UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of

COLUMBIA COLLEGE CHICAGO,

Respondent,

and **Case 30-CA-18888**
(formerly 13-CA-46562)

THE PART-TIME FACULTY ASSOCIATION AT COLUMBIA COLLEGE CHICAGO, IEA-NEA,

Charging Party

COLUMBIA COLLEGE CHICAGO'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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The Part-Time Faculty Association
at Columbia College Chicago,
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COLUMBIA COLLEGE CHICAGO'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Respondent, Columbia College Chicago (the "College"), submits this brief in support of its exceptions to the Administrative Law Judge's Decision.

STATEMENT OF THE CASE

On May 9, 2011, Charging Party, The Part-time Faculty Association at Columbia College Chicago – IEA/NEA ("P-Fac" or the "Union"), filed an amended unfair labor practice charge against the College alleging 36 separate violations of the National Labor Relations Act ("Act"). Just five of those allegations survived Region 30's investigation, one of which was settled and another of which was dramatically narrowed in scope when the General Counsel ("GC") moved to amend the complaint on the first day of trial.[1] In the amended complaint, the GC alleged that beginning in November 2010, the College violated Sections 8(a)(1) and (5) of the Act by failing and refusing to bargain with P-Fac over the effects of a "change . . . announced and subsequently implemented" in the Department of Humanities, History and Social Sciences ("HHSS"), "limiting the number of classes Unit employees could be assigned to teach per semester" (Tr. 10-

[1] The Union objected to the GC's motion to amend, arguing for a much broader theory of the alleged unlawful change. The ALJ nevertheless granted the motion, explaining that the GC is the master of the complaint (Tr. 10-15).

15; GC Ex. 1-N; Amended Complaint, ¶9(a)). The GC further alleged that the College violated the Act by failing or refusing "timely and/or adequately" to supply the Union with information relating to the alleged class-assignment limitation in response to requests dated December 15 and December 20, 2010 (Amended Complaint, ¶¶7, 8, 13). Finally, the GC alleged that the College violated Section 8(a)(1) by threatening not to "meet informally with Union representatives to discuss individual matters…" in January 2011 (Amended Complaint, ¶¶ 10, 11).

The College timely answered and denied all substantive allegations. On February 6-8, 2012, Administrative Law Judge Robert A. Ringler ("ALJ") conducted the hearing in this matter, after which all parties filed post-hearing briefs.

On July 17, 2012, the ALJ issued his Decision and Order ("ALJD"). He ruled that the College did not threaten the Union in violation of Section 8(a)(1) (ALJD at 12-13). However, he further ruled that the College violated Sections 8(a)(1) and (5) by failing to respond to parts of the Union's December 15 information request and by responding later than it should have to the December 20 request (ALJD at 13-14). Finally, although the ALJ did not find that the College had implemented any limitation whatsoever on the number of classes unit employees could be assigned to teach, he nevertheless ruled that it violated Section 8(a)(5) by failing to bargain over the effects of "its decision to modify the rollover scheduling system in HHSS" (ALJD at 15-16), which was a "change" alleged in P-Fac's 36-count amended unfair labor practice charge but *not* in the GC's complaint or amended complaint.

As to remedy, the ALJ ordered the College to provide the Union with the information it had requested and, upon request, to bargain with the Union over the effects of its decision to change the rollover scheduling system for part-time faculty in HHSS (ALJD at 17-18). He further ordered a *Transmarine* remedy which requires the College to pay *all* HHSS unit

employees the value of a three-credit course "when last in the College's employ from 5 days after the date of the Board's decision and order," until the occurrence of one of the standard *Transmarine* conditions (ALJD at 18). While ostensibly rejecting the GC's request for "treble" *Transmarine* damages (ALJD at 18, n. 36), the ALJ nevertheless ruled that the back pay amount to each HHSS employee "shall not exceed the monetary value of a three credit course from November 3, 2010 … until the date on which the College shall have offered to bargain in good faith. However, in no event shall the sum paid to any employee be less than the monetary value of a 3-credit course to that employee for a 2-week period" (ALJD at 18).

The College now appeals the ALJ's rulings against it, as well as the remedy ordered.

