

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
FIRST REGION**

In the Matter of

FIRST STUDENT, INC.

Employer

and

UNITED FOOD AND COMMERCIAL WORKERS  
UNION, LOCAL 328, AFL-CIO

Petitioner<sup>1</sup>

Case 1-RC-21713

**DECISION AND DIRECTION OF ELECTION**<sup>2</sup>

United Food and Commercial Workers Union, Local 328, AFL-CIO (Petitioner or Union) filed the petition in this matter, in which it seeks to represent a bargaining unit of all full-time and regular part-time bus drivers employed by First Student, Inc. (Employer) who have permanent school bus routes under the Employer's contract with the Town of Falmouth, Massachusetts.<sup>3</sup>

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<sup>1</sup> Although the name of the Petitioner is listed as UFCW Local 328 in the petition, the parties clarified the name at the hearing.

<sup>2</sup> Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 4) a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

<sup>3</sup> This definition of the unit as confined to drivers with *permanent* Falmouth routes is as set forth in the Petitioner's post-hearing brief. In the petition and at the hearing, however, the Petitioner defined the unit sought as regular full-time and part-time bus drivers employed in Falmouth. In addition to drivers assigned to regular routes, the Employer employs spare drivers, who are categorized as regular spare,

The Petitioner contends that the sole issue in this proceeding is whether the Employer's drivers who are assigned permanent routes in Falmouth constitute an appropriate "single location unit." Under this definition of the single location, which essentially defines the unit in terms of the customer being serviced, the Petitioner is seeking to exclude not only spare drivers who drive Falmouth routes on an as-needed basis, but also full-time and regular part-time bus drivers who are assigned permanent routes in other towns, who work out of the same East Falmouth facility, and some of whom are included on the same seniority list as the drivers who service routes in Falmouth. The Employer, instead of defining unit location in terms of the customer, maintains that its East Falmouth facility and two satellite parking lots constitute a "single location." Therefore, the Employer defines the issue as simply one of "community of interest," not single versus multi-location. In this regard, the Employer maintains that the smallest appropriate unit must include all drivers, including spares, who service the Employer's school bus contracts with the Upper Cape Cod Regional Technical School (Cape Cod Tech) and the towns of Falmouth, Bourne, and Mashpee, regardless of whether these drivers park their buses and drive out of the East Falmouth facility or one of the two satellite parking lots.

I find, in agreement with the Employer, that a unit limited to the drivers who service the Falmouth contract under a permanent route assignment is not an appropriate unit inasmuch as these drivers do not possess a community of interest sufficiently separate from the Employer's other drivers to warrant their inclusion in a separate unit. Rather, I conclude that the smallest appropriate unit must include all drivers who provide bus transportation services to Cape Cod Tech and the towns of Falmouth, Bourne, and Mashpee.

## **Facts**

### Employer's business and structure

The Employer, a Florida corporation with its principal place of business in Cincinnati, Ohio, provides school bus transportation services under contracts with cities, towns, and school districts nationwide. Region 6 Vice President Mark Aussabel oversees the Employer's facilities in Massachusetts, New Hampshire, and New York. Regional personnel are the ones responsible for bidding the school transportation contracts as well as the contracts' maintenance. Regional Operations Manager Jim Quinlan, who reports to Aussabel, oversees the Employer's East

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occasional spare, and trip spare. There are at least three spares on the Falmouth seniority list who may drive a Falmouth route on an as-needed basis and who, therefore, could be "employed in Falmouth." At the hearing, the parties did not state any positions on the record as to whether spares should be included or excluded. Instead, the Employer maintained that there were 59 drivers in its proposed unit while the Petitioner maintained that there were only 30 drivers. In reviewing the Employer's employee list, it is clear that spare drivers would have to have been included in the Employer's proposed unit in order to reach a total of 59 drivers. Likewise, the Petitioner would have to be excluding them. Therefore, the parties' lists suggest that the Petitioner is seeking only Falmouth's regular route drivers. While both parties agree that the unit should include only drivers, the parties could not agree whether or not the term "all other employees" should be listed in the unit description exclusions.

Falmouth, Massachusetts facility.<sup>4</sup> Contract Manager Steve Boleyn is the on-site East Falmouth manager.<sup>5</sup> Reporting to Boleyn are Service Manager Renato Serpa and Dispatcher Yvette Duarte.

