

*NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.*

**First Student, Inc. and Civil Service Employees Affiliates, Local 760, Service Employees International Union, AFL-CIO.** Case 34-CA-10286

January 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND SCHAUMBER

On July 15, 2003, Administrative Law Judge Margaret M. Kern issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief. Thereafter, the Respondent and the General Counsel each filed answering briefs.

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,<sup>1</sup> and conclusions

<sup>1</sup> As explained by the judge, the complaint alleged, *inter alia*, that the Respondent violated Sec. 8(a)(1) of the Act by orally and in writing threatening employees with loss of wage increases and other benefits if they selected the Union as their collective-bargaining representative. The judge found that the Respondent violated Sec. 8(a)(1) by threatening to withhold regularly scheduled wage increases during collective bargaining. The Respondent did not except to this finding.

The judge further found, however, that since the Respondent did not have a past practice of regularly improving employee benefits, the Respondent's statements that benefits would remain frozen during collective bargaining were not unlawful. Asserting that the "Respondent's statements in its flyers or by [its contract manager] Bernier, [sic] never separated wages from benefits" (GC Exceptions Br. at 4), the General Counsel contends that the judge erred by dismissing this allegation of the complaint. Citing *Jensen Enterprises*, 339 NLRB No. 105 (2003), a case which the General Counsel contends is "nearly identical" on its facts to the present case (GC Exceptions Br. at 4), the General Counsel asserts that since the Board there did not separately analyze wages and benefits but found, in effect, that a threat to freeze wages encompassed a threat to freeze benefits, the same result is required here. We disagree.

Contrary to the General Counsel's assertion that in the present case the Respondent "never separated wages from benefits," and as stated in the judge's decision, both employee Borry and Bernier testified that at employee meetings Bernier, when discussing what would happen to employee benefits during collective bargaining, specifically referred to a document (GC Exh. 5) entitled "Benefits at Bristol That Employees Enjoy Without a Union" that listed 17 employee benefits. Since the Respondent did distinguish between wages and other benefits in its discussions with employees, we find *Jensen Enterprises*, *supra*, distinguishable, and we further find that the judge, having found that the Respondent's statements that wages would remain frozen during collective bargaining, did not err in separately analyzing whether the Respondent's statements that benefits would remain frozen during collective bargaining were also unlawful. Finally, we agree with the judge,

only to the extent consistent with this Decision and Order.

The judge found, *inter alia*, that the Respondent violated Section 8(a)(1) of the Act by distributing written materials to employees which encouraged them to report the union activities of other employees. The Respondent has filed exceptions to this finding. For the following reasons, we find merit in the Respondent's exceptions.

The judge has fully set out the facts. In brief, during a union-organizing drive at its Bristol, Connecticut facility,<sup>2</sup> the Respondent, a provider of school bus transportation services to school districts, distributed certain documents to employees, including the documents at issue here. In the first document, which the judge identified as document #3,<sup>3</sup> Patty Bernier, the Respondent's contract manager at the Bristol facility, set out the following question and answer (emphasis added):

Question: Am I allowed to tell people I don't want the union here?

Answer: Yes. No one can be forced to support the union. If anyone confronts you *and* tries to force you or intimidate you to support the union, please inform me immediately. First Student will not tolerate intimidation or threats made against its employees.

In the second document, which the judge labeled document #4, Bernier stated (bolded emphasis in original):

You may have recently been approached by some of your fellow employees distributing union literature and the solicitation of getting union cards signed. You should realize that it is very possible that these employees are being paid by the union to distribute this literature [and] in addition, it is very possible that these employees are being promised a position of leadership within the union should our location become unionized.

You should ask yourself are these the employees that you want to represent you and speak for you if a union was to get in at our location. If not and you want to maintain your independence and the ability to speak for yourself let these employees know that

for the reasons set out in her decision, that such statements were not unlawful.

<sup>2</sup> On October 24, 2002, the Union filed a petition to represent the approximately 105 drivers and monitors at the Bristol facility. The results of the December 6 election were 30 votes for Petitioner, 68 against, with 5 challenged ballots. No objections to the election having been filed, the results of the election were certified on December 16, 2002.