STATEMENT OF FACTS[2]

I. The Parties

Columbia is a private college focusing on media and the arts, located in Chicago, Illinois. It operates on a traditional semester system, with its basic academic year consisting of fall and spring semesters (Tr. 334). The College is comprised of three schools – Media Arts, Liberal Arts & Sciences, and Fine & Performing Arts – within which there are 23 academic departments. The schools are run by deans; the departments by chairs (Tr. 335-36). HHSS is in the School of Liberal Arts & Sciences (Tr. 426-27; Resp. Ex. 1). The College employs both full-time and part-time or adjunct faculty. The adjuncts, of which there are about 1,300, are represented by P-Fac (Tr. 337-39). Approximately 129 of these (roughly 10%) received teaching assignments in HHSS during the 2010-11 academic year (Resp. Exs. 6-8).

II. The Parties' Collective Bargaining Agreement

The parties' collective bargaining agreement ("CBA"), which was due to expire on August 31, 2010 (GC Ex. 2), was instead extended indefinitely by agreement of the parties

[2] The ALJ found that the "majority of controlling facts are undisputed" (ALJD at 2).

pending their successful negotiation of a successor (Tr. 166). As of the date of the hearing the CBA remained in effect (Tr. 93, 257-58, 339, 346).

The CBA grants broad authority to the College. Under Article II of the CBA – Management Rights – the College has retained "sole discretion" to exercise a host of rights (GC Ex. 2, p. 2). Among them are the rights to determine what courses to offer, to schedule them, and to assign them to faculty to teach. Specifically, the College has "sole discretion . . . to plan, establish, terminate, modify, and implement all aspects of educational policies and practices, including curricula . . . scheduling . . . and the establishment, expansion, subcontracting, reduction, modification, alteration, combination, or transfer of any . . . course . . . or other activity and the staffing of the activity, except as may be modified by this Agreement" (GC Ex. 2, Art. II(A), p. 2). Moreover, the College has the right to "hire," "assign," "terminate," "appoint," and "reappoint" adjuncts, as well as the right to "establish, modify, and discontinue. . . policies . . . and practices relating to the performance of work, including workload [and] scheduling of work . . . except as may be modified by this Agreement" (GC Ex. 2, Art. II(C), p. 2). Indeed, under Article VII of the CBA, "[t]he final decision of who teaches each course is the sole prerogative of the department Chairperson" (GC Ex. 2, Art. VII(2), p. 9; Tr. 338). As P-Fac acknowledges on its website, part-time faculty are contingent employees who work at the pleasure of the College from semester to semester: "The bad news: we are contingent faculty; that is, our jobs are contingent upon the College's need and desire for our services from semester to semester" (Resp. Ex. 21, p. 1, first paragraph).

The CBA specifically addresses the effects or impact of workload reductions on unit members. That is, under certain limited circumstances, members with 51 or more accumulated credit hours who have not been assigned a class they have "routinely taught" are entitled to

"instructional continuity" (GC Ex. 2, Art. VII(2), pp. 8-9). If several conditions are met, the member may bump another adjunct with fewer than 21 accumulated credit hours out of a course he or she has been assigned to teach (GC Ex. 2, Art. VII(1), p. 8). However, *no unit member who has already been assigned two courses has any bumping right whatsoever* (GC Ex. 2, Art. VII(1), p. 8). Unit members are limited to teaching a maximum of 18 credit hours per academic year and 12 credit hours per semester (GC Ex. 2, Art. VIII(5), p. 11).

In Article XIV – Entire Agreement – the parties agreed that they each had the opportunity during negotiations to make demands and proposals on any subject and that the CBA itself was the sole agreement between them regarding wages, hours, and other terms and conditions of employment (GC Ex. 2, Art. XIV, p. 15).