The East Falmouth location services five contracts. Four are school bus contracts with Cape Cod Tech and the towns of Falmouth, Bourne, and Mashpee, Massachusetts. The fifth is a Mashpee charter contract. In servicing these contracts, the Employer utilizes 58 buses and employs a total of 59 bus drivers. Forty-nine are regular route drivers; ten are spare drivers. There are two service technicians (mechanics) at East Falmouth who perform all maintenance on the Employer's 58 buses. The mechanics report to both Contract Manager Boleyn and Marie McDonald, the Employer's Regional Safety Coordinator.<sup>6</sup> There is also a lot attendant at East Falmouth who does all the bus refueling.

There is no history of collective bargaining at the East Falmouth location.

#### East Falmouth facility

The Employer's East Falmouth location houses administrative offices and all personnel. There is also a lot for parking buses overnight, a garage where buses are serviced, and a gas tank for refueling the buses.

In addition to the lot at East Falmouth, the Employer maintains two other lots where buses are parked overnight. One of the lots is located at the Village of Catuamet in the Town of Bourne (the Catuamet/Bourne lot), while the other is located at Forestdale, which is either in or near the Town of Mashpee (the Forestdale/Mashpee lot). The Forestdale/Mashpee lot is fourteen miles from the Employer's East Falmouth facility. The Catuamet/Bourne lot is six miles from East Falmouth. The two lots are about ten miles from each other.

The Catuamet/Bourne lot is apparently nothing more than a parking area. At the Forestdale/Mashpee lot, however, there is a trailer with a telephone and a two-way radio. Drivers who park at the Forestdale/Mashpee lot use the trailer to store their keys, get coffee, and keep warm. There is no plumbing in the trailer but there is a "port-o-potty" at the lot.

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<sup>4</sup> The record does not reveal how many other facilities Quinlan oversees or where he is located, although he is not located at East Falmouth.

<sup>5</sup> At the hearing, the parties stipulated that Contract Manager Steve Boleyn is a supervisor within the meaning of Section 2(11) of the Act, and I so find.

<sup>6</sup> MacDonald is the safety coordinator for all the Employer's Southeastern Massachusetts facilities. MacDonald is not located at the East Falmouth facility although the record does not otherwise identify where she is located.

### Requirements and variations in bus contracts

The drivers provide services under five separate contracts. The Employer supplies two buses to Bourne under a five-year contract that expires at the end of the 2003-2004 school year.<sup>7</sup> The Employer, in the fourth year of its five-year school transportation contracts with the towns of Falmouth and Mashpee, supplies thirty buses to Falmouth and fifteen to Mashpee. The Employer, in the second year of a five-year school transportation contract with Cape Cod Tech, supplies that school with four buses. The Employer also has a charter service contract with the Town of Mashpee for the period September 1, 2003, until August 31, 2006.

Although each particular contract has several unique features, most terms are similar, if not identical.<sup>8</sup> For instance, all contracts require that the buses have the name of the town/school district stenciled on the outside of the bus. All require that the buses be registered and garaged at that particular town, or, in the case of Cape Cod Tech, at a town in the district. Although Cape Cod Tech's contract, unlike the rest, does not specify that the buses must be equipped with two-way radios, all are so equipped.<sup>9</sup> All contracts require that the drivers be trained and licensed and that the drivers be paid at least the minimum prevailing wage rate set by the Commonwealth of Massachusetts.<sup>10</sup> Bourne, Mashpee, and Falmouth each reserve the right to approve or disapprove any driver hired by the Employer to provide transportation to its students. All four towns/school districts reserve the right to request that the Employer terminate an employee from driving in its town/school district because of his or her performance.

Falmouth and Mashpee require the Employer to have a local telephone number and a dispatcher in their respective towns. Mashpee and Cape Cod Tech require the Employer to establish the bus routes based upon information furnished to it and reserve the right to finalize and change the routes. Falmouth and Bourne are responsible for establishing their own routes and reserve the right to make any changes to them. Falmouth, Mashpee, and Cape Cod Tech establish time frames when drivers must be at the school to pick up and drop off the students. These three also reserve the right to make any changes to their schedules. Falmouth, Mashpee, and Cape Cod Tech require the Employer to provide training to its drivers, but also may offer

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<sup>7</sup> The contract has an expiration date of 2002 but provides payment schedules for the 2002-2003 and 2003-2004 school years.

<sup>8</sup> For purposes of this discussion, when I refer to Mashpee, I am referring to Mashpee's school transportation contract. Mashpee's charter service contract is almost identical to Mashpee's school transportation contract.

<sup>9</sup> Mashpee and Bourne drivers are all tuned to the same frequency but operate on different channels. Cape Cod Tech drivers use a different frequency.