<sup>3</sup> As explained by the judge, document #3 actually consists of two letters, the first (GC Exh. 3(a)) distributed to employees on October 21, 2002, and the second (GC Exh. 3(c)) distributed to employees on November 6, 2002. The only difference between the two documents is that in the first, the word "union" is used, while in the second, "SEIU" is substituted for "union."

your [sic] not interested. **I encourage you to come to me should you have any questions or concerns about what is going on with this union organizing attempt.**

The issue here is whether the statement in document #3, requesting employees to inform the Respondent “[i]f anyone confronts you and tries to force you or intimidate you to support the union,” and/or the statement in document #4 encouraging employees to come to the Respondent “should [they] have any questions or concerns about what is going on with this union organizing attempt,” are unlawful. The judge found that they were. We disagree.

#### ANALYSIS

##### A. Document #3

The analysis of whether the statement in document #3 set out above is lawful or unlawful depends on whether the statement is “so vague as to invite employees generally to inform on fellow workers who were engaged in union activity.” *Liberty House Nursing Homes*, 245 NLRB 1194, 1197 (1979).<sup>4</sup> Examples of what the Board considers to be “vague” statements and the reason why the Board finds them to be unlawful are set out in *Greenfield Die & Mfg. Corp.*, 327 NLRB 237, 238 (1998) (footnote omitted):

The Board has held that employers violate Section 8(a)(1) of the Act when they invite their employees to report instances of fellow employees’ bothering, pressuring, abusing, or harassing them with union solicitations and imply that such conduct will be punished. It has reasoned that such announcements from the employer are calculated to chill even legitimate union solicitations, which do not lose their protection simply because a solicited employee rejects them and feels “bothered” or “harassed” or “abused” when fellow

workers seek to persuade him or her about the benefits of unionization.

In the present case, the judge, relying on *Greenfield Die & Mfg. Corp.*, supra, found that the Respondent violated Section 8(a)(1) by distributing document #3 to employees because employees could construe the directive contained therein, which urged them “to report anyone who ‘confronted,’ ‘forced,’ or ‘intimidated’ them into supporting the union,” as not limited to threatening conduct, but as including lawful union activity.

The Respondent excepts, inter alia, on the ground that its request that employees report behavior such as intimidation, threats, or use of force was not unlawful as such behavior is not protected activity and must be distinguished from lesser acts which often occur during a union organizing campaign.

As an initial matter, we find that the judge applied the correct legal analysis to resolve the issue presented. We further find, however, that she reached the wrong result because she did not apply that analysis to the actual language of the directive set out in document #3. For although the judge correctly set out the language of the directive in section III.B of her decision, she mischaracterized that language in her analysis. She described the directive’s operative language in the disjunctive as requesting employees “to report anyone who ‘confronted,’ ‘forced,’ or ‘intimidated’ them into supporting the union” (emphasis added). Construing these terms separately, she concluded, in effect, that they were vague or overly broad and that therefore “some employees could construe these terms to encompass lawful union activity [for o]ne employee’s persistent attempt to persuade may be, to a different employee, an act of confrontation or intimidation” (emphasis added).

As set out above, however, the language at issue in document #3 is: “If anyone confronts you *and* tries to force you or intimidate you to support the union, please inform me immediately” (emphasis added). Clearly, the language at issue must be read in the conjunctive, i.e., the Respondent requests that employees inform it “[i]f anyone confronts you *and* tries to force you . . . to support the union” or “[i]f anyone confronts you *and* tries to . . . intimidate you to support the union” (emphasis added). In our view, when thus read correctly, the directive at issue is not unlawful. Rather, we find that the request to report conduct that consists of both confrontation and compulsion or confrontation and intimidation is no more than a request to report threatening conduct, which, as explained above, the Board has found lawful. Consequently, we reverse the judge and find that the Respondent did not violate Section 8(a)(1) by distributing document #3 to employees.

<sup>4</sup> In that case, the Board adopted the judge’s finding that a supervisor’s statement to an employee at her initial hire interview that she, the supervisor, didn’t want anyone “harassing” the new hire to vote for the union and that the new employee should report such “harassment” to the supervisor was violative of Sec. 8(a)(1) because “[t]hat statement ‘was broad enough to cover mere attempts by union proponents to persuade employees to sign cards.’” Id. at 1197, quoting *Bank of St. Louis*, 191 NLRB 669, 673 (1971), *enfd.* 456 F.2d 1234 (8th Cir. 1972). On the other hand, in the same case, the Board also adopted the judge’s finding that the employer’s instruction that employees report threats by union organizers or other employees was not unlawful. In reaching this conclusion, the judge reasoned that the use of the term “threatened” was “sufficiently specific to require . . . any potential infringement of Section 7 of the Act to yield to the right of employers to assure that its work force, in the course of an organizational campaign, is insulated from this form of coercion at the hand of employee organizers.” *Liberty House Nursing Homes*, 245 NLRB at 1197 (fn. omitted).