III. Student Enrollment and Course Offerings

Student enrollment at the College fluctuates, with fall semester always having higher enrollment than spring semester. Student needs drive scheduling, so when enrollment is down, the College offers fewer course sections. Conversely, when enrollment is up, it offers more (Tr. 340, 378-82). Since spring semester 2005, the College has offered as few as 2,341 undergraduate course sections and as many as 3,136, more than a 25% variation (Resp. Ex. 2). There have always been fewer courses offered in the spring than in the fall, due to enrollment being lower in the spring (Tr. 341; Resp. Ex. 2). Accordingly, there have always been fewer teaching opportunities for part-time faculty in the spring than in the fall (Tr. 342). The College has never negotiated these changes or their effects with P-Fac (Tr. 340).

From fall semester 2010 to spring semester 2011, undergraduate student enrollment dropped from 11,400 to 10,471, slightly more than 8% (Tr. 343; Resp. Exs. 3, 4). Over the same

time period, the number of courses offered in HHSS dropped from 302 to 261, about 13.5% (Resp. Ex. 2).

IV. Scheduling in HHSS

A. HHSS Leadership

Dr. Cadence Wynter, Interim Chair of HHSS at the time of the hearing, began working in the department in 1995. In 1996, she became a full-time, tenure-track professor of history. In 2000, she was awarded tenure and also assumed administrative duties as Coordinator in the history division of the department (Tr. 426-27). She continued as Coordinator until 2006, when she became the Associate Chair of the department. In August 2010, she became the Acting Chair after the Chair, Dr. Lisa Brock, commenced a one-year sabbatical/leave of absence. In spring 2011, when Brock resigned from the College after her sabbatical, Wynter became the Interim Chair (Tr. 83-84; 427-28). Brock held the position of HHSS Chair from 2003 to 2011, but she was not involved in the administration of the department after August 2010 (Tr. 41, 84).

B. Teaching Availability and Teaching Assignment Forms

Every semester, adjuncts who wish to teach the following semester complete a "teaching availability form," indicating their preferences and availability (Tr. 431). Per the CBA, the availability forms must include the following language: "Submission of this form constitutes a request, not a guarantee, of teaching assignment. Further, since course enrollment and program needs, as well as your qualifications and evaluations, determine teaching assignments, no assignment can be considered final until student registration is completed" (GC Ex. 2, Art. VII(4), p. 10). The forms used in HHSS for fall semester 2008 through spring semester 2011 actually contained a variation on this language. The form for fall semester 2008 contained the following statement: "We will try to honor your choices but **cannot guarantee anyone a particular** schedule" (CP Ex. 1, p. 1 (emphasis in original)). The forms used for spring semester

2009 through spring semester 2011 stated: "Please note that we **cannot** guarantee anyone a particular schedule or room assignment but we will try to honor your requests (CP Ex. 1, pp. 3, 5, 7, 9 (emphasis in original)). At some point during fall semester 2010, Wynter noticed that the forms that HHSS had been using did not contain the language required by the CBA, so she directed that the form be modified to include the required language (Tr. 536-38). The form currently in use complies with the CBA (Tr. 536; GC Ex. 8, p. 2).

After the schedule is set, a "teaching assignment form" goes out to each part-time faculty member who has been assigned to teach a course or courses that semester, listing their assignments (Tr. 57-58; CP Ex. 1). Even then, however, their assignments are not set in stone (Tr. 481). Rather, in the letters themselves, adjuncts are warned that, "As always, assignments are contingent on sufficient enrollment. In the event that one or all of the classes listed below are cancelled, you will receive the $100 cancellation fee per course as defined in the P-Fac agreement" (Tr. 86; CP Ex. 1, last page).

C. Scheduling During Wynter's Tenure as Coordinator

As Coordinator in the history division of HHSS from 2000-2006, Wynter was responsible for scheduling, including assigning both full and part-time faculty to teach courses offered in the division (Tr. 428-29). She assigned full-time faculty to their courses first, and then assigned part-time faculty to the courses that remained (Tr. 429). When assigning courses to adjuncts, she considered their qualifications, students' needs, the curriculum, and the schedule. She also considered adjuncts' preferences, within the confines of what they had been hired to and were qualified to teach (Tr. 430). Wynter did not assign part-time faculty to any particular number of courses, and did not consider their accumulated credit hours in making assignments (Tr. 432). As she testified, "[f]or the part-time faculty, nothing's guaranteed" (Tr. 440).

