.) The General Counsel asserts that, as originally pled, paragraphs 9(b) and(c) are inconsistent with the amendment made at the hearing to paragraph 8.[3] The General Counsel further contends that the amendment to paragraph 9 conforms to the evidence presented in the case.

The Respondent objected to the amendment to the complaint made at the trial and further objects to the post and complaint amendment. For reasons which I will explain in detail herein, I granted the amendments made at the hearing and I also grant the amendment made in the General Counsel's brief.

The complaint alleges in paragraph 6 that since about June 1, 2012, the Respondent contracted with the School District to provide student transportation services and since that time has continued to provide those services in basically unchanged form and has employed as majority of its employees individuals who were previously employees of the School District. Paragraph 6 of the complaint further alleges that the Respondent is a successor to the School District.

Paragraph 13 of the complaint alleges that on or about May 17, 2012, the Respondent implemented changes in the wages, hours, and other working conditions of unit employees. The complaint also alleges that on August 27, 2012, the Respondent implemented a new employee attendance policy. The complaint alleges that these changes were implemented unilaterally and therefore violate Section 8(a)(5) and (1) of the Act. The complaint also alleges that on or about May 17, 2012, the Respondent bypassed the Union and dealt directly with employees in the Unit in violation of Section 8(a)(5) and (1). The General Counsel's theory regarding the complaint allegations relating to May 17, 2012, is that the Respondent engaged in conduct that made it "perfectly clear" that it planned to retain all of the employees in the unit and therefore had an obligation to initially consult with the employees' bargaining representative before establishing terms and conditions of employment. In support of this theory, the General Counsel relies on inter alia, *NLRB v. Burns International Security Services,* 406 U.S. 272, 294–295 (1972) and *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), enfd. mem. 529 F.2d 516 (4th Cir.1975).

The complaint further alleges that the Respondent unreasonably delayed bargaining from May 18, 2012, to October 15, 2012, in violation of Section 8(a)(5) and (1). Finally, the complaint alleges that on about October 1, 2012 the Respondent insisted on the withdrawal of an unfair labor practice charge as a condition to engaging in bargaining in violation of Section 8(a)(5) and (1).

The Respondent admits that it is a successor employer to the School District but denies that it is a "perfectly clear" successor within the meaning of *Burns* and *Spruce Up,* supra, and further denies that it committed any of the alleged unfair labor practices.

The Amendments to the Complaint

Section 102.17 of the Board's Rules and Regulations permits complaint amendments upon terms that may be just. The Board evaluates the following factors in determining whether to grant an amendment to the complaint: (1) whether there was surprise or lack of notice, (2) whether the General Counsel offered a valid excuse for the delay in moving to amend, and (3) whether the matter was fully litigated. *Stagehands Referral Service, LLC,* 347 NLRB 1167, 1171 (2006); *Cab Associates*, 340 NLRB 1391, 1397 (2003).

In the instant case, on July 19, 2013, 5 days prior to the commencement of the trial, the Respondent filed an amended answer denying the portions of the complaint in paragraphs 8 and 9, alleging that Local 9036 was designated representative of the unit employees from 1981 until the present. At the hearing, as noted above, the General Counsel amended paragraph 8 during the case in chief. This amendment was consistent with the evidence presented on this issue. In particular, the collective-bargaining agreement effective August 27, 2010, through August 31, 2012, indicates that it is "between the Board of Education of the City of Saginaw and United Steel Workers, AFL–CIO–CLC, on behalf of Local 8410-01, (hereinafter referred to as the "Union")." (GC Exh. 2.) The signature page of that document reflects that it was executed by representatives of both the United Steel Workers International Union (USW) and Local 8410-01. Before the General Counsel rested, significant

[2] I have taken administrative notice of the fact that on October 29, 2013, the United States Senate confirmed President Obama's nomination of Richard F. Griffin Jr., to be the Board's General Counsel and that he was sworn in on November 4, 2013.

[3] As originally pled, paras. 9(b) and (c) allege that since about June 1, 2012, Local 9036, has been the exclusive bargaining representative of the unit employees.

additional evidence was presented as to how and when the representation of unit employees was transferred by the USW from the jurisdiction of Local 8410 to that of Local 9036. Accordingly, it is clear that the Respondent had a fair opportunity to defend itself against paragraph 8 of the complaint as amended and that it was appropriate to grant the amendment to the complaint.

With respect to the General Counsel's motion to amend paragraph 9 of the complaint contained in his brief, the Respondent contends that it should be denied under the standards of *Stagehands Referral Service* and *Cab Associates*, supra. With regard to the first factor, the amendment made in the General Counsel's brief could hardly be surprising to the Respondent as it merely made the allegations of paragraph 8 and 9 consistent with each other. With respect to the second factor, the General Counsel admits it was an oversight not to have made the amendment to paragraph 9 at the hearing. While it would have been preferable for the General Counsel to have made the amendments to paragraph 9 at the hearing, I do not find that moving to amend paragraph 9 in the brief prejudiced the Respondent as I have carefully considered the Respondent's memorandum in opposition to the General Counsel's motion. Finally, as noted above, the issue of the representative status of the USW, Local 8410 and Local 9036 was extensively litigated at the hearing. Accordingly, I find it appropriate to grant the amendment to paragraph 9 of the complaint.

The Respondent has denied the substantive allegations in the amended complaint regarding the representative status of the USW, Local 8410 and Local 9036.

The Representative Status of the USW, Local 8410 and Local 9036

Although the complaint as amended alleges that the School District and the USW and Local 8410 have had a collective-bargaining relationship since 1981, the General Counsel produced no evidence regarding the bargaining history prior to 2010. As noted above, the 2010–2012 collective-bargaining agreement is between the School District and the "United Steelworkers, AFL–CIO–CLC on behalf of Local 8410-01, (hereinafter referred to as the "Union"). Also, as noted above, the signature page of collective-bargaining agreement reflects the signatories as the Saginaw Board of Education, the USW, and Local 8410-01. The record establishes that there were approximately 55 employees in the unit.

The Board has held that when an international union and its affiliated local union are signatories to a collective-bargaining agreement, both the international union and its affiliated local are joint representatives of the employees covered by the collective-bargaining agreement. *BASF-Wyandotte Corp*., 276 NLRB 498, 504–505 (1985). Accordingly, based on the contract between the School District and the USW and Local 8410, I find that the USW and Local 8410 were the joint representatives of the employees in the unit from at least August 27, 2010, until the unit employees were transferred to the jurisdiction of Loca1 9036 in June 2013.

The USW constitution specifically permits the USW to transfer all or part of the jurisdiction of a local union to another local union (CP Exh. 3). According to the uncontroverted testimony of USW Representative Tonya DeVore, Local 8410 is an amalgamated local union that represents severed several units. 8410-01 is the unit identifier for the employees in the unit that was employed by the School District. When the Respondent took over the operation of the bus services of the Saginaw public schools in July 2012, the unit employees were no longer public employees. In the fall of 2012, the USW began the process of transferring the unit employees from Local 8410 to Local 9036, which represents both public and private employees. The decision to transfer unit employees from Local 8410 to Local 9036 was based primarily on the fact that the officials of Local 8410 had no experience in preparing the necessary administrative documents required of a union representing private sector employees. Of particular concern to the Local 8410 officials was the LM-2 report that is required to be filed with the U.S. Department of Labor pursuant to the Labor-Management Reporting and Disclosure Act.

According to the uncontroverted and credited testimony of DeVore and Clint Bryant, a current employee of the Respondent,[4] meetings were held with unit employees in October and November 2012 regarding the transfer of the unit from Local 8410 to Local 9036. At the meeting held in October 2012, approximately 30 employees were present while approximately 25 employees attended the meeting in November. At these meetings DeVore told employees that the officials of Local 8410 had concerns about their ability to fill out the paperwork required of a union representing private sector employees. DeVore further indicated that Local 9036 represented both private sector and public sector employees and she thought that Local 9036 would be a "better fit" for the unit employees since they now worked for a private employer. The employees present at the meetings had no objections to the transfer of their unit from one local union to another.

On May 29, 2013, Michael Bolton, the director of USW District 2, wore a letter to Stan Johnson, the USW secretary-treasurer formally requesting that, pursuant to the USW constitution, the Respondent's unit employees who had been formerly been employed by the School District be transferred to Local 9036. The letter also indicated that DeVore would continue to provide services to the unit employees. The letter further indicated, in relevant part, that:

> The reason for the request is that the members in the unit were previously public school workers, and were outsourced to a private sector firm. Amalgamated Local 8410 had no private sector units prior to this change and the requested new unit will be part of an amalgamated local with both private and public units. Also the primary unit of Local 9036 is composed of passenger bus drivers, and the new unit is composed of school bus drivers.

On June 5, 2013, the USW transferred the Respondent unit employees to Local 9036 (CP Exh. 4). On approximately June 5, 2013, DeVore, Bryant, and Jennifer Wirrick, the president of Local 9036 attended a meeting with the unit employees of the

[4] Bryant was formerly the unit president for Local 8410 and is presently the unit president for Local 9036. The unit president is the highest ranking union official in the bargaining unit.

Respondent at the Saginaw facility's bus garage. The unit employees were informed that Local 9036 would be their new local and were asked to sign dues checkoff cards for Local 9036. Approximately 43 of the 45 employees present at the meeting signed dues checkoff cards. As of the time of the hearing those checkoff authorizations had not been provided to the Respondent.