<sup>10</sup> The minimum wage rate for Falmouth drivers is \$15.78/hour for the term of the contract. The minimum wage rate for Cape Cod Tech drivers is \$17.08/hour for the term of the contract. Mashpee, unlike the others, is not required to adhere to the Commonwealth of Massachusetts' prevailing wage rate laws for bus drivers. Bourne's contract does not specify what the prevailing wage rate was at the time of the contract.

them other specialized training. Under the Falmouth and Mashpee contracts, both towns may require the Employer and its drivers to meet with officials of the town prior to September 30th of each contract year in order to review expectations.<sup>11</sup>

#### East Falmouth management/supervision

Contracts Manager Boleyn oversees the East Falmouth operations, billing, payroll, accounts payable and receivable, and bus maintenance. He supervises the drivers, including being responsible for hiring, firing, and disciplining the drivers. He does not need to secure approval from regional managers to make any of these decisions. Boleyn is also responsible for assigning drivers, as needed, to bus routes, charters, and sporadic shuttle services.

Yvette Duarte is the dispatcher for the East Falmouth facility. She ensures that the Employer's Falmouth, Bourne, Mashpee, and Cape Cod Tech routes and charter services have drivers assigned to them. She is also responsible for answering the telephones. According to Boleyn, they are the only two supervisors and/or managers who direct the activities of its drivers.<sup>12</sup> Both Boleyn and Duarte also drive buses on an as-needed basis.

Since about December 2002, all dispatching has been done out of the East Falmouth facility and Duarte has been the only dispatcher. At some time, prior to the 2002-2003 school year, however, a dispatcher, who was responsible for Mashpee, Sandwich, and Cape Cod Tech routes, did work out of the trailer at the Forestdale/Mashpee lot.<sup>13</sup> During the 2002-2003 school year, from September to December 2002, Mashpee spare driver Michelle White worked part-time as a dispatcher at the Forestdale/Mashpee lot. The Employer did not replace her, however, when she resigned these dispatching duties.<sup>14</sup> Morag MacLeod, a Mashpee spare driver, answered the phone at the Forestdale/Mashpee trailer from September to October 2003 in order to help Boleyn. She performed no other dispatch duties.<sup>15</sup>

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<sup>11</sup> Falmouth has held annual meetings with the drivers assigned its routes.

<sup>12</sup> The parties failed to stipulate as to the supervisory status of Duarte, but the Petitioner also failed to address the Employer's assertion that Duarte is a supervisor. Nonetheless, she is excluded from the unit since she is not a bus driver.

<sup>13</sup> At the time, the Employer had a contract with the Town of Sandwich, which it no longer has, for the transportation of its students.

<sup>14</sup> The Petitioner asserts that the Employer, based upon its 2003 daily log, Employer Exhibit 7, employed a dispatcher "Steve" at the Forestdale/Mashpee lot on January 2, 2003. The entry for this date states the following: "Steve dispatch Mash/Sandwich until replaced." It is unclear whether "Steve" is actually Boleyn or another employee. Boleyn testified, however, that the Employer did not replace the Mashpee dispatcher after White resigned in December of 2002, which coincides with the January 2, 2003 date.

<sup>15</sup> The Employer denies that it stationed MacLeod there to comply with its contract with Mashpee that requires the Employer maintain a Mashpee telephone number and dispatcher.

### Driver terms and conditions of employment

As indicated above, the drivers are categorized as regular route drivers, regular spare drivers, occasional spare drivers, and trip drivers. All drivers must be certified by the Massachusetts Department of Transportation and the Department of Telecommunications and Energy and must possess a class B commercial driver's license (CDL) with passenger endorsement and a valid medical certificate.

The Employer's regional office is responsible for employees' wage rates and compensation. Although the contracts require drivers to be paid at least the minimum prevailing wage rate, the Employer pays its drivers more than this amount. The drivers who drive routes in Falmouth, Bourne, and Mashpee are paid \$16.50 per hour. Those who drive for Cape Cod Tech receive \$17.25 per hour. Drivers who provide charter transportation to Mashpee receive \$13.50 per hour. All other charter work is paid at the rate of \$11.50 per hour. All 59 drivers are eligible for \$35 monthly performance bonuses and a \$275 year-end performance bonus. These bonuses are part of the Employer's nationwide Performance Plus Policy. The drivers are also provided health and dental benefits as part of the Employer's nationwide corporate policy. All 59 drivers are subject to the Employer's national policies for bonuses, benefits, work rules, and disciplinary procedures. All drivers are subject to the rules and regulations contained in the First Student National Employee Handbook.