### B. Document #4

As to the statement at issue in document #4, in which, as explained above, Bernier encouraged employees “to come to me should you have any questions or concerns about what is going on with this union organizing attempt,” the judge found, in effect, that the statement, standing alone, was not unlawful. The judge went on to find, however, that it was unlawful within the context of document #4 because she concluded that a person reading the entire document “could easily interpret Bernier’s remarks as an invitation to report the identity of the pro-union employees.” We disagree.

As to the statement at issue, all that Bernier did was to invite, or “encourage,” employees to come to her with their “questions or concerns” about the union organizing attempt. There was no request, express or implied, that employees report to the Respondent the identity of pro-union employees. The statement at issue, therefore, is not unlawful on its face, as the judge herself implicitly found. Nor, contrary to the judge’s finding, does the context in which the statement occurs render the statement unlawful.

To find a violation, the judge imposed the following “construct” on the entire document: “first, Bernier focused employees’ attention on the ‘problem’ of pro-union co-workers possibly representing them; second, she told employees to tell their pro-union co-workers they were not interested in the union; and third, with bolded emphasis, she encouraged employees to come talk to her” (Section IV.C). The judge then apparently inferred from Bernier’s references to the employees’ “pro-union co-workers” in steps one and two of her “construct” that Bernier was also referring to these “pro-union co-workers” in step three.

We have our doubts about the judge’s reasoning. But even assuming arguendo that document #4, in its entirety, refers to pro-union employee solicitors, the document does not ask the reader to report the identity of such employees to management. The document, in relevant part, merely invites the reader to discuss with management any questions or concerns about the union’s organizational effort. There is nothing unlawful in such an invitation.

### CONCLUSION

For all these reasons, we reverse the judge’s finding that the Respondent violated Section 8(a)(1) by distributing written materials to employees which encouraged them to report the union activities of other employees. We shall dismiss this allegation of the complaint.

### ORDER

The Respondent, First Student, Inc., Hartford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with the loss of regularly scheduled wage increases if they select the Union as their collective-bargaining representative.

(b) Prohibiting employees from distributing union literature in nonworking areas during nonwork time.

(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) Within 14 days after service by the Region, post at its facility in Bristol, Connecticut, copies of the attached notice marked “Appendix.”<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 2002.

(b) 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.

---

<sup>5</sup> 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.”

Dated, Washington, D.C. January 30, 2004

---

Robert J. Battista, Chairman

---

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, concurring.

I concur in the result. With respect to document #3, compare *Bloomington-Normal Seating Co.*, 339 NLRB No. 30, slip op. at 1 fn. 2 (2003) (finding violation where employer asked employees to report if they were “threatened *or* harassed about signing a union card”) (emphasis added); *Niblock Excavating, Inc.*, 337 NLRB 53, 61 (2001) (finding violation where employer letter asked employees to tell foreman “[i]f you feel threatened *or* harassed”) (emphasis added).

Dated, Washington, D.C. January 30, 2004

---

Wilma B. Liebman, Member

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 threaten you with loss of your regularly scheduled wage increases if you select Civil Service Employees Affiliates, Local 760, Service Employees International Union, AFL-CIO, or any other union, as your collective-bargaining representative.

WE WILL NOT prohibit you from distributing union literature in nonworking areas during nonwork time.

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.

FIRST STUDENT, INC.

*Lindsey E. Kotulski, Esq.*, for the General Counsel.

*Thomas A. Secrest, Esq.*, for the Respondent.

#### DECISION

##### STATEMENT OF THE CASE

MARGARET M. KERN, Administrative Law Judge. This case was tried before me in Hartford, Connecticut, on April 10, 2003. The complaint, which issued on January 31, 2003, was based on an unfair labor practice charge and an amended charge filed on November 12, 2002,<sup>1</sup> and January 30, 2003, by Civil Service Employees Affiliates, Local 760, Service Employees International Union, AFL-CIO (Union), against First Student, Inc. (Respondent).