As I noted above, the Respondent admits that is a successor to the School District with regard to bus transportation services and began to bargain with the USW and Local 8410 in October 2012. DeVore is the chairperson of the Union's negotiating team. At a bargaining meeting held in approximately January or February 2013, DeVore notified the Respondent's chief representative, Audrey Adams, that the local union number would be changing because the employees were going from a local union that represented solely public employees to a local union that represented both public and private employees. The Respondent did not indicate any objection to that procedure at the meeting. From June 2013 until the hearing was held in July 2013 there were two additional bargaining meetings. None of the Respondent's representatives present at the meeting raised any objection to the transfer of the unit employees from one local union to another.

It is clear that USW representative DeVore was involved in the affairs of the bargaining unit as it underwent the transition from the School District to the Respondent. She was also deeply involved in the transition of the unit from Local 8410 to Local 9036. In addition, DeVore has been the chairperson of the Union's negotiating team since negotiations began with the Respondent in October 2012, when local 8410 was the joint representatives of the unit employees and continued in that role after June 5, 2013, when the unit employees were transferred to Local 9036. Such active participation by a USW representative in the affairs of a local union establishes that since June 5, 2013, the USW and Local 9036 have been the joint representatives of the unit employees. *BASF-Wyandotte*, supra at 505.

Based on the foregoing, I find that since at least August 27, 2010, until June 5, 2013, the USW and Local 8410 were the joint representatives of the unit employees. Since June 5, 2013, until the present the USW and Local 9036 have been the joint representatives of the unit. In reaching this finding I rely on the Board's decision in *Raymond F. Kravis Center for the Performing Arts*, 351 NLRB 143 (2007). In that case, the Board indicated that:

> [W]hen there is a union merger or affiliation an employer's obligation to recognize and bargain with the incumbent union continues unless the changes resulting from the merger or affiliation are so significant as to alter the identity of the bargaining representative. Id. at 147.

It is the burden of the party seeking to avoid its bargaining obligation to establish that the merger or affiliation resulted in a change that is "sufficiently dramatic" to alter the union's identity. Id. at 147.

It is clear that in the instant case the employer has not met that burden. Based on the foregoing, there has been substantial continuity in the representation of the unit by the USW and Local 8410 before the transfer of the unit and the USW and Local 9036 after the transfer of the unit. Accordingly, references to the "Union" in this decision refer to the USW and Local 8410 prior to June 5, 2013, and the USW and Local 9036 after June 5, 2013.

The Respondent's Procedural Defenses

The Respondent contends in its brief that the complaint must be dismissed pursuant to Section 10(b) or because Local 9036 did not represent the unit employees until over 7 months after it filed its charge.

The charge was filed on October 29, 2012, by the "United Steelworkers Local 9036" and alleges in substance that the Respondent was a "Perfectly Clear successor to Saginaw Public Schools" which unilaterally changed terms and conditions of employment; delayed bargaining with the "Union" and conditioned bargaining with the "Union" on the withdrawal of an unfair labor practice charge in violation of Section 8(a)(5) and (1). Listed on the charge was the fact that Local 9036 is affiliated with the "United Steelworkers." The 10(b) period regarding this charge commenced on April 29, 2012.

The fact that the charge was nominally filed by Local 9036 before it became the joint representative of the unit employees along with the USW, is of no significance as it is clear that "any person" may file a charge with the Board. Section 102.09 of the Board's Rules and Regulations; *Apex Investigation & Security Co*., 382 NLRB 815, 818 (1991).

Is also clear that a charge is not a pleading and does not require the specificity of a complaint. A charge merely initiates a Board investigation to determine whether a complaint should be issued. *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307 (1959). The charge in the instant case notified the Respondent of the substantive allegations set forth above and refers to the "Union." As I set forth above, the "Union" until June 5, 2013, was comprised of the USW and Local 8410 and after June 5, 2013, was comprised of the USW and Local 9036. There has been continuity of representation throughout the entire 10(b) as the USW has always been one of the joint representatives of the unit employees. The transfer of the unit from Local 8410 to Local 9036 did not in any way change the continuity in representation.

Is also clear that a complaint is not restricted to the precise allegations of a charge. Rather, a complaint may allege any matter sufficiently related to or growing out of the charged conduct. *Fant Milling*, supra at 309. As originally issued, all of the substantive allegations of the complaint were within the 6 month time period required by Section 10(b) but only made reference to Local 9036 as the Section 9(a) representative of the unit employees. However, as finally amended, the complaint properly alleged the appropriate 9(a) representative as the USW and Local 8410 until June 2013 and the USW and Local 9036 after June 2013. The specific addition of the USW and Local 8410 as the 9(a) representative during the appropriate time period is closely related to the allegations of the charge under the standards applied in Board's decision in *Redd-I, Inc*. 290 NLRB 1115, 1115–1116 (1988). In this connection, the complaint amendments involved the same legal theory as the charge and arise from the same factual circumstances alleged in the

charge. As I have discussed above in detail, the complaint was amended in a manner that permitted the Respondent to adequately defend itself against the amendments. Based on the foregoing, I find no merit to the procedural defenses raised by the Respondent and will address the merits of the amended complaint.

Whether the Respondent is a "Perfectly Clear" Successor Which Violated Section 8(a)(5) and (1) by Unilaterally Establishing Initial Terms and Conditions of Employment and Directly Dealing with Employees

Facts

Background

The Respondent is headquartered in Cincinnati, Ohio, and is the largest provider of school transportation services in the North America. In the United States the Respondent employs over 59,000 employees and transports approximately 6 million students. In Michigan, the Respondent provides transportation services in 18 school districts and operates approximately 1000 buses.

The July 2011 Meeting and Aftermath

In the summer of 2011 the School District issued a request for proposals (RFP) seeking bids regarding the privatization of its school transportation system. The Respondent and two other entities submitted proposals. In July 2011, the School Districtconducted an interview with the Respondent regarding its proposal. Representatives of the School District included Dr. Kelley Peatross; the assistant superintendent of schools, Phoebe Wood, the School District's chief financial officer; and Robert Bradley, the School District's then facilities manager. The Respondent's development manager Daniel Kinsley and another manager, Justin Grygiel, attended for the Respondent. At the invitation of Peatross, USW representative DeVore was present at the interview. No unit employees were present at this interview.

Peatross and DeVore testified regarding this meeting on behalf of the General Counsel, while Kinsley and Bradley testified on behalf of the Respondent. For the most part, there was not much of a much variance in the testimony of the witnesses regarding this meeting. Based on a composite of their testimony, I find that Kinsley stated that the Respondent would hire the bargaining unit employees if they met the Respondent's hiring criteria which included an application, an interview, a background check, a drug screen, and some other tests. Kinsley stated that the Respondent would maintain the current wages and planned to raise wages in the future. When Kinsley was asked whether the Respondent would recognize the Union, he indicated that the Respondent would recognize the Union if it hired 51 percent or more of the School District's employees.[5] Kinsley further indicated that it was the Respondent's intention to hire a majority of the School District's employees if they met the Respondent's hiring protocols. Kinsley also stated that at other locations the Respondent had hired 80 to 90 percent of the existing unit.

After the meeting, Woods prepared two documents summarizing the proposal made by the Respondent and the two other entities that had submitted proposals (GC Exh. 3 and CP Exh. 2). They are very similar but not identical documents. The summaries were provided to employees by the School District and were made available to the public at Board of Education meetings. Peatross gave a copy of Charging Party Exhibit 2 to DeVore.

Both the General Counsel and the Charging Party contend that these exhibits are probative but I find them to be of minimal value. The documents are Wood's summary of what each entity stated during their individual interviews. The accuracy of the summaries is questionable. For example, with respect to the summary involving the Respondent in General Counsel Exhibit 3, under the heading "Union" the document indicates "Will recognize union." Under the same heading, CP Exh. 2 states "The union will be recognized." Peatross testified on direct examination that the summaries accurately reflected what the Respondent's representatives stated at the meeting (Tr. 358). On cross-examination, however, Peatross testified that with respect to the portion of the summary in GC Exh. 3 that states "Will recognize union" it was her understanding that would occur on the condition of the Respondent hiring a majority of the School District's employees (Tr. 378). As noted above, Peatross also testified that she recalled that the Respondent's representatives stated at the meeting that after hiring the majority of the existing work force, it would recognize the union (Tr. 377). Thus, Peatross' testimony regarding the accuracy of the summary was equivocal and conflicts with her testimony that at the meeting the Kinsley stated that the Respondent would recognize the union if it hired a majority of the School District's employees. In addition, Kinsley testified that the summaries were missing important qualifications on relevant topics. For example, Kinsley testified that with regard to the reference to the recognition of the Union in General Counsel Exhibit 3 the summary was missing the qualifier that he stated at the meeting that the Respondent would recognize the Union if it hired 51 percent or more of the School District's employees (Tr. 474). Since Kinsley's testimony on what he said at the meeting is corroborated by both that of Peatross and Bradley, I find his testimony that the summaries were not entirely accurate to be credible.

Under these circumstances, I find that the summaries prepared by Woods are not complete statements of what the Respondent stated at the meeting. I find these documents to be too unreliable to base any findings on them.

In October 2011, the School District selected the Respondent as a provider of its bus services and the School Board voted to approve a contract. However, Dr. Carleton Jenkins, the School District's superintendent, decided not to proceed with subcontracting bus services at that time. In November 2011, the School District withdrew its RFP and notified the Respondent that it would not proceed with subcontracting bus services during the 2011–2012 school year.

[5] Kinsley, Bradley, and Peatross all testified that Kingsley answered the question about recognizing the Union in the same manner. DeVore testified that when asked if the Respondent would recognize the union, Kinsley answered "yes" without any further qualification. I do not credit DeVore's testimony on this point as it conflicts with that of Bradley and Peatross, who I view as neutral witnesses.