For accounting purposes, the Employer has divided the five contracts into two separate accounts. The first, referred to as the Falmouth account, includes Falmouth, Bourne, and Cape Cod Tech. The second, the Mashpee account, is exclusively for the two Mashpee contracts. All revenues and expenses from the respective contracts are applied to the appropriate account. As a result, the Employer also maintains separate driver/seniority lists by account. Therefore, the Falmouth, Bourne, and Cape Cod Tech drivers are included together on the Falmouth list and the Mashpee drivers are on the Mashpee list. Seniority is not transferable between the Falmouth and Mashpee lists.

All drivers are assigned to a specific town/school district. Regular route drivers are assigned specific routes. Spare drivers are used when the Employer needs route or charter coverage. Drivers generally keep their route assignment from year to year. Drivers may bid on open routes, which are awarded by seniority. As noted above, however, seniority is not transferable between the two lists. For example, if Mashpee has an open route, a Falmouth driver may bid on it, but Mashpee drivers, by seniority, will have preference. Drivers volunteer for charter service work. The Employer posts the charter work available and awards it based on seniority. For Mashpee charter work, Mashpee drivers will have first priority. If no Mashpee driver signs up for the work, a driver from the other seniority list, that is, a driver for Falmouth, Bourne, or Cape Cod Tech, may be awarded the work. Spares, like the regular route drivers, and contrary to Boleyn's testimony, appear to be assigned to specific towns/school districts as opposed to being assigned merely to one of the two seniority lists. Employer's Exhibit 3, which is a listing of the drivers, identifies the town/school district for which each spare provides transportation, along with job title, wage rate, and bus parking location. According to this list, three spare drivers are assigned to Falmouth, four spare drivers and one trip driver are assigned to Mashpee, and one spare driver is assigned to Cape Cod Tech.

All route drivers perform morning and afternoon runs as part of their route. On average, a driver may have one to three runs in each time period. Falmouth has thirty regular route drivers who are assigned to thirty routes servicing seven schools. Falmouth drivers may make more than one run to a school, but they do not go to every school. There are also six mid-day runs in Falmouth to accommodate its half-day kindergarten program.

Mashpee has fifteen regular route drivers who are assigned to fifteen routes servicing three schools. Thirteen of these drivers make three runs in both the morning and afternoon. Bourne has two regular route drivers who service Bourne's two routes. Each driver performs two runs in the morning and afternoon. Bourne also requires mid-day runs because of its half-day kindergarten program, although it is unclear if both drivers drive this mid-day run. Lastly, there are four regular route drivers for Cape Cod Tech's four routes. Each of the four drivers has one run in both the morning and afternoon.

The daily activities of the route drivers are identical, regardless of route or contract. In the morning, drivers report to the assigned parking lot where their bus is parked. They conduct a pre-trip inspection of the bus, complete the necessary paperwork, and then go out on the road to pick up the students and drop them off at school. After the morning run(s), the drivers either return the bus to the lot or drive it home. They then perform a post-trip inspection. In the afternoon, the drivers conduct another pre-trip inspection, complete the necessary paperwork, and then go out to pick up the students at school and drop them off at home. At the end of the day, the drivers return their buses to their assigned parking lot.

As noted above, the town contracts require that the buses be registered and garaged within the particular town that they service. For the most part, a driver servicing Bourne would park at the Catuamet/Bourne lot, a driver servicing Mashpee would park at the Forestdale/Mashpee lot, and a driver servicing Falmouth would park at the East Falmouth facility. Although under the Cape Cod Tech contract their buses may be garaged at any location within the district, their drivers are assigned to the Falmouth seniority list. Drivers are allowed, however, with Boleyn's permission, to park their buses at a lot closer to their homes, rather than at the lot located in the town for which they drive. For example, Amy Gillis, a Mashpee regular route driver, and Russell Bishop, a Mashpee spare driver, park their buses at the East Falmouth facility instead of the Forestdale/Mashpee lot. Stanley Harris, a Mashpee route driver, parks his bus at the Catuamet/ Bourne lot instead of the Forestdale/Mashpee lot. Instead of parking at the East Falmouth facility, three of the four Cape Cod Tech drivers park their buses at the Forestdale/Mashpee lot, and the fourth parks at the Catuamet/Bourne lot. Mary Leonard and Debra Campbell, both Falmouth route drivers, park their buses at the Catuamet/Bourne lot instead of at East Falmouth. Audrey Travers, a Falmouth spare driver, parks her bus at the Forestdale/Mashpee lot instead of at East Falmouth. Therefore, the East Falmouth lot is not used exclusively by Falmouth drivers, nor do all Falmouth drivers park at, and drive out of, the East Falmouth lot.

