UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

FIRST STUDENT, INC.

and **Case No. 3-CA-26811**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 294

Alfred Norek, Esq., Counsel for the General Counsel.
Thomas Walsh, Esq., Jackson, Lewis, LLP, Counsel for the Respondent.

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me on December 16, 2008[1] in Albany, New York. The Complaint herein, which issued on October 22, and was based upon an unfair labor practice charge and an amended charge that were filed on August 13 and September 17 by International Brotherhood Of Teamsters, Local 294, herein called the Union, alleges that on about July 28, First Student, Inc., herein called Respondent, unilaterally changed the existing practice and policy regarding the assignment of light duty work to employees with physical restrictions and, as a result, suspended the employment of Roger Zeller on July 28, and terminated Zeller on August 15, in violation of Section 8(a)(1)(5) of the Act.

Findings of Fact

I. Jurisdiction

Respondent admits, and I find, that it has been engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Labor Organization Status

Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Facts

The unit involved herein, and admitted to be an appropriate unit, is all full-time and regular part-time mechanics employed by the Respondent at its facility located in Catskill, New York, herein called the facility, excluding office clerical employees, managers, guards and all professional employees and supervisors as defined in the Act. Pursuant to an election conducted on October 24, 2007, the Union was certified as the exclusive collective bargaining representative of this unit on November 5, 2007. On October 1, 2007 there was a transfer of

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2008.

ownership of the facility, as well as other facilities owned and operated by Laidlaw Transit, Inc., herein called Laidlaw, from Laidlaw to the Respondent. Subsequent to this purchase, the Respondent agreed to honor the Board's certification. Respondent and the Union agreed to defer bargaining until May 6, although it did not actually begin until September 9; an agreement was reached on September 30 and was ratified on October 7. Prior to the negotiations, the parties exchanged proposals. The Respondent's proposals for maintenance technicians lists twelve "Job Responsibilities" the last of which is "Performs all other duties as assigned." In addition, "Job qualifications" includes: "Must be able to work in a crouched position or on back lying on mechanic's dolly beneath motor vehicle equipment; subjected to dust, dirt, and grease conditions." The Union's proposals did not include the subject of light duty; Rocco Losavio, Union business agent, testified that he didn't feel that it was necessary because he was under the impression that it was a long standing practice to accommodate employees with light duty, when needed.

Zeller began his employment with Laidlaw as a mechanic in 1994. After transferring to other facilities of Laidlaw, in about 2002 he was transferred to the facility where he was employed as the lead mechanic until his termination on August 15. He was one of three mechanics; there was also a foreman. The work of the unit employees at the facility involves mechanical repairs and maintenance of the approximately forty school buses and vans that are operated out of the facility, which is a garage containing six separate bays for the buses, one of which is a "pit" for observing, and working on, the underside of the vehicle. The other five bays are flat bays which allow the mechanics to work around and above, but not below, the vehicle. There are a number of operations performed by the mechanics at the facility. A-Service work refers to maintenance work performed on all of the Respondent's (and Laidlaw's vehicles previously) vehicles after a certain number of miles driven or time since the last A-Service inspection. It usually involves bringing the vehicle to the pit, where it is inspected top and bottom to determine whether any repairs are needed. Transmission service is also performed over the pit on a time or mileage basis. B-Service work is performed in any of the other five bays. In this service, parts, such as the wheels and brakes pads, are removed and inspected to determine whether they need replacements. Zeller's regular work hours were 6:00 a.m. to 2:30 p.m., but he usually worked about 2 ½ hours of overtime daily. In February, Zeller was asked if he would be interested in taking the foreman's position at the facility. He agreed to the new position with the understanding that if he didn't like the job, he could return to his lead mechanic position without the loss of benefits, and the Respondent agreed. He began working as foreman in March, remained in that position until mid-May, when he informed the Respondent that he was not happy in that position, and he returned to his prior job.