The March 2, 2012 Meeting

Pursuant to a new RFP issued by the School District regarding the subcontracting of school bus transportation for the 2012–2013 school year, on February 3, 2012, the Respondent submitted a new proposal to the School District. The Board of Education again approved entering into negotiations with the Respondent for a contract. While those negotiations were ongoing, Peatross arranged for a meeting between the Respondent's representatives and School District employees that was held on March 2, 2012, at the School District's transportation facility. All of the School District' s unit employees were invited to attend the meeting and approximately 40 attended. Peatross attended for the School District. Robert Bradley also attended the meeting. At the time of the meeting Bradley was the general manager for Sodexo, which, pursuant to a contract, provided custodial and maintenance services to the School District. Prior to going to work for Sodexo in September 2011, Bradley had been employed by the School District as the operations manager for those functions. Attending for the Respondent were Kinsley and the Respondent's area general manager, Douglas Meek.

Peatross and current unit employees Millie Stidhum-Stewart and Michelle Ezell, testified on behalf of the General Counsel regarding this meeting. Bradley, Meek, and Kinsley testified on behalf of the Respondent.

According to Peatross, the purpose of the meeting was to discuss the transition of the school bus services from the School District to the Respondent and to allow the employees to ask questions they may have. Peatross introduced Kinsley and Meek to the assembled employees. The Respondent's primary spokesman, Meek, spoke about what the employees could expect in the upcoming weeks in anticipation of a final contract being reached between the School District and the Respondent.

Meek testified that he told the employees that they would be receiving an application form at a future meeting if a contract was reached between the Respondent and the school district. He stressed that the application had to be filled out completely. Meek indicated that he and another one of the Respondent's managers would be present to answer questions when the employees receive their application. Meek stated that after the completion of the application and the necessary background checks, applicants would be subject to a preemployment drug screen, a physical examination and receive training. Meek stated that after completion of these requirements the Respondent would offer employment to existing employees who met their criteria.

After Meek's initial presentation, employees were permitted to ask questions. When asked how many employees would be hired, Meek indicated that in a conversion between a public school transportation system and the Respondent's operation, the Respondent typically hired 80 to 90 percent of the existing work force. Meek testified that he told the employees that if the workforce was represented and the Respondent hired 51 percent of the existing work force as its own, the employees would bring their representation with them and a new contract would be negotiated.

When asked about how many hours were going to be guaranteed to employees, Meek responded that the Respondent would use the School District's routing system but that the Respondent did not know how many hours would be worked at that time. He indicated that the Respondent would no more when the routes were established. In response to other questions regarding the conditions employees would work under if hired by the Respondent, Meek stated that those issues would be subject to negotiations.

Kinsley testified that Meek stated that the applications for employment would have to be complete and that employees who applied for work with the Respondent would be subject to a background check, a dexterity test, a drug screen and receive training. According to Kinsley, Meek said that if the Respondent hired 51 percent or more of the current work force, the Respondent would bargain in good faith regarding new terms and conditions of employment. Kinsley further indicated that questions were posed to Meek regarding issues such as paid time off, vacation pay and sick pay and that Meek responded by saying those items would be subject to negotiations.

Bradley, who testified pursuant to a subpoena issued by the Respondent, recalled that employees asked questions about the number of hours they would work. According to Bradley, Meek explained that until the routes were determined, the Respondent would not know the number of hours that would be worked by employees. While Bradley did not recall the specific subjects that were raised by employees, he recalled Meek stating that certain matters would be subject to negotiations.

Peatross testified that in response to a question by an employee, Meek stated that the Respondent would recognize the Union if it hired 50 percent plus one of the School District's employees as its employees. Peatross also recalled that Meek did not make any commitment to the number of hours the employees would work but stated that the Respondent would have to look at the routes in order to determine the hours that would be provided to employees. While Peatross did not recall the specific topics that were raised by employees, she recalled Meek stating that certain subjects would be subject to negotiations.

Stidhum-Stewart testified that Meek was present along at the meeting along with the Respondent's human resources manager Frederick Kellerman. Stidhum-Stewart further testified that "another guy" and a "lady" attended the meeting for the Respondent. According to Stidhum-Stewart, in response to a question from an employee as to whether the Respondent would recognize the Union, Meek responded that the Respondent would recognize the Union if it hired 50 percent plus one of the current employees. Stidhum-Stewart also testified that, in response to questions from employees, Meek said the duties of the unit employees would remain the same as would the wages and benefits.

Michelle Ezell testified that Meek, Kinsley, and Kellerman were at the meeting for the Respondent. Ezell also recalled that Meek responded to questions about recognizing the Union by saying that the Respondent would do so if it hired 50 percent plus one of the current employees. According to Ezell, Meek said that there was going to be a smooth transition and that the Respondent would "honor or our contract," go by seniority and that their insurance would be cheaper. Ezell could not recall near the specific issues that were raised by employees.

I find the testimony of Meek to be the most reliable account

of this meeting and I credit the portion of his testimony set forth above. It is detailed and consistent and it is corroborated in important respects by the testimony of Peatross, Kinsley, and Bradley. I do not credit the testimony of Stidhum-Stewart and Ezell to the extent it conflicts with that of Meek. In the first instance, both Stidhum-Stewart and Ezell place Kellerman at this meeting when the record clearly establishes that the first time that Kellerman met with employees occurred on May 17, 2013. The testimony of Stidhum-Steward and Ezell did not have much detail and their demeanor while testifying reflected a lack of certainty. In addition, the testimony of Stidhum-Stewart and Ezell was not corroborated by the testimony of Peatross, who also testified on behalf of the General Counsel.

The May 16, 2012 Board of Education Meeting

The representatives of the School District and the Respondent agreed on the terms of a transportation services contract in early May 2012. At the Board of Education's regularly scheduled, public May 16, 2012 meeting, one of the items on the agenda was the approval of the terms of the contract between the Respondent and the School District. Prior to the meeting Peatross advised DeVore that the proposed contract was on the agenda. Peatross also advised Kinsley of that fact and invited him to attend the meeting. Kinsley, DeVore, Bryant, and approximately five other bargaining unit employees attended the meeting, along with members of the public.

Bryant, DeVore, and Peatross testified on behalf of the General Counsel regarding this meeting, while Kinsley and Bradley testified for the Respondent.

Bryant testified that at the at the meeting one of the members of the Board of Education asked School District Superintendent Jenkins what the wages of the employees would be if the if the Respondent operated the transportation services. Jenkins referred the question to Bradley who, in turn, referred the question to Kinsley. Kinsley took the podium to answer and stated that employees would maintain their current wages. Another board member asked if the Respondent intended to hire the current employees employed by the School District. Kinsley said that much like the school district, employees would have to go through a background check, a drug screen, and pass a physical. Kinsley stated that f the employees met those prerequisites they would be hired. DeVore asked Kinsley if the Respondent would recognize the Union. Since, according to the rules of the meeting, only board members could ask questions, a board member then asked Kinsley if the Respondent would do so. Kingsley responded that the Respondent would recognize the Union. According to Bryant, Kingsley did not identify any conditions of employment that may change during the meeting.

DeVore testified that when Kinsley was asked by a board member about hiring the School District's employees, he responded that if the employees met the Respondent's hiring practices, it would hire them. He further indicated that the hiring practices consisted of having a commercial driver's license (CDL), undergoing a background check, a drug screen, and a physical. He added that those requirements "would not be a problem." According to DeVore, when Kinsley was asked about wages he stated that "everything would be the same."

Peatross also testified that Kinsley answered questions at the meeting that were posed by members of the School Board. According to Peatross, Kinsley said that the Respondent would offer positions to the existing employees who satisfied the Respondent's hiring requirements such as background checks and physical exams. In response to a question about the wages that the Respondent would offer, Kinsley replied that the Respondent would hire current district employees at the same rate of pay. When asked if the Respondent would recognize the Union, Peatross testified that Kinsley stated that the Respondent would recognize the Union upon hiring 51 percent of the employees.

Kinsley confirmed that he was asked questions by board members at the meeting. With respect to a question regarding whether the Respondent would recognize the Union, he responded that the Respondent would recognize the Union if it hired 51 percent or more of the existing work force. With regard to the Respondent's hiring process, Kinsley testified that he indicated that employees would have to submit applications, have background checks and drug screens conducted, be interviewed, and perform dexterity tests. When asked what the wages would be, Kinsley stated that the Respondent intended to maintain the wages for the current work force. He denied saying that "everything would remain the same." Kinsley testified that he did not say what terms and conditions would change when the former School District employees became the Respondent's employees because that was not a question he was asked.

Bradley testified that Kinsley was asked a question at the meeting about whether the Respondent would recognize the Union. According to Bradley, Kinsley stated that if the Respondent hired 51 percent of the employees they would have to recognize the Union. When asked whether the Respondent would hire the existing employees, Kinsley answered that they would offer all of the employees a position as long as they completed the process involving the background checks, the physical examination, and drug screens.

I credit the testimony of Kinsley, Peatross, and Bradley to the extent that it conflicts with that of DeVore and Bryant. The testimony of Kinsley, Peatross, and Bradley is mutually corroborative and Peatross and Bradley are neutral witnesses. The demeanor of all three witnesses reflected certainty about what Kinsley said that the meeting and I find their testimony to be more reliable than that of DeVore and Bryant.

Based on the credited testimony, I find that at the May 16, 2012 meeting in response to questions asked by various Board members, Kinsley stated the Respondent would hire School District employees if they submitted applications and met the Respondent's hiring criteria which included a background check, a drug screen, an interview, and dexterity tests. Kingsley also indicated that the Respondent would hire the current School District employees at the same rate of pay. Finally, he indicated that the Respondent would recognize the Union if it hired 51 percent or more of the existing work force.