## Interchange

Either Contract Manager Boleyn or Dispatcher Duarte will assign a driver to a route if it needs coverage. Boleyn testified that coverage can be needed as seldom as once a day and as often as three or four times a day. The Employer tries first to fill the opening with a spare driver from that particular accounting code (Falmouth or Mashpee) driver list. If someone from that list is not available, it will try to fill the opening with a driver from the other list. Fill-in drivers for Mashpee, Bourne, and Falmouth routes earn \$16.50 per hour; fill-in drivers for Cape Cod Tech earn \$17.50 per hour. These are the same wage rates as the regular route drivers assigned to these towns/school districts receive.

The Employer introduced its 2003 daily log to establish route coverage by its drivers. This log identifies the route, the period of day the route was covered, the first name of the driver covering the route, and, for the most part, the drivers' last name initial. Boleyn testified that, in order to determine which driver covered the route and where he or she was assigned, the log must be compared with the Employer's driver lists. Nevertheless, Boleyn testified that this determination would be difficult for someone to do who was not employed by the Employer.

Based upon this log, Boleyn testified that on November 24, 2003, a Falmouth route driver covered a Mashpee run, a Mashpee spare driver covered a Cape Cod Tech run, and a Falmouth spare driver provided charter services to Mashpee. He also testified that on November 25, 2003, a Falmouth route driver and a spare driver covered Mashpee runs and a Mashpee spare driver covered a route for Cape Cod Tech. The exact number of runs each driver covered is unclear from Boleyn's testimony.

According to its 2003 log, the Employer had an open route in Mashpee from October 31 until the end of the year.<sup>16</sup> There were 34 school days from October 31 until December 31, 2003. For 18 of these days, non-Mashpee drivers, not including Boleyn, drove runs for at least part of the day. From December 1 until December 23, 17 school days, Audrey Travers, a Falmouth spare driver, drove runs on nine days and Shawn Thines, a Falmouth route driver, drove runs on two days. In addition, the Employer has also had an open route for Cape Cod Tech since November 10.<sup>17</sup> There were 28 school days between this date and December 31. Gregory MacDonald, Cape Cod Tech's spare driver, did not drive this route at all during this time period. Travers, a Falmouth spare driver, drove the route four full days and part of one day. Kim Paliotto, a Falmouth regular route driver, drove the route for part of one day. Morag MacLeod, a Mashpee spare driver, drove the route 22 full days and two part-days. MacLeod has driven the route exclusively since November 21.

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<sup>16</sup> This is based on an analysis of Employer's Exhibit 7, compared to its driver lists, Employer's Exhibits 3, 8. The open route is Mashpee Route 14.

<sup>17</sup> This is based on an analysis of Employer's Exhibit 7 compared to its driver lists, Employer's Exhibits 3, 8. The open route is Cape Cod Tech Route 11.

Based on the Employer's 2003 daily log, there were 17 school days in December. There were 31 instances of drivers covering routes in the town/school district to which they were not assigned, including the instances previously discussed, on these 17 days.<sup>18</sup> Eighteen out of the 31 drove the route for the full day and 13 for part of the day. The Employer drove 23 charters for Mashpee in the month of December, 11 of which were driven by non-Mashpee drivers.<sup>19</sup> It also appears that the Employer drove five other charters in that month that required 12 drivers, seven of whom were Mashpee drivers and three were Falmouth drivers. The Mashpee drivers and the Falmouth drivers did not, however, drive any of the same charters. In December of 2003, eight of the Employer's 59 drivers drove routes for towns/school districts to which they were not assigned.

The Employer holds required monthly safety meetings at two different times, in two different locations – Falmouth and Mashpee.<sup>20</sup> Drivers are allowed to attend either meeting depending on their schedule. The Employer maintains two safety committees, known as Safety Action Teams, one each for each drivers list – Falmouth and Mashpee. Additionally, the Employer holds an annual kick-off party for all of its drivers prior to the start of the school year. The location of this party varies. Last year, the party was in Mashpee, and the year before that, in Falmouth. In the past, the Employer has also held year-end meetings open to all drivers.

#### Control over drivers exercised by town/school districts

The town/school district exercises some degree of control over the drivers who provide transportation to it by virtue of the terms of its contract with the Employer. The Employer also allows its national rules and regulations to be preempted by the contract if the contract requires more stringent standards. For instance, Contract Manager Boleyn complied with Mashpee's request that a driver be removed from a certain run.<sup>21</sup> Cape Cod Tech Headmaster Edward Osgood will call Boleyn when he has an issue with one of the drivers.