In October 2004, Zeller injured his right shoulder while at work and, as a result, was absent from work for about six weeks, during which period he collected Workmen's Compensation for the injury. The orthopedist who was treating him determined that the injury was unrepairable and evaluated him on May 12, 2005 for an "alternative work assignment" and "No overhead lifting." As a result, when he returned to work, Laidlaw put him on light duty. In that regard, he was able to perform most of the A-Service work, but was not able to perform any work that required carrying or lifting heavy objects. He was also able to perform auto-body work and replace the seats or seat covers on the buses. There were some jobs, such as repairing or replacing transmissions, where he could not perform the work on his own, but would assist one of the other mechanics performing the job. Shortly thereafter, Laidlaw asked him for another medical evaluation and this one, dated July 21, 2005, from the same orthopedist, states that there are no restrictions on what work he can perform; however, he continued to perform only light duty.

On April 12, 2007, while at home, Zeller fell off a ladder and landed on his left shoulder,

and was unable to return to work for six months. When he returned, Laidlaw again asked him for a doctor's evaluation, and the orthopedist completed an evaluation dated September 18, 2007 that states: "Return to light duty on 9/19/07." When he returned to work at that time, he returned to the light duty that he had been performing since his Workmen's Compensation injury. He testified that his work assignments did not change from the time of his initial injury in 2004 to July 28, except that after his 2007 injury, he was not allowed to drive a school bus, which he had done previously, three or four days a week when needed, for about an hour a day.

In mid-May, when Zeller left his position as foreman to return to being a mechanic, Dave Carmen, who had been a mechanic at the facility for about six years, became the foreman. On July 28, Carmen approached him at about 6:00 a.m. and told him that he received a call from someone named "Frank," from Respondent's management, saying that Zeller should be assigned to perform a B-Service on a big bus. Zeller testified that this was the first time that he was given a job assignment that came from someone other than his foreman and told Carmen that he knew that Zeller was not supposed to perform that work and that the Respondent had his doctor's letters spelling out the restrictions in the work that he could perform. Carmen said that they did not have the doctor's letters and Zeller said that he had the paperwork at home and if Carmen wanted it, he could get it for him. When Carmen said that he did, Zeller went home and gave Carmen the orthopedist's letters, and returned to his regular, and restricted, jobs. On the following morning, Carmen approached him again and gave him an evaluation sheet of the Respondent to be completed by his orthopedist. Zeller then went to his orthopedist for an examination and returned with the form dated August 4. For the different forms of activity involved with the job, the doctor wrote: "If he can't do it safely, then he should not do it." He also wrote that Zeller should not carry or lift anything heavier than fifty pounds, that there should be no overhead lifting, and that the restrictions are not temporary. Copies of this evaluation were given to Carmen and Dawn Kavanagh, Respondent's Contract Manager. After that, Zeller attempted to return to work on several occasions, but on each occasion, Carmen told him that "corporate" told him that he should not allow Zeller to return until they made a decision on his situation. On August 15, Zeller was given a letter from Kavanagh entitled: "Administrative Discharge," stating, *inter alia*:

> An employee who has a disability or illness, whether temporary or permanent, and is capable of performing the essential functions of the job, will be provided with reasonable accommodation to assist their performance of the required work, in a safe and efficient manner.
>
> During recent months, you have had a medical issue with the potential of affecting your job performance. For this reason, we asked that you request your medical provider to complete a medical information form, providing the detail regarding any possible limitations, or accommodations needed. This information has now been provided and given very serious consideration. Based on all information available at this time, it is First Student's understanding that you are unable to perform the essential functions of your job, with or without a reasonable accommodation, and that your condition is not expected to improve. For this reason, your employment with First Student will be administratively terminated.
>
> If sometime in the future your condition permits you to resume your work duties at First Student, you may of course apply for re-employment.

Zeller testified that prior to July 28 neither Laidlaw nor the Respondent had ever expressed concerns about his ability to work or that his work limitations were affecting the performance of the other mechanics, nor did they ever express any concerns about his physical

restrictions. Losavio testified that prior to the receipt of the Respondent's contract proposals, the Respondent had not told the Union that it had any concerns about the work performance of Zeller or any other employee, nor had the Respondent expressed concerns about accommodating restrictions on the work being performed by Zeller or the nature of the work assignments given to Zeller. The first that the Union learned of Zeller's termination was from Zeller; there was no prior notification from the Respondent. The Respondent never notified the Union that Zeller's work restrictions were causing problems in its operation, nor did the Respondent ever offer to bargain with the Union concerning the change in its practice of accommodating Zeller with respect to his job responsibilities.