At this meeting the Board of Education voted to approve the contract between the Respondent and the School District. While the contract provides that "The District and Provider have agreed to the terms of this agreement as of the 16th day of May, 2012" (GC Exh. 17, p. 17) the contract was actually executed by representatives of the School District and the Respondent on

May 24, 2012, and June 1, 2012, respectively. The contract provides that it is effective from July 1, 2012, through June 30, 2017. The value of the entire contract is $9,519,420 (GC Exh. 4).

At the conclusion of the School Board meeting, Bryant, DeVore, and four other employees were in the parking lot outside the building. Bryant testified that Kinsley was walking toward them and as he approached the group, Kinsley put his arm around one of the employees in said "don't worry, everything will be fine." According to Bryant, DeVore then asked Kinsley if the Respondent would recognize the Union and Kingsley responded "yes" and "welcome to First Student." DeVore testified that Kinsley approached the group and said "don't worry. Everything will be okay. This is going to be smooth." He added that he understood why employees were hesitant but that everything was going to be okay and added that "everything will be the same." DeVore testified that she asked Kinsley whether the Respondent would recognize the Union and he responded "yes we will, we're Union friendly." He added "We have a master agreement with the Teamsters, it is not a problem."

Bradley and Kinsley also testified regarding this brief meeting in the parking lot. According to Bradley, he and Kinsley walked out of the building together. Bradley testified that as he and Kinsley walked past the group including DeVore and Bryant, DeVore told Kinsley that the company would be required to recognize the Union if it hired 50 percent plus one and not 51 percent of the current work force and that Kinsley should know that. Bradley testified that he kept walking and did not hear anything further.

Kinsley testified that as he and Bradley approached the group including DeVore and Bryant, DeVore told him that his statement about recognizing the Union if it hired 51 percent or more of the employees was incorrect and he should say that the Respondent would recognize the union if it hired 50 percent plus one of the employees. Kinsley acknowledged that DeVore's statement was correct. Kinsley then stated to the group of employees that the Respondent's goal was to hire as many employees as it could that met all of the Respondent's hiring "protocols." He added that if employees met the Respondent's hiring criteria their wages would be maintained and "they shouldn't have anything to worry about in coming to work for our Company." He denied, however, saying that "everything would remain the same."

To the extent that the testimony of Bradley and Kinsley conflicts with that of DeVore and Bryant regarding this brief meeting, I credit the testimony of Bryant and Kinsley. As noted previously, Bradley is an independent witness and his demeanor reflected certainty about how the encounter began. I find Kinsley's version of the conversation to be more plausible than that of Bryant and Devore. As noted previously I find that Kinsley had indicated at the just concluded Board of Education meeting that the Respondent would recognize the Union if it hired 51 percent of the School District's employees as its employees. I doubt that Kinsley would immediately afterward say that the Respondent would recognize the Union without making any reference to the requirement of hiring a majority of the existing work force. I also note that DeVore acknowledged on cross-examination that her pretrial affidavit did not indicate that Kinsley told the group of employees that "Everything would stay the same." (Tr. 268.)

The May 17, 2012 Meeting with Employees

On May 17, 2012, the Respondent met with the School District's unit employees at the School District's transportation facility. Present for Respondent were Meek, Kellerman, Kinsley, Char Campbell, a new human resources manager, and John Kiraly, a former School District supervisor whom the Respondent had hired to be its location manager. Almost all of the School District's transportation employees were present. Peatross and Bradley were also present.

Meek briefly discussed the Respondent's operation and management structure. The Respondent then distributed a document, dated May 17, 2012 (GC Exh. 5) to the employees who were present. The opening paragraph of the document indicated:

> Welcome to First Student. As you know, First Student has been selected as the student transportation provider for the Saginaw Public Schools. We are looking forward to working with you to serve the community.

With respect to the hiring procedure, the memo stated:

> All current Saginaw Public School drivers and monitors who successfully pass the company's hiring criteria will be offered an employment opportunity with First Student. You are not hired and officially considered an employee of First Student until you successfully meet and pass all the requirements listed below and are extended a formal job offer:
>
> Background checks
> Employment history checks
> Driving history review
> Criminal records checks
> Physical exam
> Drug test
> Physical Performance Dexterity Test (PPDT)
> Completion of training requirements and classroom and behind the wheel evaluations

The memo also stated that employees would be given interviews and employment applications had to be completed and returned by May 23, 2012, for an employee to maintain his or her seniority.

With regard to pay rates, the memo indicated that school bus drivers and monitors who turned in an application by May 23, 2012, would maintain their current rate of pay and that the hourly rate would also apply for field trips and athletic trips. The memo further indicated that they would be paid a "B" hourly rate for nonstudent transportation duties (i.e. attending training, employer school meetings, clerical work, bus washing, etc).[6] The memo further indicated that employees would be

[6] The Respondent's August 1, 2012, offer letter to Bryant indicated that his rate of pay would be $15.23 while driving and $10 an hour for all nondriving duties (GC Exh. 8).

paid a guarantee of 1½ hours for each a.m. and p.m. shift worked and midday routes would be paid a minimum of one hour. With respect to training, the memo indicated that current School District drivers who complete the Respondent's training program and were hired by it would receive a bonus of $150 in their initial paycheck. It also indicated that current monitors who completed the Respondent's training program and were hired would receive a bonus of $75 in their initial paycheck.

The memo stated that all of the Respondent's driver and monitor positions are considered part time and that benefit programs are designed for a part-time work force. The memo also indicates that the Respondent offered medical, dental, and division insurance plans to its employees and that current drivers and monitors serving in the School District who enroll in the medical insurance plan would receive a company-paid contribution of 80 percent towards employee-only coverage.

The memo contained several terms and conditions of employment that differed from those contained in the collective-bargaining agreement between the Union and the School District. Under the collective-bargaining agreement, employees received one hourly wage rate for all of the work they performed regardless of its nature. The pay guarantee was different in that under the collective-bargaining agreement, bus drivers were guaranteed 4.5 hours per day and monitors were guaranteed 4.3 hours per day. Pay for training was also different in that under the collective-bargaining agreement employees were paid their hourly rate for training.

Kellerman reviewed the topics contained in the memo and gave employees an opportunity to ask questions about the information they had received. One of the questions asked was whether the Respondent would recognize the Union. According to Kellerman's uncontroverted testimony, he responded by saying that the Respondent had a neutrality policy toward unions and that if there was an existing union and the Respondent hired 50 percent plus one of the bargaining unit, the union could request recognition. The Respondent also distributed applications for employment to the employees who were present at this meeting.

The Initial Discussions Between the Union and the Respondent

On May 18, 2012, DeVore sent a letter to Kinsley on behalf of the "USW International Union; And Its Affiliated Local #8410-01" requesting recognition and bargaining regarding the Respondent's bargaining unit at the Saginaw public schools (GC Exh. 11). On May 21, 2012, DeVore sent an email to Kinsley and Meek, attaching her May 18 letter and requesting that bargaining begin for the Saginaw unit in late May or June 2012. After not receiving a response to her May 21 email, DeVore contacted Meek by phone within 2 weeks of her email and requested that bargaining begin. Meek responded that he would not be handling negotiations but that Audrey Adams, one of the Respondent's attorneys, would be responsible for the negotiations. DeVore called Adams and spoke to her in early June and requested that the parties establish dates for bargaining. DeVore stated that it was her position that the negotiations should start with the existing contract between the Union and the School District.

Adams indicated that the Respondent was in the process of hiring employees at the Saginaw location and added that she did not know at that point if the Respondent would be legally obligated to recognize the Union. Adams told Devore that the Respondent's contract with the School District became effective in July and that she would not know anything concrete until after that date. Devore asked if she could call Adams after July 4 to see where the Respondent was in the hiring process. Adams agreed that Devore could call her at that time. Adams also indicated that she would be taking maternity leave from approximately mid-August to late November. On June 13, 2012, Devore sent an email to Adams stating that she would call her after July 4 and attaching the contract between the School District and the Union.

At the local level, after the meeting that the Respondent held with employees on May 17, Bryant introduced himself to Kellerman and informed him that he was the unit president of the local union. Bryant also introduced Union Stewards Ken Berry and Shanta Rowe. Pursuant to an email from Kellerman to Bryant requesting a meeting to discuss seniority issues, on June 14, 2017, Kellerman, Kiraly, Bryant, Berry, and Rowe met to discuss the seniority rankings of employees who held dual roles as bus drivers and monitors. During the meeting the parties discussed the manner in which those employees should be ranked. On June 19, Kellerman sent an email (CP Exh. 10) to Bryant indicating the following:

> Thanks for meeting with John Kiraly and me on June 14 to try to come up with a mutual way to handle the seniority rankings for the dual-role assistants/drivers who have to choose whether [they] want to be a driver or a monitor for First Student.
>
> Attached is a preliminary draft of the seniority lists for drivers and monitors with the dual-role folks listed on both. Please review these lists and let me know by tomorrow (Wednesday, June 20) if there are any changes or further discussions necessary. Thereafter, we'll need to get this information out to the dual-role applicants so they can make a choice on their preferences of being a driver or a monitor.
>
> Thanks for your input

After reviewing the list with Berry and Rowe, Bryant faxed it back to Kellerman on June 19. (CP Exh. 11.) The mutually agreed-upon list was used by the Respondent as the seniority list for the 2012–2013 school year.

The Completion of the Respondent's Hiring Process

After the Respondent received completed applications from School District unit employees, it began conducting background checks and interviews. Apparently not all employees were interviewed, however, as Stidhum-Stewart was hired without ever having an interview.

The Respondent began to schedule training for applicants in June 2012. Employees were issued the Respondent's national employee handbook when they began their training. The acknowledgment form employees were required to sign indicates that most employees received their handbooks in mid-June

2012 (R. Exh. 11).