Falmouth Public Schools Transportation Manager Greg Kennedy has been the most active in personally advising Falmouth drivers of the town's policies and disciplining drivers who violated these policies. For example, Falmouth requires its drivers to be at the school 15 minutes prior to students' dismissal. When driver Michele Parker arrived at the school on March 5, 2003 less than 15 minutes before dismissal, Kennedy sent Boleyn a memo in which he stated that if Parker continued to be late, further steps, including her suspension or dismissal, would be called for. Kennedy also sent a notice to the Falmouth drivers on March 23, 2003, wherein he reminded them of the town's policy regarding the early arrival of buses at the schools. He ended

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<sup>18</sup> This is based on an analysis of Employer's Exhibit 7, which is its 2003 daily log that purportedly demonstrates when a driver was sent to cover a route or charter, compared to its drivers' lists, Employer's Exhibits 3, 8.

<sup>19</sup> One of these charters appears to have been rescheduled, but it is included in the total number.

<sup>20</sup> The record does not indicate where in these towns the meetings were held.

<sup>21</sup> The record did not provide a date when this occurred.

the reminder with the threat that, if drivers continued to disregard this policy, they would face suspension or termination from driving for the Falmouth School Department. In a May 5, 2003 letter, Kennedy notified Boleyn that Falmouth driver Bob Locarni was using inappropriate language over the radio. He stated that this conduct would not be tolerated and asked Boleyn to speak with Locarni and have Locarni sign the letter, which was then to be returned to Kennedy. In addition, on December 10, 2003, Kennedy notified Boleyn that Falmouth driver Pete Nielson had violated the town's rules and, therefore, he was suspended for three days. Kennedy stated that if Nielson had any further disciplinary issues, he would be terminated as a driver for the Falmouth school system.<sup>22</sup> In all these instances, however, the driver is suspended or terminated only from working in that particular town or district.

### **Analysis**

It is well settled that a union need not seek to represent the most appropriate unit or most comprehensive unit, but only an appropriate unit. *Transerv Systems*, 311 NLRB 766 (1993); *Morand Bros. Beverages Co.*, 91 NLRB 409 (1950). In determining unit scope, the Board first considers the petitioning union's proposals. If the unit sought is appropriate, the inquiry ends. If it is inappropriate, the Board will scrutinize the employer's proposals. *Dezcon, Inc.*, 295 NLRB 109, 111 (1989).

In deciding whether a unit is appropriate, the Board weighs various factors, including differences or similarities in the method of wages or compensation, hours of work, employment benefits, supervision, working conditions, job duties, qualifications, training, and skills. The Board also considers the degree of integration between the functions of employees, contact with other employees, and interchange with other employees, as well as history of bargaining. *Overnite Transportation Co.*, 322 NLRB 723, 724, (1996), citing *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962). The petitioner's desire as to the unit is a relevant consideration, though not dispositive. *Florida Casino Cruises*, 322 NLRB 857, 858 (1997), citing *Airco, Inc.*, 273 NLRB 348 (1984).

I find that the unit, as petitioned for, of drivers who have permanent routes under the Falmouth contract, is inappropriate. Rather, I find that the smallest appropriate unit must also include all drivers who service the Bourne, Cape Cod Tech, and Mashpee contracts inasmuch as these drivers share such a community of interest with the petitioned-for Falmouth drivers that, without their inclusion, the sought after employees would constitute a unit fragment.

The Falmouth drivers who drive permanent routes do not have wages, benefits, hours, skills, duties, working conditions, seniority, or supervision unique to them.<sup>23</sup>

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<sup>22</sup> Boleyn testified that as the result of the above, he and Quinlan met with Kennedy and advised him that any driver discipline must emanate from them, not Kennedy. He testified that Kennedy has been adhering to this request. Boleyn could not recall the date of the meeting with Kennedy. He testified that it might have been in November of 2003, but after being shown Nielson's suspension, he said the meeting was after this discipline.

<sup>23</sup> As there is no history of collective bargaining, this factor is not a consideration.