D'Anna Soehnge, who is employed by the Respondent as Director of Human Resources for the Northeast Area, identified the Respondent's National Employee Handbooks effective July 2007 and July 2008.[2] They refer to a policy that Soehnge refers to as transitional duty, but the handbooks refer to as Return to Work, and the 2007 and 2008 provisions are identical:

> First Student maintains a commitment that employees injured on the job receive prompt quality medical care and return to work in a productive transitional duty capacity as quickly as they are medically able to do so.
>
> Should you sustain an injury while on the job, you must take the following steps…
>
> 8. Return to a regular or temporary transitional duty position when it is offered and your doctor allows it…
>
> Transitional duty is a temporary process (up to 90 days) that allows employees to remain productive in the workforce while they regain their full capacity during the recovery/ rehabilitation process. There are two types of transitional duties that allow for this process:
>
> 1. **Limited duty** allows for an employee to work in their original job with some limitation.
> 2. **Modified work** allows for an employee to work a position other than their normal position.
>
> **This return to work policy requires employees to:**
>
> return to work once they are medically allowed to do so, by a physician, to a job they are capable of performing.
> participate in this process to the best of their ability as a condition of employment.
> Sign an Employee Responsibility Form which indicates that the employee has received and understands this process.
>
> Employees that choose to not participate in this process will subject themselves to disciplinary action, up to and including termination…

Soehnge testified that at the end of the 2007-2008 school year, when preparing their budgets for the following school year, there was an indication that the Respondent needed to hire an additional mechanic at the facility even though they already employed three mechanics at that facility. She also determined that Zeller's "status was very unclear" in that although they were

[2] There is no evidence that these handbooks were distributed to the Union or to the mechanics at the facility.

aware that he was on restricted duty, they could not document what the restrictions were and whether it was a personal injury or if he was on Workmen's Comp. When she learned that it was not Workmen's Comp, she instructed Kavanaugh to give Zeller an Injury Prevention Form to be completed by his doctor. Zeller returned it to Kavanaugh, who faxed it to Soehnge and after receiving this form, she authorized Kavanaugh to send the August 15 termination letter to Zeller. She testified that after receiving the form completed by his orthopedist, the Respondent decided to terminate him because he was "…unable to perform the essential functions of his job and that we were going to terminate him administratively—an administrative termination which in our language means no fault, this isn't a performance issue."

IV. Analysis

It is alleged that on about July 28, the Respondent unilaterally changed its existing practice and policy regarding the assignment of light duty work to employees with physical restrictions and, as a result of this alleged change, the Respondent suspended Zeller on July 28 and terminated him on August 15 in violation of Section 8(a)(1)(5) of the Act. This is solely a unilateral change allegation; there is no allegation that this also violated Section 8(a)(3) of the Act.

The Union was certified as the collective bargaining representative of the mechanics at the facility on November 5, 2007, and the Respondent, which had purchased this and other facilities of Laidlaw, the predecessor employer, agreed to honor the certification. The evidence establishes that since late 2004 Zeller, who suffered a Workmen's Comp injury in 2004 and a non-work related injury in 2007, has been performing only light duty work with the approval of Laidlaw and, later, the Respondent. It is also clear that since late in 2004 Laidlaw and (since October 1, 2007) the Respondent have permitted Zeller to perform only light duty work at the facility, and that the Respondent was aware of this situation and, apparently, had no problem with Zeller's work performance, or his limited work responsibilities, having offered him the foreman job in February.