D. Scheduling During Brock's Tenure as Chair

Brock testified that starting in about 2006 – just four years before the events at issue in this case – HHSS began using a "rollover" system for scheduling (Tr. 50). That is, when directed to do so by the dean, the department used the schedule from the same semester the previous year (spring to spring and fall to fall) "as a template with which to build the current schedule[ ]," repeating many of the same course offerings *but also making changes that were needed to update it* (Tr. 49). The schedule was developed to serve student needs: "We wanted to make sure that there were enough history courses, enough humanities courses, enough social sciences courses, and enough diversity for students to take" (Tr. 49). For a spring semester, the "rollover" generally occurred mid-way through the previous fall semester (Tr. 52).

Indeed, Brock recalled that there were many changes to the scheduling process over her time as Chair of HHSS (Tr. 52). Another big change was the implementation of universal or uniform start times for courses (Tr. 49), which became effective fall semester 2008 (*see* CP Ex. 1, p. 1 ("Columbia has officially moved to Uniform Start Times")). The teaching availability forms also changed. The form for fall semester 2008 went to adjuncts with the courses they had taught the previous fall semester rolled over, *i.e.,* already printed on the form (Tr. 54-55; CP Ex. 1, p. 1). The form for spring semester 2009, in contrast, went to adjuncts blank with instructions to "list the courses and times you wish to teach. Please **only** list courses you are currently approved to teach" (Tr. 59; CP Ex. 1, p. 3 (emphasis in original)). None of these changes or their effects was negotiated with P-Fac (Tr. 84-85).

In about 2006, the teaching load for full-time faculty changed from four courses per semester to three, leaving more courses available for part-time faculty to teach (Tr. 429-30). At about the same time, department chairs were notified that they could assign up to three courses per semester to adjuncts, whereas previously, the administration "didn't want adjuncts to teach

three [fall semester] and three [spring semester] or 18 credit hours" in an academic year (Tr. 67). Brock embraced this change and began to try to give experienced adjuncts three courses per semester (Tr. 68). However, she never considered it mandatory that she do so (Tr. 63). Rather, "when the numbers went up and when we needed more classes, it was important for me . . . to give adjunct faculty three classes each semester if in fact they were qualified and they could do that and they had expertise in that area *and we needed them to teach*. So, that was my policy and practice, to give up to the three classes each semester *if in fact we need[ed] them to teach that*" (Tr. 64 (emphasis supplied)).[3]

In 2008, HHSS went from using three Coordinators for scheduling to using a single Academic Manager, Tomiwa Shonekan (Tr. 70, 84). Shonekan first did the scheduling for fall semester 2008 (Tr. 84). Brock directed him to schedule according to her policies and practices, as set forth above (Tr. 73).

E. Scheduling for Spring Semester 2011

Wynter took over the duties of the HHSS Chair in August 2010 when Brock commenced her sabbatical (Tr. 427-28). Almost immediately, a number of part-time faculty complained to Wynter that courses to which they had been assigned for fall semester were cancelled over the summer, primarily due to low enrollment but also because too many courses had been offered in the first instance and on the wrong days of the week and times of day. Ultimately, about 40 courses had to be cancelled, which was very upsetting and disruptive to faculty as well as to students, who then had to find other courses to fit into their schedules (Tr. 435-37, 468). Brock testified that in a typical semester, only five to 10 courses were cancelled (Tr. 79).

[3] According to P-Fac's website, the "norm" has been for the College to assign experienced faculty *two* courses per semester. In the same publication, however, P-Fac acknowledges that many chairs and other administrators have taken the position that no faculty member, regardless of "seniority," is entitled to what P-Fac perceives to be the "norm" (Resp. Ex. 21, p. 2, first paragraph).