It is alleged that in the course of an organizing drive, in October and November, Respondent displayed and distributed leaflets to employees asking them to report the union activities of other employees. It is further alleged that in October, November, and December, Respondent orally and in writing threatened employees with loss of wage increases and other benefits if they selected the Union as their collective-bargaining representative. Finally, it is alleged that in November, Respondent informed an employee that he was prohibited from distributing union literature while on nonworking time in nonworking areas. This conduct is alleged to have violated Section 8(a)(1) of the Act.

Respondent contends that all of the statements made to employees were lawful. Respondent admits that an employee was told he could not distribute literature while on nonworking time in nonworking areas, but submits this was an isolated incident, the employee was not disciplined, and any violation of the Act was de minimis.

##### FINDINGS OF FACT

###### I. JURISDICTION

Respondent is engaged in providing school bus transportation services and maintains a facility in Bristol, Connecticut. Respondent admits, and I find, it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

###### II. LABOR ORGANIZATION STATUS

On October 24, the Union filed a petition to represent a unit of approximately 105 drivers and monitors employed at the Bristol facility. Respondent entered into a consent election agreement with the Union on November 1, and an election was conducted on December 6. The results of that election were certified on December 16. Brian Borry, an employee of Respondent, testified about his membership in the Union and the Union’s organizational activities prior to the election. Based

<sup>1</sup> All dates are in 2002 unless otherwise indicated.

upon these facts, I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

### III. ALLEGED UNFAIR LABOR PRACTICES

#### A. Past Practice Re: Wage Increases

Patty Bernier is Respondent's contract manager at the Bristol facility and is an admitted agent and supervisor. She has been employed by Respondent since 1989, and she testified that throughout the period of her employment, Respondent has given employees a raise each September, at the beginning of the school year. The amount of each raise is based on seniority.

Jim Castelli is regional vice president. He also testified that it has been Respondent's practice to give wage increases at the beginning of each school year. Castelli oversees six of Respondent's unionized facilities, and he has negotiated the collective-bargaining agreements covering those facilities. He testified there have been occasions in the past when contract negotiations were ongoing during the month of September, and it is Respondent's practice to freeze the regularly scheduled wage increases whenever negotiations are under way.

#### B. The Four Documents at Issue

Four documents authored by Respondent during the union organizing drive are at issue. In document #1, entitled "Q&A," Respondent posed the following question and answer:

Q: Do wages and benefits always go up during negotiations? The union says we will get more.

A: During negotiations wages & benefits are frozen. No raises or benefits improvements can be given. When negotiations are over employees can gain, lose or stay the same. Even if you stay the same, you lose because you would be paying dues. Three things can happen, two of them mean less for you. The Union can only negotiate with what you have now. Keep what you have, Vote No!

Document #2 was entitled "How long does it take for a Union and First Student to negotiate a first collective-bargaining agreement?" Respondent summarized the length of time negotiations were conducted at nine of its facilities located throughout the United States and the times given ranged from 7 months to "11 months and counting." The following statement appeared:

Labor contracts do not happen overnight. *Negotiations are a "give & take"* and take a lot of time. First Student does not just "agree" to the Union's demands. If the Union is voted in, the law requires *no changes in wages or benefits until agreed to by the Company and Union*. This means the next scheduled increase can't be given if negotiations are continuing. **HOW MUCH WOULD A DELAY COST YOU?** (Emphasis in original).

In document #3, Bernier posed the following question and answer:<sup>2</sup>

<sup>2</sup> This question was posed in two different letters, dated October 21 and November 6. The only difference between the two letters was that in the October 21 letter, Bernier used the word "union" and in the No-

Question: Am I allowed to tell people I don't want the union here?

Answer: Yes. No one can be forced to support the union. If anyone confronts you and tries to force you or intimidate you to support the union, please inform me immediately. First Student will not tolerate intimidation or threats made against its employees.

In document #4, a letter dated October 22, Bernier wrote:

You may have recently been approached by some of your fellow employees distributing union literature and the solicitation of getting union cards signed. You should realize that it is very possible that these employees are being paid by the union to distribute this literature [and] in addition, it is very possible that these employees are being promised a position of leadership within the union should our location become unionized.

You should ask yourself are these the employees that you want to represent you and speak for you if a union was to get in at our location. If not and you want to maintain your independence and the ability to speak for yourself let these employees know that your [sic] not interested. **I encourage you to come to me should you have any questions or concerns about what is going on with this union organizing attempt** (bolded emphasis in original).