There can be little question that a restricted work schedule or light duty work is a mandatory subject of bargaining. *Jones Dairy Farm*, 295 NLRB 113 (1989); *Industria Lechera De Puerto Rico, Inc.*, 344 NLRB 1075 (2005) and that this subject is a substantial and material term and condition of employment. It certainly was for Zeller as it allowed him to continue working at the facility despite his disabilities. Further, it is no defense for the Respondent that it purchased the facility prior to the election. As the Board stated in *Mackie Automotive* Systems, 336 NLRB 347, 349 (2001): "It is well settled that an employer's past practices prior to the certification of a union as the exclusive collective bargaining representative of the employees do not relieve the employer of the obligation to bargain with the certified union about the subsequent implementation of those practices that entail changes in wages, hours, and other terms and conditions of employment of unit employees." Zeller had been allowed to perform light duty work since 2004, and continued to perform this work for the Respondent until July 28, and the change of ownership does not alter the legal obligations herein. Respondent also defends that when it assumed the operation of the facility, its terms and conditions of employment, including its transitional duty policy, kicked in and replaced Zeller's light duty job responsibilities. That would be true if, at that time, the Respondent presented the Union with these work rules and offered to bargain about them. It did not do so, however. What the Respondent did was to unilaterally notify Zeller that as of July 28 his light duty status was over, and on July 15 he was terminated. In doing so, the Respondent violated Section 8(a)(1)(5) of the Act.

Conclusions of Law

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

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

3. The Respondent violated Section 8(a)(1)(5) of the Act on about July 28, 2008 by unilaterally changing its existing practice as regards the assignment of light duty work to employees with physical restrictions resulting in the suspension of Roger Zeller on that day and his termination on about August 15, 2008, also in violation of Section 8(a)(1)(5) of the Act.

The Remedy

Having found that the Respondent violated Section 8(a)(1)(5) of the Act by unilaterally departing from its past practice of allowing employees with physical limitation to work light duty schedules, which resulted in the suspension and termination of Zeller, I recommend that the Respondent be ordered to rescind the change instituted on about July 28, 2008 and, upon request of the Union, bargain in good faith on this subject. I also recommend that the Respondent be ordered to offer Zeller immediate reinstatement to his former position of employment or, if that position no longer exists, to a substantially equivalent position, and to make him whole for any loss of earnings and other benefits that he suffered as a result of the change, as set forth in *F.W. Woolworth Co.*, 90 NLRB 289 (1050), along with interest as computed in *New Horizons for the Retarded*, 289 NLRB 1173 (1987).

Upon the foregoing findings of fact, conclusions of law and the entire record, I hereby issue the following recommended

ORDER[3]

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

1. Cease and desist from

(a) Unilaterally changing the terms and conditions of employment of its mechanics employed at its Catskill, New York facility, without prior notice to, or bargaining with, the Union.

(b) Suspending or terminating employees pursuant to a unilateral change in the terms and conditions of employment of its mechanics at the facility.

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

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

---

[3] 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.

(a) Rescind the unilateral change made on about July 28, 2008 regarding light duty work for employees with physical limitations, and notify the Union that it has done so and that, upon request, it will bargain in good faith with the Union about this subject.

(b) Within 14 days from the date of this Order offer Zeller full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Make Zeller whole for any loss of earnings and other benefits suffered as a result of his suspension and termination, in the manner set forth above in the Remedy section of this Decision.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful termination and discharge of Zeller, and within 3 days thereafter notify Zeller and the Union, in writing, that this has been done and that the discharge will not be used against him in any way.

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

(f) Within 14 days after service by the Region, post at its facility in Catskill, New York, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 28, 2008.

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

Dated, Washington, D.C., February 4, 2009.

Joel P. Biblowitz
Administrative Law Judge

[4] 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."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT unilaterally change the terms and conditions of employment of our mechanics at our Catskill, New York facility, without first bargaining, or offering to bargain, with International Brotherhood of Teamsters, Local 294 ("the Union") and **WE WILL NOT** suspend, discharge or otherwise discriminate against employees due to this unilateral change in the terms and conditions of their employment.

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

WE WILL rescind the unilateral change that we made in the terms and conditions of employment of the mechanics by eliminating light duty work for employees with physical limitations and **WE WILL** offer Roger Zeller immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without loss of seniority or any other rights previously enjoyed and **WE WILL** make him whole, with interest, for any loss of earnings or other benefits that he suffered.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspension and discharge of Zeller, and **WE WILL**, within 3 days thereafter, notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

FIRST STUDENT, INC.
(Employer)

Dated_____ By_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

111 West Huron Street, Federal Building, Room 901

Buffalo, New York 14202-2387

Hours: 8:30 a.m. to 5 p.m.

716-551-4931.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 716-551-4946.