After looking into the matter, Wynter determined that HHSS had lost control of the schedule, primarily due to Shonekan's poor performance (Tr. 436).[4] To avoid a repeat of the fall 2010 course-cancellation fiasco, Wynter determined to tie the schedule for spring semester 2011 more closely to student enrollment, as she had done in the past when she was in charge of scheduling.[5] In her view, this was not so much a "change" as simply getting back to the way scheduling had been done for many years before Shonekan was hired just two years previously in 2008 (Tr. 438, 441, 467-68). Specifically, she decided that for the 40 or so adjuncts who had requested to teach three courses (some of whom had taught three in the past, some of whom had not (Tr. 534)), they would be assigned only two in the first instance. The third course would he "held" (meaning that it was visible to faculty on OASIS, the College's computerized scheduling system, but was not visible to students and could not be registered for (Tr. 442)), and then "released," if possible, as student enrollment justified it (Tr. 438-40, 42). The initial round of assignments occurred in early November 2010 (Tr. 441). Then, over the next two and one-half months[6] as courses were released, 22 of the adjuncts who had requested a third course were assigned a third (Tr. 442-43). Wynter announced this "change" to part-time faculty in a November 3, 2010 email (Tr. 462-63; GC Ex. 5). She wrote:

> This is to inform you of schedule changes for spring semester 2011.
>
> Adjunct faculty members in [HHSS] will be scheduled for a maximum of two classes next semester. Adjunct faculty members who indicated that they are available to teach a third class will only be assigned a third class as and if student enrollment deems this necessary. As we are all aware, no teaching assignment is guaranteed and [quoting from the CBA,] 'no assignment can be considered final until student registration is completed.'

[4] Indeed, Shonekan was terminated in early February 2011 for poor performance, including the mess he had made of scheduling (Tr. 437-38).
[5] The ALJ credited Wynter's testimony regarding her scheduling practices (ALJD at 4-5).
[6] Spring semester 2011 began on January 24, 2011 (Tr. 443).

She decided to send the email because she knew that the schedule for spring semester 2011 had been mounted and was visible to faculty on OASIS and that faculty would see that their third course was being held, so she wanted to explain to them what was happening (Tr. 463-64). As it turned out, some courses were held for just a day or a week after Wynter's email (Tr. 535).

Wynter received a number of complaints about the email from part-time faculty. Based on their complaints, she realized that many had misunderstood it as announcing a two-course maximum for spring semester 2011. In fact, the email specified that a third course would be assigned "as student enrollment deems it necessary," belying any notion of a two-course maximum (Tr. 464-65). She clarified this for the faculty many times, to the point where "[i]t seemed as though [she] kept saying the same thing over and over again" (Tr. 465).

On November 9, 2010, Wynter met with P-Fac representatives John Stevenson, MaryLou Carroll, and Janina Ciezadlo about the email's contents at Stevenson's request (Tr. 465). Wynter went through the email line by line, explaining what she had decided to do and her rationale for it. She explained the scheduling debacle for fall semester 2010 (they did not seem to be aware of it) and told them she did not want to repeat it by offering too many courses for spring semester 2011 that would then have to be cancelled. She explained that the schedule had to be more closely tied to student enrollment as it had been in the past, before Shonekan was hired (Tr. 466-67). In particular, she clarified the "widespread misunderstanding that no one would receive three classes to teach" (Tr. 466).

Ultimately, 22 adjuncts received a third assignment for spring semester 2011 (Tr. 443; Resp. Exs. 6, 8). Of the 18 or so who had requested, but not been assigned a third course, only 12 of them had taught a third course during fall semester 2010 (Andress, Beecham, Bond, Carroll, Gibson, Griffith, Grossman, Kollenbroich, Kveberg, Powell, Soro, and Tafel) (Tr. 443; Resp.

Exs. 6, 7). Of these 12, six (Bond, Gibson, Griffith, Kveberg, Powell, and Soro) had not consistently been assigned a third course (or even a first or second) anyway, for the several academic years preceding 2010-2011 (Resp. Exs. 16, 17). Of the remaining six adjuncts, three (Andress, Kollenbroich, and Tafel) actually turned down a third course assignment for spring semester 2011 (Tr. 460-61; Resp. Exs. 9-11). Consequently, at most, three adjuncts (Beecham, Carroll, and Grossman) who were "used to" receiving three courses per semester were adversely affected by Wynter's "change" in scheduling procedures – just three of the 129 (2.3%) who taught in HHSS during academic year 2010-2011 (Resp. Exs. 6-8).[7]