The Respondent issued letters offering employment (offer letters) to two School District unit employees on June 27, 2012, the third on July 11, 2012, and the remainder on August 1, 2012 (R. Exh. 6). The Respondent sent offer letters to 42 of the approximately 55 unit employees that were employed by the School District. The offer letters indicate the specific rate of pay offered to individual employees. The offer letters issued on August 1 indicate that an employee's "official hire date" was August 6 but that date was contingent upon the completion of the hiring requirements. The Respondent did not consider employees to be actually hired until they signed the offer letter accepting the terms set forth in the letter.

The Respondent began operations for the 2012–2013 school year on August 27, 2012. On that date, all of the employees who had been hired by the Respondent in its Saginaw public school unit attended a "kickoff" meeting on that date. The purpose of this meeting was to prepare employees for the beginning of the school year. As of August 27, 2012, 41 of the 51 employees employed by the Respondent had been employed in the School District's bargaining unit (R. Exh. 12). By August 17, the Respondent had hired 36 of the former School District unit employees and had hired only 2 employees who were not previously employed by the School District. All of the employees hired by August 17 were either bus drivers or monitors,[7] which are the two unit classifications.

I find that by August 17, 2012, the Respondent had hired a substantial and representative complement of its employees and was therefore, on request, obligated to bargain with the Union as of that date. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 52–53 (1987); *Sullivan Industries*, 302 NLRB 144 (1991), enfd. in relevant part, 957 F. 2d 890 (D.C. Cir. 1992). As I noted at the outset, the Respondent does not deny that it is a successor to the to the School District for the provision of transportation services but disagrees with the General Counsel and Charging Party that it is a "perfectly clear" successor that had an obligation to bargain with the Union prior to setting initial terms and conditions of employment.

At the August 27, 2012, kickoff meeting the Respondent provided employees with an attendance policy that was to become effective on September 1, 2012 (GC Exh. 10). After the meeting, Kellerman and Kiraly noticed that the policy contained language that did not apply to the Saginaw location. The language was corrected and the Respondent issued a revised policy to employees on September 4, 2012. (R. Exh. 13.) The August 27 policy, as revised on September 4, sets forth a comprehensive attendance policy including the requirements for taking sick leave. It also includes a disciplinary procedure for "chargeable absences." The record establishes that the new attendance policy contained differences from than the School District's attendance policy as set forth in the collective-bargaining agreement with the Union. For example, the sick leave provision contained in article XVI and the leave of absence provision contained in article XVIII of the collective bargaining agreement are substantially different than the attendance policies set forth in the Respondent's policy.

The Respondent began to provide school bus transportation services to the Saginaw public schools on or about September 4, 2012 pursuant to its unilaterally established terms and conditions of employment.

The Union Again Requests Bargaining

After July 4, 2012, DeVore called Adams several times on the telephone to discuss recognition and bargaining for the Respondent's Saginaw unit. Adams did not answer the calls and Devore left several voicemail messages requesting that Adams contact her. Adams testified she recalled seeing Devore's number come up on her telephone caller ID but did not return the calls because the Respondent was still in the hiring process and she had nothing to tell DeVore.

At some point in August, Adams went on maternity leave. After not receiving any response from Adams, on August 29, 2012, DeVore wrote a letter to John Kiraly, the Respondent's location manager for the Saginaw unit. (GC Exh. 14.) In her letter, DeVore indicated that she understood that the Respondent had hired a majority of its existing work force in the Saginaw unit from employees who had previously worked for the School District. The letter again requested that the Respondent recognize the Union and commence bargaining.

Since DeVore had been unsuccessful in reaching Adams, she had asked Bryant to assist her in getting a name from the Respondent as to who would be responsible for the negotiations involving the Saginaw unit. Bryant obtained the name of another one of the Respondent's attorneys Kristen Huening, from Kellerman and passed her name on to Devore.

On August 30, 2012, DeVore, sent another letter requesting recognition and bargaining to Huening. After not receiving a reply from Huening for approximately 2 weeks, DeVore called Huening. Huening advised DeVore that she would not be handling negotiations as she was an EEOC attorney and would forward the bargaining request to another attorney, Raymond Walther. On September 18, 2012, shortly after obtaining Walther's name, DeVore sent Walther an email asking him to give her a call regarding the Saginaw public school unit. Walther replied by email the same day indicating that he was in negotiations in Georgia and that he would call her when he got back to his office later that week. (GC Exh. 16.) On September 21, Walther sent an email to DeVore indicating that he would be Devore's contact while Adams was on maternity leave but that Adams would be handling negotiations.

On September 21, 2012, the Union filed a charge in 07–CA–089760 alleging that the Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union. The charge further alleges that the Respondent fail to bargain over initial terms and conditions of employment despite the fact that it was a "perfectly clear" successor (GC Exh. 18).[8]

On September 25, DeVore emailed Walther. Her email indicated that she would like to begin " negotiations as soon as possible and preferably before November when Ms. Adams returns from maternity leave. Is there any way we can begin

[7] Under the collective-bargaining agreement between the School District and the Union the position of monitor was referred to as a bus assistant.

[8] This charge was later withdrawn.

negotiations before that?" On the same date, Walther replied by email indicating that he was "booked into November anyway. So it makes the most sense to start negotiations with Audrey once she's back."

On October 1, Devore sent Walther an email indicating that the Union would wait until November before beginning negotiations as long as the Respondent maintained the terms and conditions of employment that the unit employees had prior to the Respondent beginning operations. On the same date, Walther replied by email indicating "As you may know, the company has no obligation to assume the terms and conditions of employment from the predecessor's CBA with the Union. I understand that you filed a ULP charge with the NLRB on this issue. The NLRB has requested my response as they conduct their investigation, and I will comply with that request." (GC Exh. 16.) Later on October 1, Walther sent DeVore the following email: "I had some time free up in October if you would still like to start negotiations this month. If you're going to withdraw the ULP charge, I can send you a recognition letter and we can get some dates scheduled. (Of course, if you are not willing to withdraw the ULP charge, then we will not be able to begin negotiations until the Board concludes its investigation.) If you agree we can schedule a couple days the week of October 15. Let me know how you would like to proceed."

On October 3, Walther sent the following email to DeVore: "I left you another voicemail this morning. Could you please let me know if the Union intends to begin negotiations on October 15, 2012 and drop the pending ULP charge? Thanks." On October 5, DeVore sent Walther an email indicating that she was disappointed that he was conditioning negotiations on the Union's withdrawal of the unfair labor practice charge. She further indicated "Of course, the Union wants to bargain. So, if you rescind your demand that the Union withdraw the ULP charge before First Student will bargain, I would be pleased to meet with you during the week of October 15. Walther responded to DeVore's email on the same date indicating: "Apologies for the confusion, I'm happy to begin negotiations on 10/15 regardless of whether you withdraw the charge. It's just that I see no point for the charge at this point. The Company has never refused to bargain with you. Which days are you available the week of 10/15."

Thereafter, the parties agreed to begin negotiations on October 17, 2012. The negotiations that began in October 2012 were ongoing at the time of the hearing but no agreement had been reached by the parties.

Analysis

In *NLRB v. Burns Security Services*, 406 U.S. 272, 294–295 (1972) the Supreme Court stated:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees bargaining representative before he fixes terms.

In *Spruce Up Corp.*, 209 NLRB 194 (1974), enfd. on other grounds, 529 F. 516 (4th Cir. 1975) the Board set forth its analysis as to how it would apply the "perfectly clear" exception to the normal rule that a successor employer is free to set initial terms upon which it will hire employees.

In *Spruce Up*, on February 6, 1970, when the union learned that the new employer, Fowler, was likely to take over the operation of the Spruce Up barbershops it requested Fowler to recognize and bargain with it. Fowler refused, contending that he had no employees yet as he anticipated on taking over the barber shops on March 3. When asked about his intentions about hiring barbers, Fowler told the union representatives "all the barbers working will work." He also told the union representatives what he planned to pay the barbers.

On February 27, Fowler distributed to the barbers at all of the shops individual form letters setting forth the rates of commission he intended to pay, which were different from those paid to the barbers by Spruce Up. The Board found that Fowler's statements to the employees of the predecessor, Spruce Up, did not operate to forfeit his right to set initial terms of employment.

In so finding, the Board held:

> When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous workforce to accept employment under those terms, we do not think it can be fairly said that the new employer "plans to retain all the employees in the unit," as that phrase was intended by the Supreme Court. The possibility that the old employees may not enter into an employment relationship with the new employer is a real one as illustrated by the present facts. Many of the former employees here did not desire to be employed by the new employer under the terms set by him—a fact which will often be operative, and which any new employer must realistically anticipate.
> Since that is so, it is surely not "perfectly clear" to either the employer or to us that he can "plan to retain all the employees in the unit" under such a set of facts.
>
> We concede that the precise meaning and application of the Court's caveat is not easy to discern. But any interpretation contrary to that which we are adopting here would be subject to abuse, and would, we believe, encourage employer action contrary to the purposes of this Act and lead to results which we feel sure that the Court did not intend to flow from its decision in *Burns*. For an employer desirous of availing himself of the *Burns* right set initial terms would, under any contrary interpretation, have to refrain from commenting favorably at all upon employment prospects of old employees for fear he would therefore forfeit his right to unilaterally set initial terms, a right to which the Supreme Court attaches great importance in *Burns*. And indeed, the more cautious employer would probably be well advised not offer employment to at least some of the old work force under such a decisional precedent. We do not wish—nor do we believe the Court wished—to discourage continuity in employment relationships for such legalistic and artificial considerations. We believe the caveat in *Burns*, therefore, should be restricted to cir-

> cumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours or conditions of employment, or at least to circumstances where the new employer, unlike the Respondent here, has failed to clearly announced its intent to establish a new set of conditions prior to inviting former employees to accept employment.