### Common wages, hours, benefits, and working conditions

The Falmouth drivers with permanent routes receive the same wage rate, \$16.50 per hour, as spares who fill in on Falmouth routes and as the regular route drivers and spares who service the Bourne and Mashpee contracts. Any Falmouth driver who volunteers for charter work is paid the regular charter rate for that location. Further, the Falmouth drivers do not receive benefits that are not available to all drivers. All 59 East Falmouth drivers are eligible for \$35. monthly performance bonuses and a \$275 year-end performance bonus. These bonuses are part of the Employer's nationwide Performance Plus policy. All drivers are provided health and dental benefits as part of the Employer's nationwide corporate policy. All drivers are subject to the Employer's national policies for bonuses, benefits, work rules, and disciplinary procedures. All drivers are subject to the rules and regulations contained in the First Student National Employee Handbook.

All drivers are required to have the same skills, qualifications, and licenses. For the most part, all work the same hours. All perform the same duties. The Employer does maintain two separate driver/seniority lists, the Falmouth list and the Mashpee list, but the Mashpee drivers, not the Falmouth drivers, are the only ones with a separate list. The Falmouth list includes not only the Falmouth drivers, but also the Bourne and Cape Cod Tech drivers. Therefore, the Falmouth, Bourne, and Cape Cod Tech drivers have interchangeable seniority.

### Common supervision

Contracts Manager Boleyn is responsible for implementing the Employer's personnel policies, to include hiring, discharge, discipline, and assignment of all drivers. Out of his East Falmouth office, Boleyn controls the operations, billing, payroll, accounts payable and receivable, and the maintenance of the buses. For billing, payroll, accounts payable and receivable, and driver and seniority lists purposes, the five contracts are divided into two accounts.<sup>24</sup> Boleyn is the only manager responsible for the drivers assigned to Falmouth, Bourne, Mashpee, and Cape Cod Tech. He and Dispatcher Duarte are responsible for the day-to-day operations at these locations. Although it is not clear from the record whether Duarte is a statutory supervisor, she handles all of the dispatch duties and ensures that the routes and charters have coverage. There are no supervisors, dispatchers, or lead-type employees located at either the Catuamet/Bourne or the Forestdale/Mashpee lots.

The Petitioner argues against a finding of common supervision and, instead, asserts that each town/school district, by virtue of its contract with the Employer, exercises local autonomy over the drivers assigned to provide it with transportation. The contracts do specify the drivers' minimum hourly wage rate, but do not prohibit the Employer from paying its drivers more than that rate. In fact, the Employer does pay its drivers more than the rate set by the contracts. As such, the Employer has the "final say" over the compensation of its employees.

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<sup>24</sup> Despite the Petitioner's assertions, the Employer does not separate the drivers according to the five separate contracts for the purposes of accounting, including billing, payroll, accounts payable and receivable, or for seniority purposes. The parties stipulated, in fact, that the Employer maintains two accounts for these functions.

The rights retained by Falmouth, Bourne, Mashpee, and Cape Cod Tech in their contracts grant them considerable control over the Employer's drivers. This control is not sufficient, however, to be considered "local autonomy." In *Columbia Transit Corp.*, 226 NLRB 812, 814 (1976), the Board found that a state agency and school district did not sufficiently control a bus company's labor relations where the employer retained complete freedom in setting wages and benefits of its employees. It reached this conclusion notwithstanding the fact that the state agency and school district retained the authority to approve the hiring of drivers, to demand dismissal of drivers, to discipline drivers, to set qualifications for drivers, and to control the deployment of buses and equipment markings.

The cases cited by the Petitioner to support its assertion of local autonomy involve supervisors and/or managers of the employer exercising control over its employees. See e.g., *New Britain Transportation Co.*, 330 NLRB 397 (1999); *D & L Transportation, Inc.*, 324 NLRB 160 (1997). In contrast to the cases cited by the Petitioner, in *Dattco, Inc.*, 338 NLRB No. 7 (2002), the Board found that a unit limited to only one of nine bus terminals was not appropriate even though each terminal had a manager or dispatcher who had the authority to explain local rules to drivers, tell them where to park buses, and to issue initial oral warnings for attendance and tardiness. Instead, the fact that terminal managers could not hire employees or grant time off and only headquarters personnel could issue written warnings, suspend, or terminate employees were all factors that negated local autonomy sufficient to support a single terminal unit. Therefore, the complete absence of separate supervision or other oversight of the Falmouth drivers necessarily leads to the conclusion that no autonomy exists for them.

### Interchange

Although drivers assigned to drive for Falmouth, Bourne, Mashpee, and Cape Cod Tech have the option to bid on any open routes, there is no evidence of transfer of any permanent route assignments. Drivers assigned to Falmouth, Bourne, and Cape Cod Tech do provide charter services to Mashpee. In December 2003, non-Mashpee drivers drove 11 of the 23 charter routes. Participation in charter and shuttle trips is voluntary, however, and drivers must sign up to participate.