Borrry testified that copies of document #1 were left in the buses and were picked up by employees when they reported for work one morning.

In her opening statement, counsel for the General Counsel made the following representation with respect to the four documents alleged to be unlawful:

This case involves primarily four flyers that Respondent distributed during the organizing drive. And you will see that they violated the Act because of their request that employees report Union activities. And, they also threatened employees with loss of wage increases by stating benefits will be frozen.

In his opening statement, counsel for Respondent stated:

Basically, I agree with counsel for the General Counsel. This case only consists of four, not even four flyers, rather four phrases contained in flyers, some of which are three pages long. And the counsel for the General Counsel is focusing on one, one or two phrases taken out of context to allege that they somehow are, portrayed surveillance or asked that employees report on Union activities or threatened loss of benefits. I think the evidence will show that in taking these exhibits as a whole, they are simple statements made by management to employees.

In his closing statement, counsel for Respondent went on to state:

Throughout the charge and the investigation, the company has basically, has admitted the authenticity of these documents,

November 6 letter, she substituted "SEIU." These letters will be referred to collectively as document #3.

does not, has not challenged the authenticity, has not challenged the distribution.

### C. Employee Meetings

From October to December, Respondent conducted periodic meetings with employees. Borry testified that at a number of these meetings, Bernier told employees that the regular September pay increases would be frozen pending the outcome of bargaining between the Union and the company. He also recalled that at two of the meetings Bernier referred to a document entitled, "Benefits at Bristol That Employees Enjoy Without a Union." In this document, Respondent listed 17 benefits (e.g. Christmas ham, half the cost of a health club membership, barbecues, pizza parties, and "giveaways" including flashlights, watches, plaques, and tee shirts). Borry gave several different accounts of what Bernier said about these benefits. On direct examination, he testified Bernier said that employees would lose the benefits if the Union came in. He then modified that statement and said Bernier said employees would "most likely" lose the benefits. On cross-examination, Borry testified that Bernier said employees could lose or gain benefits, that benefits would be frozen, and that benefits were subject to negotiation. At one point, Borry acknowledged he could not recall the exact wording of what Bernier said.

Bernier denied stating that benefits would be lost if the Union were voted in. She did admit saying that wages and benefits would be frozen and that nothing would change during the period of negotiations until a contract was reached. Referring specifically to the list of benefits, Bernier testified she told employees "this is what we do regardless of whether we have a union or no union. This is what we have, and this will stay or it could go."

### D. Distribution of Union Literature by Borry

Borry testified that in the course of the preelection campaign, he frequently distributed union literature during nonwork time while standing on the public road abutting the employee parking lot. The lot is a dirt lot and the road is paved, and Borry was certain he always stood on the pavement. Sometime during the week of November 4, Borry was with Chad, a nonemployee union organizer and, according to Borry, both men were standing on the pavement, distributing literature to employees as they were exiting the parking lot. At one point, Chad walked away to retrieve an item from his car. While Borry was standing alone, with leaflets in his hands, Karla DiVirgilio, Respondent's safety coordinator and an admitted agent and supervisor, approached Borry and asked him what time he got off the clock. Borry said he was already off the clock, and DiVirgilio told him to leave the property. Borry did not respond and DiVirgilio walked away. Borry remained where he was and continued leafletting, and no action was taken against him.

DiVirgilio testified that when she approached Borry he was in the dirt parking lot and therefore on company property. She saw Chad walk away and she spoke only to Borry. She asked if he were on the clock and he said he was not. She then testified, "being that he was on company property, I asked him to please leave the company property." On cross-examination DiVirgilio acknowledged that employees are allowed to remain on com-

pany property when they are not on the clock. There is a rule in the handbook that states there is to be no loitering, but she admitted that it is not a hard and fast rule. DiVirgilio testified that several times she directed nonemployee organizers to leave company property, but her direction to Borry to leave the property was the only time she gave such a direction to an employee. Respondent has a written no-solicitation/no-distribution rule, the lawfulness of which is not challenged by the General Counsel.