V. Effects Bargaining/Grievance Processing

A. P-Fac's December 15, 2010 Demand for Bargaining

In a December 15, 2010 letter addressed to Dr. Louise Love, the College's Vice President of Academic Affairs, Barry Tusin of the IEA contended that there had been "widespread course reductions" in two departments, including HHSS, and requested to "bargain over the impact of the changes" on bargaining-unit members (GC Ex. 27). In a November 5, 2010 email addressed to Love, Dave Walter of the IEA had previously requested a meeting to "discuss the two class restriction imposed . . . in HHSS and Marketing," along with an emergency-procedures issue, but P-Fac had not previously requested *bargaining* over the class-assignment issue (GC Ex. 26). At the time of her email communication with Walter in November, Love was not sure what Walter meant by a two-class restriction (Tr. 350), so she asked for clarification, which he provided on November 7 (GC Ex. 26). Shortly afterwards, however, Walter left the IEA and Love did not hear from him again, so they did not meet.[8] Neither Walter's email nor Tusin's letter so much as

[7] Of these three, only Carroll testified at the hearing. The record contains no evidence regarding what Beecham and Grossman were "used to" or what their expectations were for spring semester 2011.

[8] Walter was replaced on a temporary basis by Tusin, who in turn was replaced after a short time by Bill Silver (Tr. 169-70).

mentioned the rollover scheduling system, much less demanded bargaining over any supposed change to it (GC Exs. 26-27).

B. December 17, 2010 Bargaining Session

The parties had a pre-scheduled bargaining session on December 17, 2010, and Tusin's request for bargaining was discussed at that meeting. The issue came up in a "roundabout" way, with Diana Vallera, P-Fac's President and primary spokesperson, deviating from the agenda (Tr. 606-07). Vallera began talking about some "senior" P-Fac members who were not getting classes they wanted (Tr. 606-07). This struck a chord with Annice Kelly, the College's General Counsel and a member of its bargaining team, because she was aware of various communications from Vallera to department chairs and to Love in November and December, discussing her dissatisfaction with the course assignments given (or not) to particular individuals (Tr. 596-600, 607; Resp. Exs. 29 (earliest e-mail in thread) and 30). After much discussion on this topic, it occurred to Kelly that perhaps Vallera was talking about the issue raised in Tusin's letter, although Vallera never said so (and neither did Tusin, although he attended the bargaining session). Rather, for reasons not explained, P-Fac left it to the College's bargaining team to "make the connection" between Vallera's concerns about "senior" P-Fac members' course assignments and the Union's demand for bargaining (Tr. 607). Shortly after Kelly made the connection, she called a caucus to inform the rest of her bargaining team what she believed Vallera was talking about (Tr. 608).

Upon returning from the caucus, Love, also a member of the College's bargaining team, asked P-Fac if they were talking about Tusin's bargaining demand.[9] P-Fac confirmed that they were, and stated that they believed the matter was urgent and had to be resolved immediately

[9] The Union's bargaining notes confirm that Love was the first to mention Tusin's letter across the table at the December 17, 2010, session, and that she did so after a caucus (GC Ex. 29, p. 2).

(Tr. 608-09). The College responded that it was not prepared to address Tusin's demand at that session, as it had just received his letter. However, due to P-Fac's protestations that the matter had to be addressed immediately, Love offered to make P-Fac liason Susan Marcus available to discuss it at some point before the holiday break, despite Marcus' already-jammed schedule (Tr. 175, 609-10). Moreover, the College agreed to place the matter on the agenda for the first bargaining session after the holidays, which was January 13, 2011 (Tr. 572, 610; Resp. Ex. 14). In fact, on December 20, 2010, Javier Ramirez, the FMCS mediator assigned to facilitate the negotiations, distributed an agenda for the January 13 bargaining session that listed "Scheduling (Affects[sic] Bargaining)" as the first item to be discussed (GC Ex. 32). The record does not reveal any reference to an alleged change to the rollover system at the December 17 meeting.