Drivers do fill in on open routes outside the town/school district to which they are assigned. In the month of December, eight of the Employer's 59 drivers drove for towns/school districts that they were not assigned to. Falmouth and Mashpee drivers have covered a route for Cape Cod Tech since November 11. Mashpee has had an open route since October 31 that Falmouth drivers have covered. Nevertheless, the Employer's evidence does not unambiguously establish the exact amount or consistency of temporary interchange. It is unclear from the record how many runs the drivers actually perform and how many actual runs were covered.<sup>25</sup>

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<sup>25</sup> In its post-hearing brief, the Employer asserts, citing its 2003 daily log, that there were 37 instances of interchange in December, 31 in November, 45 in October, and 27 in September. The Employer did not, however, list the specific names, dates, and routes from the log that support these numbers. Given the fact that Boleyn testified it would be difficult for an outsider to ascertain this information from the logs, these cited totals, without support, are of limited value.

### Contact Between Drivers

The Falmouth drivers do have some contact with other drivers. The East Falmouth lot is not used exclusively by Falmouth drivers, nor do all Falmouth drivers park at, and drive out of, the East Falmouth lot. Additionally, even though their jobs require them to be on the road transporting school children to and from school, they do report to and perform work where their bus is parked. Driver interaction may also occur at the Employer's monthly safety meetings, as drivers are free to attend either one of the two meetings held each month. All of the Employer's buses are maintained, serviced, and refueled at the Employer's East Falmouth facility.

I find that the petitioned-for unit of the Employer's Falmouth drivers who have permanent routes is inappropriate in that it is not a distinct and homogeneous grouping of employees whose interests are separate and distinct from the Employer's Bourne, Mashpee, and Cape Cod Tech drivers. Rather, the centralized control over daily operations and labor relations; lack of autonomy; common supervision; identical skills, duties, and other terms and conditions of employment; and contact among drivers require the conclusion that the Falmouth drivers' interests are effectively merged with those of the Bourne, Mashpee, and Cape Cod Tech drivers.

Although the parties did not take any official position at the hearing regarding the inclusion of the spare drivers, who are classified as regular spares, occasional spares, and trip spares, the record evidence is that the spares are paid the same rate, receive the same benefits, share common supervision, possess identical skills and qualifications, and perform the same duties as the regular drivers. The only difference is that they work only on an as-needed basis. Therefore, I find that any spare who regularly averages four hours or more per week for the last quarter prior to the eligibility date has a sufficient community of interest in the unit and may vote in the election. See *Davison-Paxson*, 186 NLRB 21 (1970).

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time bus drivers employed by First Student, Inc. out of its East Falmouth, Massachusetts facility and Catuamet/Bourne and Forestdale/Mashpee lots, but excluding all other employees, managerial employees, office clerical employees, guards, and supervisors as defined in the Act.

## DIRECTION OF ELECTION<sup>26</sup>

An election by secret ballot shall be conducted by the Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date, and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for purposes of collective bargaining by United Food and Commercial Workers Union, Local 328, AFL-CIO.

## LIST OF VOTERS<sup>27</sup>

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven days of the date of this Decision, two copies of an election eligibility list containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Regional Director, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received by the Regional Office, Thomas P. O'Neill, Jr. Federal

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<sup>26</sup> Because the unit found appropriate herein is significantly larger than the Petitioner's proposed unit, the Petitioner shall have a reasonable period of time, not to exceed 10 days from the date of this Decision, to submit additional evidence of interest in the unit found appropriate, unless a Request for Review is timely filed by the Petitioner, in which event the submission of the additional showing of interest will be due, if appropriate, 10 days from the date of the Board's action on the Request for Review. Should the Petitioner not wish to proceed to an election in the broader unit, it will be permitted, upon request, to withdraw its petition without prejudice.

<sup>27</sup> The Excelsior List may be used initially by the Regional Director in determining the adequacy of the showing of interest. The Regional Director shall make the list available to all parties to the election when she has made the determination that the Petitioner has made an appropriate showing of interest among the employees in the unit found appropriate.

Building, Sixth Floor, 10 Causeway Street, Boston, Massachusetts, on or before February 24, 2004. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by March 2, 2004.

/s/ Rosemary Pye  
Rosemary Pye, Regional Director  
First Region  
National Labor Relations Board  
Thomas P. O'Neill, Jr. Federal Building  
10 Causeway Street, Sixth Floor  
Boston, MA 02222-1072

Dated at Boston, Massachusetts  
this 17th day February, 2004.

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