## IV. ANALYSIS

### A. Distribution by Respondent of the Four Documents

In his brief, counsel for Respondent argues there is insufficient evidence that the four documents at issue were distributed by Respondent to employees. I find this argument to be without merit for three reasons. First, Borry testified that Respondent left copies of document #1 on the buses which were picked up by employees when they reported for work. Second, Bernier referred during her testimony to Respondent's practice of leaving documents on the buses. Third, counsel for Respondent admitted, during his opening and closing statements, that these four documents were distributed to employees. Counsel's statements are properly chargeable to Respondent as admissions. *Riverwoods Chappaqua Corp. v. Marine Midland Bank*, 30 F.3d 339 (2d Cir. 1994); *U.S. v. McKeon*, 738 F.2d 26 (2d Cir. 1984); *Packaging Techniques, Inc.*, 317 NLRB 1252 (1995). I therefore find counsel for the General Counsel has proven, by a preponderance of the evidence, that the documents at issue in this case were in fact distributed by Respondent to employees.

### B. Documents #1 and #2

In *More Truck Lines, Inc.*, 336 NLRB 772 (2001), enfd. 324 F.3d 735 (D.C. Cir. 2003), the Board summarized the law regarding an employer's threat to withhold wages and benefits during collective bargaining:

It is settled law that when employees are represented by a labor organization their employer may not make unilateral changes in their terms and conditions of employment, such as their wages. See *NLRB v. Katz*, 369 U.S. 736, 747 (1962). This duty to maintain the status quo imposes an obligation upon an employer not only to maintain that which has already been given to employees, but also to "implement benefits which have become conditions of employment by virtue of prior commitment or practice." *Alpha Cellulose Corp.*, 265 NLRB 177, 178 fn. 1 (1982), enfd. mem. 718 F.2d 1088 (4th Cir. 1983). Accord: *Illiana Transit Warehouse Corp.*, 323 NLRB 111 (1997) (employer unlawfully told employees "wages and benefits would be frozen at current levels for the period of negotiation" and unlawfully withheld annual wage increases for this reason). As the judge explained, once promised, future nondiscretionary wage increases are such existing terms and conditions of employment. See *Liberty Telephone & Communications*, 204 NLRB 317, 318 (1973) (a promised wage raise that induces employees to accept or continue their employment is an "established" condition of employment); cf. *McDonnell Douglas Aerospace Services Co.*, 326 NLRB 1391 fn. 2 (1998).

Respondent grants wage increases to employees every September; it is an established condition of employment. In documents #1 and #2, Respondent threatened to withhold those wage increases if collective bargaining were taking place at the time the increases were due. This was a threat to change the status quo, and was therefore unlawful. It is not a defense that Respondent has a past practice of withholding scheduled wage increases during periods of collective bargaining. It is unlawful to do so, and that Respondent might have done so in the past (a finding I do not make) such a past practice would not justify the unlawful conduct found in this case. I therefore find the statements contained in documents #1 and #2 relating to the withholding of regularly scheduled wage increases violated Section 8(a)(1) of the Act.

The statements contained in documents #1 and #2 relating to benefits were not unlawful. Respondent stated that benefits would remain frozen, that is, remain the same for as long as negotiations were ongoing, and that at the end of that process, benefits could increase, decrease, or stay the same. There is no threat express or implied in these statements. I therefore recommend the allegations in the complaint relating to the statements contained in documents #1 and #2 about benefits be dismissed.

#### C. Documents #3 and #4

Employers violate Section 8(a)(1) when they invite their employees to report instances of fellow employees bothering, pressuring, abusing, or harassing them with union solicitations and imply that such conduct will be punished. *Greenfield Die and Mfg. Corp.*, 327 NLRB 237 (1998). While the Board has accepted as lawful an employer's announced intent to protect employees from those who "threaten" them, Respondent, in this case, did not limit its directive to threatening conduct. Rather, in document #3, Respondent urged employees to report anyone who "confronted," "forced," or "intimidated" them into supporting the Union. Some employees could construe these terms to encompass lawful union activity. One employee's persistent attempt to persuade may be, to a different employee, an act of confrontation or intimidation. Respondent's statement therefore had the potential dual effect of encouraging employees to report other employees engaging in union activity in a manner subjectively offensive to the solicited employees, and correspondingly, of discouraging employees from engaging in union activities for fear of being reported to management. *Arcata Graphics/Fairfield, Inc.*, 304 NLRB 541, 542 (1991). By distributing document #3 to employees, Respondent violated Section 8(a)(1) of the Act.