C. December 21, 2010 Meeting

On December 21, 2010, Marcus met with P-Fac, as requested by Love (Tr. 387). The day before, she had received a grievance and information request from P-Fac relating to the same subject as Tusin's letter, *i.e.*, an alleged two-course limit in HHSS (Tr. 386; GC Exs. 14, 15). Again, neither the grievance nor the accompanying information request referred to any alleged change to the rollover system.

At the meeting, Marcus asked the P-Fac representatives about their concerns. Silver answered by asking her what she knew about a two-course limit for part-time faculty in HHSS. Marcus responded that she had no knowledge of such a limit and explained that chairs determine assignments based on student needs and enrollment (Tr. 180-81, 388). The P-Fac representatives replied that they did not believe her and that she was not being truthful (Tr. 389). Silver stated that in P-Fac's view, part-time faculty with 51 or more accumulated credit hours (P-Fac called them "senior" faculty, although the CBA does not mention seniority) should receive assignments to teach three courses if they want three assignments, before faculty with fewer accumulated

credit hours receive any assignments at all. Marcus answered that the College had never operated that way (Tr. 393). Rather, she explained, course assignments are based on student needs and enrollment and teacher qualifications (Tr. 393). In response to Marcus' queries about which provisions of the CBA they believed were violated, the P-Fac representatives simply reiterated that faculty who wanted three courses should have received three (Tr. 393-94). Carroll testified that the meeting took about an hour (Tr. 152). Again, the record does not reveal any reference to the rollover system at the December 21 meeting.

After her meeting with P-Fac, Marcus spoke with Wynter about P-Fac's concerns. Wynter told Marcus that there was no two-course limit in HHSS. To the contrary, Wynter explained, she expected that several faculty members would receive a third course assignment prior to the beginning of spring semester, as student enrollment allowed (Tr. 394-95). After completing her investigation of P-Fac's grievance, Marcus denied it by letter dated January 13, 2011 (Tr. 395; GC Ex. 31). Marcus denied the grievance because there was no two-course limit in HHSS but even if there were, it would have been well within the HHSS Chair's prerogative under the CBA to impose it (Tr. 395-96).

D. January 13, 2011 Bargaining Session

The parties bargained as scheduled on January 13, 2011 (Tr. 575, 611). According to notes taken by both Silver and John Wilkin, a member of the College's bargaining team, they discussed the class-assignment issue at length.[10] Wilkin's notes reflect that Silver began the

[10] In contrast to Silver's notes, Stevenson's bargaining notes from January 13, 2011, indicate little to no discussion of the class-scheduling issue (Resp. Ex. 24). Indeed, Stevenson testified at trial at "there was no discussion of that issue" on January 13 (Tr. 124). In his affidavit given during the course of the Region's investigation of the underlying unfair labor practice charge, Stevenson similarly testified that "[t]he question of class reductions in the HHSS department and class reductions in general was raised by the Union, but the time for the session had almost expired so it was not discussed at this session" (Tr. 124). Silver's notes and testimony, as well as Wilkin's, establish that Stevenson's testimony was not truthful. The Union's "official" bargaining notes (Tr. 260-61) for January 13, 2011, are not helpful on this point as they are incomplete. P-Fac's first notetaker, "Christina" or "CG," apparently left the session before the class-scheduling issue was discussed (GC Ex. 33(a) ("CG – had to leave. End of notes but

discussion by stating that courses had been reduced in some departments and that P-Fac wanted information in order to bargain over the impact of the reductions. He asked whether faculty with more than 51 accumulated credit hours lost any courses and whether the course reductions were similar to a layoff (Tr. 577; Resp. Ex. 15, p. 1). Someone on the College's bargaining team apparently answered "no" (Resp. Ex. 15, p. 1).

Love stated that the College needed to know what P-Fac's specific issue was if the parties were going to bargain about it (Tr. 577; Resp. Ex. 15). Kelly testified that the College was confused because the "issue" had been articulated in different ways at different times. Was it that a two-course limit had been imposed or was it P-Fac's often-articulated wish that classes be assigned according to "seniority"? (Tr. 612-17). Silver confirmed that the College seemed not to understand what the Union's issue was and that Kelly asked a number of questions in an effort to figure it out. For example, he recalled that she asked whether the Union's issue was "connected with employees with 51 or more credits and their claims to . . . class assignments" (Tr. 190).