Applying the principles set forth above, I find that the Respondent was not required to negotiate initial terms of employment under *Burns* and *Spruce Up,* and that the Respondent did not violate Section 8(a)(5) and (1) of the Act in this regard as alleged by the General Counsel.

In the instant case, the first contact between the Respondent and the Union occurred in July 2011 at the interview that the School District conducted with the Respondent regarding its proposal to provide transportation services for the 2011–2012 school year. DeVore attended the meeting at the invitation pursuant to an invitation extended by Peatross. At this meeting, the credited testimony establishes Kinsley stated that the Respondent would hire the School District's transportation employees if they met the Response hiring criteria and that the Respondent would maintain the current wages. Kinsley also stated that the Respondent intended to hire a majority of the school district's employees if they met the Respondent's hiring protocol and that the Respondent's policy was to recognize a union if it hired a majority of the current workforce. Kinsley also stated that at other locations, the Respondent had hired 80 to 90 percent of the existing workforce.

Kinsley's statements establish that it was anticipated that the Union would remain the representative of the employees if the Respondent obtained a contract from the School Board. Thus, even though no employees were present at this meeting, I find that since Devore, a representative of the Union, was present, Kinsley's statements are a communication with employees through their representative. *Marriott Management Services, Inc*., 318 NLRB 144 fn. 1 (1995).

As noted above, the School District's superintendent decided not to subcontract transportation services for the 2011–2012 school year and notified the Respondent of this fact in November 2011.

After the School District issued another RFP for the 2012–2013 school year, the Respondent submitted a new proposal. In February 2012, negotiations began again between the Respondent and the School District for a contract regarding the provision of transportation services. While these negotiations were ongoing, Peatross arranged for a meeting on March 2, 2012, between representatives of the Respondent and unit employees and approximately 40 unit employees attended the meeting. According to the credited testimony, at this meeting the Respondent, through Meek, notified the employees that they would be receiving an application form at a future meeting if a contract was reached between the Respondent and the School District. Meek indicated that after the completion of the application and a necessary background check, applicants would be subject to a preemployment drug screen, a physical examination and receive training. Meek further stated that after completion of these requirements the Respondent would offer employment to existing employees who met its criteria.

In response to a question from an employee regarding how many employees would be hired by the Respondent, Meek indicated that in a conversion between a public school transportation system and the Respondent's operation, the Respondent typically hired 80 to 90 percent of the existing work force. Meek further stated that if the employees are represented and the Respondent hired 51 percent of the existing work force as its own, the employees would bring their representation with them and a new contract would be negotiated.

Meek stated that the Respondent did not know how many hours would be guaranteed to employees but that it would know more when the routes were established. In response to questions regarding under what conditions the employees would work if hired by the Respondent, Meek stated that those issues would be subject to negotiations.

At the May 16, 2012, Board of Education meeting which Devore, Bryant and approximately 5 unit employees attended, the credited testimony establishes that Kinsley stated that the Respondent would hire School District employees if they submitted applications and met the Respondent's hiring criteria which included a background check, a drug screen, an interview, and dexterity tests. Kinsley also indicated that the Respondent would hire the current School District employees at the same rate of pay and that the Respondent would recognize the Union if it hired 51 percent or more of the existing work force.

In the discussion that Kinsley had with DeVore, Bryant and four other unit employees after the Board of Education meeting on May 16, 2012 Kinsley stated that it was the Respondent's goal to hire as many of the School District's employees as it could which met its hiring criteria. Kinsley acknowledged to DeVore that it would be more accurate for him to say that the Respondent would recognize the Union if it hired 50 percent plus one of the existing work force. He also repeated that if employees met the Respondent's hiring criteria their wages would be maintained.

Based on the statements noted above, it is clear that from July 11, 2011, through May 16 2012, the Respondent expressed a willingness to hire a majority of the School districts employees and that if it did so, it would recognize and bargain with the Union. However, the Respondent also indicated that, if it did recognize the Union, a new contract would be negotiated. The Respondent indicated it did not know how many hours would be worked by employees. The Respondent stated that employees would retain their rate of pay but, when asked about issues such as paid time off vacation pay and sick pay, the Respondent indicated those issues would be subject to negotiations. These statements indicate that the Respondent would not be adopting the School District's collective-bargaining agreement and that new working conditions would be implemented. The Respondent stated that employees would be employed at their existing wage rates but beyond that was not specific with respect to the employment conditions it would apply.

On May 17, after the Board of Education voted to approve the contract between the Respondent and the School District, the Respondent clearly and unequivocally announced in writing

the terms and conditions of employment that it was inviting employees to apply under. This memo indicated with specificity the Respondent's initial terms and conditions of employment. With respect to rates of pay, the memo indicated that all current school bus drivers and monitors who returned a completed employment application by May 23 2012 would have their current rate of pay retained and that this rate would apply for field trips and athletic trips. It also indicated, however, that a "B" hourly rate would apply for work performed for nonstudent transportation duties (i.e. attending training, employer school meetings, clerical work bus washing etc.)

This clear and unequivocal expression of the employment terms offered by the Respondent was distributed to employees at a meeting that the School District mandated that all unit employees attend. Employees were permitted to ask questions about the terms and conditions of employment announced in the memo. At this meeting employment applications were made available for all employees who were interested in working for the Respondent under the conditions it had announced.

The Respondent's clear and unequivocal announcement of the conditions upon which it invited employees to apply for jobs with it occurred while the unit employees were still employed by the School District, as it was before the school year ended at the end of June 2012. It also occurred before the contract between the School District and the Respondent had actually been signed and before its effective date of July 1. The May 17 meeting occurred over 3 months before the Respondent would begin to actually provide school transportation services.

Thus, the Respondent clearly and unequivocally announced new terms of employment substantially before it commenced operations. As in *Spruce Up*, the Respondent announced these terms simultaneously with offering employees an application to apply for work under those terms. Under these circumstances, I find that the Respondent did not "either actively or, by tacit inference, mislead employees into believing they would all be retained without change in their wages, hours or conditions of employment" under the standard set forth by the Board in *Spruce Up,* at 195. If employees were unclear about what terms and conditions of employment the Respondent was offering before May 17, 2012, there could be no doubt of what those terms were after the Respondent distributed its May 17 2012 memo. Thus, when employees submitted applications that were handed out at that meeting, they knew in detail the initial terms and conditions of employment that were being offered by the Respondent. After reviewing the applications and conducting background checks and interviews the Respondent offered employment to the first two unit employees on June 27 and did not offer employment to the great majority of the former unit employees until August 1, 2012.

I do not find that the fact that Kellerman and Kiraly met with Bryant and two union stewards in June 2012, and reached an accord in the manner in which seniority would be applied for dual role employees is sufficient to deprive the Respondent of its right under *Burns* and *Spruce Up* to unilaterally set its initial terms of employment. As I have indicated, it was anticipated that the Respondent would recognize the Union. This type of cooperation in the interim period before the Respondent actually commenced operations is both practical and laudable. To use it as a basis to deprive the Respondent of its right under *Burns* to unilaterally establish conditions of employment would, in my view, discourage continuity in the employment relationship in an artificial manner, a result which the Board clearly indicated a desire to avoid in *Spruce Up.*

My conclusion that the Respondent had a right to unilaterally establish its initial terms and conditions of employment is in accord with the Board's decision in *Banknote Corp. of America*, 315 NLRB 1041 (1994). In that case the Board found that the employer was not a "perfectly clear" successor within the meaning of *Burns* and *Spruce Up*. In that case, the respondent began operations at the facility involved on April 19, 1989. On March 23, 1987, the respondent advised the unions involved that it intended to hire its initial workforce from the employees who were currently employed at the facility. At the same time the respondent indicated it was not making any commitment to recognize the unions or be bound by their collective bargaining agreements. On April 11, the respondent met with union representatives and informed them that it would not honor the collective bargaining agreements they had with the predecessor. The respondent further advised the unions that it intended to have a more flexible operation and that it would cross train employees so they would be able to perform various functions. The Responded told the unions that the health benefits presently in effect would continue for a period of 60 days. No other terms and conditions of employment were discussed.

On April 16, the Respondent interviewed job applicants from the predecessor employees. Three employees testified regarding those interviews at the trial. At these interviews the respondent mentioned flexibility and that employees may be asked to do different things but no more specific information was revealed about benefits except that one employee was told that her salary and benefits would remain the same. On April 19 the Respondent began operations with 50 employees, all of whom had worked for the predecessor.

The Board found that simultaneous with its stated intention to retain the predecessor's employees, the respondent conveyed the message that it would not be adopting the predecessor's terms and conditions of employment and thus put the employees on notice that it would be making changes in the employment terms of the predecessor. The Board also noted that specific anticipated changes were communicated to the unions and to three of the prospective employees at the interviews. Under these circumstances, the Board concluded that the respondent was not a "perfectly clear" successor under *Burns* and that its bargaining obligation did not attach until it hired the employees on April 19. *Banknote Corp. of America*, at 1043.

In *Specialty Envelope Co*., 321 NLRB 828, 831–832 (1996) the Board found that Specialty was not a "perfectly clear" successor under *Burns* and *Spruce Up.* In that case, before extending job offers to the predecessor's employees, Specialty distributed application packets in which it announced the terms and conditions of employment that would be in effect when it began operations. Specialty thereby informed applicants that if they applied and were hired there would be different terms and conditions of employment. In the instant case, as noted above, employees were similarly given new terms t and conditions of employment in writing when they were given applications.