In document #4, Bernier asked employees to consider the possibility that if the union were selected as the bargaining representative, they might end up being represented or spoken for by the pro-union employees who were distributing literature and soliciting signatures on authorization cards. In the last sentence, in bolded type, Bernier encouraged employees to come to her with "questions or concerns about what is going on with this union organizing attempt." Respondent argues there is nothing wrong with asking employees to bring questions or concerns to members of management. It is the entire document, however, that must be read in context, not just the last

sentence. In reviewing the entire document, what emerges is the following construct: first, Bernier focused employees' attention on the "problem" of pro-union co-workers possibly representing them; second, she told employees to tell their pro-union co-workers they were not interested in the Union; and third, with bolded emphasis, she encouraged employees to come talk to her. Any person reading this could easily interpret Bernier's remarks as an invitation to report the identity of the pro-union employees. In distributing document #4 to employees, Respondent therefore violated Section 8(a)(1) of the Act.

#### D. Bernier's Statements at Employee Meetings

Bernier admitted in her testimony that in the course of employee meetings, she told employees that the regularly scheduled wage increases would be frozen during collective bargaining. For the same reasons stated above with respect to the statements contained in documents #1 and #2, these oral statements made by Bernier violated Section 8(a)(1) of the Act.

I do not credit Borry's testimony regarding Bernier's statements about benefits. His recollection was vague and inconsistent. Each time he was asked what Bernier said about benefits, he gave a slightly different answer. Bernier was more credible when she testified that she told employees that during negotiations, all benefits would be frozen until an agreement was reached. Not only was Bernier's recollection more precise, her testimony was consistent with the written materials Respondent had distributed to employees.

Having determined that Bernier orally made statements to employees that benefits would be frozen during collective bargaining, the issue is whether those statements violated the Act. For the same reasons previously stated in connection with the statements about benefits contained in documents #1 and #2, I find nothing unlawful about Bernier's statements and recommend dismissal of this complaint allegation.

#### E. Borry's Distribution of Literature

Respondent concedes that DiVirgilio told Borry he could not distribute union literature during nonworking time in a nonworking area, but argues this was a de minimis violation of the Act and should be dismissed. I have considered all of Respondent's arguments on this point including those made at the hearing and those made in the brief. I nevertheless decline to dismiss the allegation as de minimis in view of the other unlawful conduct engaged in by Respondent. I therefore find Respondent violated Section 8(a)(1) of the Act when it prohibited Borry from distributing union literature during nonworking time in a nonworking area. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 621 (1962).

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. In October and November 2002, Respondent violated Section 8(a)(1) of the Act by distributing written materials to employees which threatened the loss of regularly scheduled

wage increases if employees selected the Union as their collective-bargaining representative.

4. In October, November, and December, 2002, Respondent, by Bernier, violated Section 8(a)(1) of the Act by threatening employees with the loss of regularly scheduled wage increases if they selected the Union as their collective-bargaining representative.

5. In October and November 2002, Respondent violated Section 8(a)(1) of the Act by distributing written materials that encouraged employees to report the union activities of other employees.

6. On or about November 4, 2002, Respondent, by DiVirgilio, violated Section 8(a)(1) of the Act by prohibiting an employee from distributing union literature in a nonwork area during nonwork time.

7. Respondent did not violate the Act when it advised employees in written materials and in statements made by Bernier that there would be no change in benefits if employees selected the Union as their collective-bargaining representative.

#### REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>3</sup>

#### ORDER

The Respondent, First Student, Inc., Bristol, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) threatening employees with the loss of regularly scheduled wage increases if they select the Union as their collective-bargaining representative;

(b) encouraging employees to report the union activities of other employees;

(c) prohibiting employees from distributing union literature in nonwork areas during nonwork time;

(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) Within 14 days after service by the Region, post at its facility in Bristol, Connecticut, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided

by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 2002.

(b) 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. July 15, 2003

#### 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 on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT threaten you with loss of your regularly scheduled wage increases if you select Civil Service Employees Affiliates, Local 760, Service Employees International Union, AFL-CIO, or any other union, as your collective-bargaining representative.

WE WILL NOT encourage you to report to us on the union activities of your fellow employees.

WE WILL NOT prohibit you from distributing union literature in nonwork areas during nonwork time.

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.

FIRST STUDENT, INC.

<sup>3</sup> 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.

<sup>4</sup> If this Order is enforced by a Judgment of the 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."

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."