I also find the Board's decisions in *Bekins Moving & Storage Co*., LLC, 330 NLRB 761 (2000); *Planned Building Services Inc.,* 318 NLRB 1049 (1995); and *Marriott Management Services, Inc*., 318 NLRB 144 (1995), to be supportive of my decision in this case. In each of these cases, as here, the successor employer made clear to the employees of the predecessor that they were being hired under different conditions of employment. Thus, in each of these cases the Board found that the successor was entitled to unilaterally establish initial terms and conditions of employment.

I find the cases relied on by the General Counsel and the Charging Party in support of their claim that the Respondent is a "perfectly clear" successor to be distinguishable. In *Elf Atochem North America, Inc*., 339 NLRB 796 (2003), prior to the respondent commencing operations in June 1998, on January 27, 1998, it informed the employees that it would provide employment to all of the existing work force of the predecessor dedicated to performing work for AtoHaas. The Respondent also indicated that it would recognize employee seniority and would provide employees with an equivalent salary and a comparable health, welfare and benefits package, including a pension plan, a savings plan and vacation benefits. In addition, on March 17, 1998, the respondent informed the union in a letter that it would keep the predecessor's collective bargaining agreement in effect until the parties negotiated a replacement contract.

In the instant case, the Respondent clearly and unequivocally indicated to employees in writing its initial terms and conditions of employment before they applied for positions with the Respondent. In addition, the Respondent never indicated that the terms and conditions of the School District contract would be applied until a new agreement was reached. Rather, the Respondent made it clear that it would not apply the terms of that contract.

In *DuPont Dow Elastomers LLC*, 332 NLRB 1071 (2000), the Board found that DDE was a "perfectly clear" successor. In that case, on November 15, 1995, DDE announced to the unions representing unit employees at the predecessor DuPont's Louisville and Chambers Works facilities that it intended to offer employment to all incumbent employees at both plants under conditions that would be announced on November 30. On November 30, DDE notified the unions that although it declined to honor their contracts with the predecessor, it would maintain the employees' wages and benefits under those contracts, only adding a bonus program called success sharing. In mid-December 1995, DDE held a series of meetings with incumbent employees explaining in detail the terms of its offers. There was no indication of changes other than the addition of the success sharing plan. On January 2, 1996, DDE tendered unconditional offers of hire under those terms. Under these conditions, the Board found that by November 30 the DDE had indicated that it intended to retain its predecessor's employees at both facilities under the same terms and conditions of employment, except for the success sharing plan, thus leading employees to believe that they would be employed on substantially the same basis as before. In the instant case, as noted above, the Respondent clearly indicated in writing what its initial terms would be before employees applied to work for it. This factor also distinguishes the instant case from *Hilton's Environmental, Inc.*, 320 NLRB 437 (1995), and *Canteen Co*., 317 NLRB 1052 (1995), enfd. 103 F.2d 1355 (7th Cir. 1997).

In *Fremont Ford*, 289 NLRB 1290, 1296–1297 (1988), the Board found that the Respondent failed to clearly announce a new set of conditions prior to inviting former employees to accept employment. In so finding the Board noted that the respondent "embarked on a misinformation campaign" and instructed supervisors to give false and misleading information to the predecessor's employees who inquired about the working conditions that the respondent intended to impose. It was not until after the hiring process began that the Respondent first informed the predecessor's employees that there would be significantly different employment conditions. In addition, the respondent engaged in other unfair labor practices that demonstrated an unlawful plan to defeat the union's status as the employees bargaining representative. The Board emphasized in its finding that any uncertainty as to what the respondent would have done, absent its unlawful purpose, must be resolved against it since it could not be permitted to benefit from its unlawful conduct. In the instant case, the employees were clearly and unequivocally informed of the terms and conditions that the Respondent was offering before they submitted applications and the hiring process began. In addition, there is no evidence that the Respondent engaged in any unlawful conduct during the period of time it was hiring its workforce that was designed to defeat the Union's status as the bargaining representative.

Finally, the instant case is also distinguishable from *Road & Rail Services Inc*., 348 NLRB 1160 (2006). There, the issue was whether the respondent violated Section 8(a)(3), (2), and (1) of the Act by recognizing the union and entering into a collective bargaining agreement with it prior to the hiring of the respondent's workforce and the commencement of its operations. In that case, the respondent did not unilaterally set initial terms, but rather negotiated an agreement with the union which was in effect at the time it commenced operations and employees reported to work. Thus, unlike the instant case, *Road & Rail Services* did not involve the issue of whether the employees continued employment was contingent on their acceptance of a successor's unilateral implementation of the initial conditions of employment.

On the basis of the foregoing, I find that the Respondent was not a "perfectly clear" successor within the meaning of *Burns* and *Spruce Up* and thus was privileged to unilaterally establish its initial terms and conditions of employment on May 17, 2012. Thus, I find that the Respondent did not violate Section 8(a)(5) and (1) of the Act by failing to bargain with the Union prior to the implementation of those terms of conditions of employment, nor did it engage in unlawful direct dealing. Accordingly, I shall dismiss those allegations in the complaint.

Whether the Respondent Violated Section 8(a)(5) and (1) by Unilaterally Implementing an Attendance Policy on August 27, 2012

Paragraph 14 of the complaint alleges that on or about August 27, 2012, the Respondent unilaterally implemented a new employee attendance policy in violation of Section 8(a)(5) and (1).

As set forth above, on August 27, 2012, the Respondent issued a comprehensive attendance policy to employees which included a disciplinary procedure for "chargeable" absences. On September 4, the Respondent issued a revised policy to employees regarding attendance. These policies were implemented without giving notice to or bargaining with the Union and contained substantial and material differences from the attendance policies set forth in the expired collective-bargaining agreement between the Union and the School District.

The Board has long held that attendance policies are mandatory subjects of bargaining. *Production Plated Plastics Inc*., 254 NLRB 560 (1981); *Harris-Teeter Super Markets, Inc.,* 293 NLRB 743 (1989).

As I have noted above, on May 16, 2012, the School Board voted to approve the contract between the School District and the Respondent. On May 17, 2012, Respondent informed the unit employees of its initial terms and conditions of employment and invited the unit employees to apply for positions with it. On May 18 2012, and May 21, 2012, the Union submitted written demands for recognition and bargaining to the Respondent. DeVore diligently continued to assert the Union's request for recognition and bargaining in her June telephone conversations with Adams. After July 1 DeVore called Adams several times to discuss the Union's outstanding request for recognition and bargaining but Adams did not return her phone calls. On August 27 and 30 the Union again submitted written demands for recognition and bargaining to the Respondent.

By the time the Union made its initial demand for bargaining on May 18, it was apparent that there was a substantial likelihood that the Respondent would hire the majority of its employees from the School District's workforce. The Respondent's hiring efforts after May 17 were focused on the hiring of these former employees.

Under these circumstances, I find that the Union made a viable demand for recognition and bargaining on May 18 which was continuing in nature. *Fall River Dyeing Corp. v. NLRB*, supra at 54; *Fremont Ford*, supra at 1295. By August 17, 2012, the Respondent had hired a substantial and representative complement of its work force and the overwhelming majority of those employees had been employed by the School District. Accordingly, the Respondent had an obligation to recognize and bargain with the Union as of August 17, 2012. By unilaterally implementing an attendance policy on August 27, 2012 and September 4, 2012, without giving notice to or bargaining with the Union, the Respondent violated Section 8(a)(5) and (1) of the Act. *Production Plated Plastics, Inc*., supra.

Whether the Respondent Delayed Bargaining in Violation of Section 8(a)(5) and (1)

As set forth above, the Union, through DeVore, began to demand recognition and bargaining from the Respondent on May 18 and that demand was continuing in nature. When DeVore spoke to the Respondent's attorney Adams by telephone in early June and requested that the Respondent recognize the Union and begin bargaining, Adams replied that it was premature as the Respondent had only begun hiring employees and that the Respondent's contract with the School District was not effective until July 1. Adams and DeVore agreed to wait until after July 4 to again discuss the Union's request for recognition and bargaining. After July 4 DeVore made several phone calls to Adams but Adams never returned the calls. During this period the Respondent continued to hire employees and, by August 17, 2013, had hired a substantial and representative complement of its workforce, the majority of which were former unit employees of the School District. Finally, on August 29, after not receiving any response from Adams, DeVore wrote another letter requesting bargaining in recognition to the Respondent's Saginaw location manager, Kiraly. On August 30 DeVore sent another such letter to Huening, another one of the Respondent's attorneys.

Kiraly never responded to DeVore. DeVore called Huening after not receiving a response to her letter for approximately 2 weeks, to discuss the Union's request for recognition and bargaining. Huening responded by telling DeVore that negotiations were not her responsibility as she was an EEOC attorney. Huening gave DeVore the name of yet another attorney for the Respondent, Walther. After getting Walther's name, DeVore immediately sent him an email on September 18 asking him to contact her regarding the Saginaw unit. Walther replied on the same date indicating that he was in negotiations and telling DeVore that he would contact her the following week.

On September 21, Walther sent an email to DeVore indicating he was the Union's contact person while Adams was on maternity leave but that Adams would be handling negotiations. On September 25 DeVore replied to Walter indicating she would like to start negotiations as soon as possible. On the same date Walther replied saying that he was booked into November and it would make the most sense to start negotiations when Adams returned.

On October 1, DeVore sent an email to Walter indicating that the Union would wait until November if the Respondent maintained the terms and conditions of employment that were contained in the collective-bargaining agreement between the Union and the School District. On October 1, Walther replied indicating that the Respondent had no obligation to assume the School District's collective-bargaining agreement with the Union. He also indicated that he understood that an unfair labor practice charge had been filed. On October 1, Walther sent an email to DeVore indicating that he could meet to start negotiations in October if the Union was willing to withdraw the unfair labor practice charge. He further indicated if the Union was not going to withdraw the charge, then the Respondent would not be able to begin negotiations until the Board concluded its investigation.

On October 3, Walther sent DeVore an email asking if the Union intended to begin negotiations on October 15 and drop the pending unfair labor practice charge. On October 5, Devore replied by an email indicating that if the Respondent would rescind its demand to withdraw the unfair labor practice charge before the Respondent would bargain, the Union would meet with the Respondent during the week of October 15. Finally, on October 5, Walther sent Devore an email indicating that he would begin negotiations on October 15 regardless of whether the union withdrew the charge. By agreement the parties began negotiations on October 17.

As the foregoing demonstrates, the Union earnestly pursued its right to bargain with the Respondent as a successor to the School District since May 18, the day after the Board of Education approved the contract between the School District and the Respondent. The Respondent attained a substantial and representative complement of its workforce on August 17, a majority of which were unit employees under the collective-bargaining agreement between the School District and the Union. It was on that date that the Respondent was obligated to recognize and bargain with the Union. Rather than responding on May 17, the Respondent treated the outstanding request to bargain in a cavalier fashion. Adams never responded to DeVore's repeated calls after July 1. Kiraly never responded to DeVore's request. Huening, after initially not responding for 2 weeks, essentially told DeVore that negotiations were not her job and passed on Walther's name to DeVore. Walther initially wanted to have the Union wait for Adams return from her maternity leave in November. When DeVore requested that negotiations start sooner, Walther then sought to have the Union withdraw its pending unfair labor practice charge before finally agreeing to bargain the week of October 15. Thus, negotiations did not start until 2 months after August 17, the date the Respondent was clearly obligated to commence negotiations.

In my view none of the reasons advanced by the Respondent for the delay are sufficient to excuse its failure to bargain during this period. The Respondent is a large corporation with many resources, rather than devoting these resources to timely responding to the Union's request for bargaining, its representatives either did not respond to the request or gave insufficient reasons for the failure to meet and bargain. While it was treating the Union's demand for recognition and bargaining in a dilatory fashion, the Respondent implemented an unlawful unilateral change in an important mandatory subject of bargaining, rules regarding absences and the disciplinary process attending those rules.

In *Fruehauf Trailer Services, Inc.*, 335 NLRB 393 (2001), the Board found that a delay in bargaining for almost 3 months without good reason constituted an unlawful delay in negotiations. In the context of the instant case, I find the 2 month delay that occurred herein is sufficient to find that the Respondent unreasonably delayed negotiations in violation of Section 8 (a)(5) and (1).

Whether the Respondent Insisted as a Condition of Meeting that the Union Withdraw an Unfair Labor Practice Charge in Violation of Section 8(a)(5) and (1)

As noted above, on October 1, Walther sent DeVore an email indicating that he could schedule bargaining the week of October 15 if the Union would withdraw the then pending unfair labor practice charge in 07–CA–089760. He further indicated that if the Union was not willing to withdraw the charge, the Respondent would not be able to begin negotiations until the Board finished its investigation of the charge. On October 5, DeVore sent Walther an email indicating that she was disappointed that he was conditioning negotiations on the Union's withdrawal of the unfair labor practice charge. She reiterated the Union's desire to bargain and further stated that if the Respondent rescinded its demand that the Union withdraw the charge before it would bargain with the Union, the Union would be willing to meet during the week of October 15. After receiving this email, on October 5 Walther indicated that he would begin negotiations on October 15 regardless of whether the Union withdrew the charge. Negotiations began on the agreed-upon date of October 17.

The Respondent's October 1 proposal that the Union withdraw its unfair labor practice charge is a nonmandatory subject of bargaining. *Carlson Porsche Audi, Inc*., 266 NLRB 141, 149–150 (1983); *Patrick & Co.*, 248 NLRB 390, 393 fn. 5 (1980).

In the instant case, while Walther proposed on October 1 that the unfair labor practice charge be withdrawn as a condition to begin negotiations, on October 5 Walther dropped that proposal and indicated that the Respondent would be willing to begin negotiations on October 15, regardless of whether the union withdraw the charge. It is permissible to propose a nonmandatory subject of bargaining such as the withdrawal of an unfair labor practice charge. What is impermissible is to insist to impasse that a charge be withdrawn before an agreement is reached, or as in this case, negotiations commence.

It is clear that in the instant case the Respondent did not insist to impasse that the Union withdraw the information practice charges condition to commencing negotiations. As noted above, I find that the interjection of this issue caused some additional brief delay before negotiations actually commenced. However, since the Respondent raised the issue only briefly did not insist to impasse on it I find it does not rise to the level of a separate unfair labor practice. *Carlson Porsche Audi*, supra at 149–150. Accordingly, I shall dismiss this allegation in the complaint

CONCLUSIONS OF LAW

1. At least from August 27, 2010, to June 5, 2013, The United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), AFL–CIO and Local 8410, The United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), AFL–CIO (the Union) was the exclusive bargaining representative in the following appropriate unit (the Unit):

> All full-time and regular part-time drivers and monitors employed by First Student Inc., A Division of First Group America at its Saginaw, Michigan location, but excluding substitutes and temporary drivers and monitors, dispatchers, confidential employees and supervisors as defined in the Act.

2. Since June 5, 2013, The United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), AFL–CIO and Local 9036, The United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), AFL–CIO, has been the exclusive bargaining representative of the employees in the Unit.

3. By unilaterally implementing attendance policies on August 27, 2012, and September 4, 2012, the Respondent violated Section 8(a)(5) and (1) of the Act.

4. By delaying bargaining from August 17, 2012, to October 17, 2012, the Respondent has violated Section 8(a)(5) and (1) of the Act.

5. The above unfair labor practices affect commerce within the meaning of Section 2 (2), (6), and (7) of the Act.

6. The Respondent has not otherwise violated the Act.

REMEDY

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

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing attendance policies on August 27, 2012, and September 4, 2012, I shall order the Respondent to rescind those rules and bargain with the Union about any future implementation of an attendance policy. I shall also order that the Respondent restore the status quo which existed at the time of its unlawful unilateral action by rescinding any disciplinary actions resulting from the implementation of its attendance policies. *Production Plated Plastics*, *Inc.* supra. Accordingly, if any employees have been discharged pursuant to these attendance policies, I shall order the Respondent to offer them full and immediate 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 and privileges previously enjoyed. For any employees who have been discharged or disciplined pursuant to these rules I shall order the Respondent to make them whole for any loss of earnings and other benefits suffered as a result of the application of the unlawful rules to them. Backpay shall be computed in the manner set forth in *F.W. Woolworth Co*., 90 NLRB 289 (1950); with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987); compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Since the Respondent violated Section 8(a)(5) and (1) of the Act by delaying bargaining, I shall order the Respondent to meet with the Union, upon request, promptly and at reasonable times and intervals.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, First Student, Inc. A Division of First Group America, Saginaw, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Implementing attendance policies without bargaining with the Union.

(b) Refusing to meet promptly with the Union, on request, for purposes of collective bargaining.

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

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

(a) Rescind the August 27, 2012, and September 4, 2012, attendance policies and, upon request, bargain with the Union regarding the implementation of any future attendance policy. The appropriate unit is:

> All full-time and regular part-time drivers and monitors employed by First Student Inc., A Division of First Group America at its Saginaw, Michigan location, but excluding substitutes and temporary drivers and monitors, dispatchers, confidential employees and supervisors as defined in the Act

(b) Within 14 days of the date of the Board's Order, expunge from the personnel files of employees all references to disciplinary actions which resulted from the failure to comply with the Respondent's unilaterally implemented attendance policies and within 3 days thereafter notify the employees in writing that this has been done and that the discipline will not be used against them in any way.

(c) Within 14 days from the date of the Board's order, offer any employees discharged pursuant to the unilaterally imposed attendance policies, immediate and full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make whole employees for any loss of earnings and other benefits suffered by them as a result of discipline imposed against them pursuant to the unilaterally implemented attendance policies, in the manner set forth in the remedy section of the decision.

(e) On request, meet and bargain with the Union and do so promptly and regularly at reasonable times and intervals.

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

(g) Within 14 days after service by the Region, post at its facility in Saginaw, Michigan copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 7, 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. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other

[9] 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.

[10] 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."

electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 17, 2012.

(h) 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. December 13, 2013.

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 implement attendance policies without bargaining with the United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), AFL–CIO and Local 9036, The United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), AFL–CIO (the Union)

WE WILL NOT refuse to meet promptly with the Union, on request, for purposes of collective bargaining.

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 August 27, 2012, and September 4, 2012 attendance policies that we unilaterally implemented and WE WILL, upon request, bargain with the Union regarding the implementation of any future attendance policy. The appropriate unit is:

> All full-time and regular part-time drivers and monitors employed by First Student Inc., A Division of First Group America at its Saginaw, Michigan location, but excluding substitutes and temporary drivers and monitors, dispatchers, confidential employees and supervisors as defined in the Act.

WE WILL, within 14 days of the Board's Order, expunge from the personnel files of employees all references to disciplinary actions which resulted from the failure to comply with the Respondent's unilaterally implemented attendance policies and within 3 days thereafter notify the employees in writing that this has been done and that the discipline will not be used against them in any way.

WE WILL within 14 days from the date of the Board's Order, offer any employees discharged pursuant to the unilaterally imposed attendance policies, immediate and full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole employees for any loss of earnings and other benefits suffered by them as a result of discipline imposed against them pursuant to the unilaterally implemented attendance policies, with interest.

WE WILL, on request, meet and bargain with the Union and do so promptly and regularly at reasonable times and intervals.

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

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CA-092212 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington DC 20570, or by calling (202) 273–1940.