In response to Love's inquiry, Silver stated his view that any reduction in work for unit members was subject to bargaining (Tr. 577-78; Resp. Ex. 15, p. 1). After some discussion about an email from Dean Nichols of the School of Fine & Performing Arts (which does not include HHSS)(CP Ex. 3), the Union referred to Wynter's November 3, 2010 email to part-time faculty (Tr. 236; Res. Ex. 26, p. 4), with Stevenson noting that some courses in HHSS had been "restored" (Tr. 237). Finally, the Union stated that based on anecdotal reports from members, they believed something similar to what was supposedly happening in HHSS might also be happening in another department (Tr. 238-39; Resp. Exs. 15, p. 1 and 26, p. 4).

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meeting continued. See Jason's notes.")). Jason Halprin's notes appear to be missing a page (or more), given that page 2 of GC Ex. 33(b) starts in the middle of a sentence about the class-scheduling issue.

After a caucus, the College asked P-Fac whether it had any proposals on the class-limitation issue; the Union responded that it did not because it had not received the information it had requested from the College (Tr. 239-40; Resp. Ex. 26, p. 5). Stevenson then relayed the information he and the other P-Fac representatives had been given by Wynter during their November 9, 2010 meeting with her, including that a faculty member's third course could be restored if others "filled up," that too many courses had been offered in the past, and that Wynter believed that holding third courses pending enrollment was a "fair way to do it" (Tr. 241-43; Resp. Ex. 26, p. 5). Someone from the College confirmed that additional course sections might be opened up (Tr. 244; Resp. Ex. 26, p. 5). Kelly then asked some questions in an attempt to nail down what P-Fac's concerns were, including what departments were at issue and who had been affected by the "change" (Tr. 190, 245). Silver acknowledged that P-Fac did not give the College any specific information on these topics, explaining, "It wasn't like we were withholding information . . . but we just didn't know who was affected, how many, you know, all that" (Tr. 190). Once again, the record does not reveal any discussion whatsoever about an alleged change to the rollover system.

E. January 21, 2011 Bargaining Session

The class-ssignment issue was placed on the agenda for the parties' next bargaining session on January 21, 2011 (Tr. 579-80, 618; Resp. Ex. 22 ("2. Scheduling/Assignments (Effects/Impact bargaining)"). The College went to that session prepared to discuss it, but the Union wanted to deviate from the agenda and talk about another issue they deemed to be more urgent, which Silver recalled involved a "very particular instance of somebody who the union believed should have been able to bump" (Tr. 192, 582-84, 618-19; Resp. 15, p. 2).[11] Due to P-

[11] P-Fac's bargaining notes confirm that Silver raised an issue not on the agenda (GC Ex. 34(a) ("DV: Bill do you want to introduce the issue that is separate from bargaining?"); GC Ex. 34(b) ("Bill: There's another issue to

Fac's preferences, the parties did not discuss the class-assignment issue at all on January 21, although the FMCS mediator tried to get them back on track (Tr. 583, 619). Thereafter, P-Fac never again requested to resume effects bargaining over the issue (Tr. 584; 619).

VI. P-Fac's Information Requests and the College's Responses

A. December 15, 2010 Request

Tusin's December 15, 2010 bargaining demand included an information request (GC Ex. 27). In reference to its contention that "widespread course reductions" had occurred in "several departments," including HHSS, the Union asked for 1(a) - a list of all individuals, by department, whose class assignments had been reduced; 1(b) – for each such individual, the number of classes that he/she was eligible to receive during the upcoming semester; 2 – for each such individual, his or her number of accumulated credit hours; 3 – the notifications provided to such individuals; 4 – the reasons for any reductions; and 5 – the efforts made, if any, to find replacement courses for such individuals (GC Ex. 27). The Union requested no information about any alleged change to the rollover system. For example, it did not ask for copies of course schedules for successive spring semesters.

The College provided responsive information to the extent it was available and not otherwise at P-Fac's fingertips (Tr. 356). As to the information requested in item 1(a), it was readily available to P-Fac on OASIS, the College's computerized scheduling system. To use OASIS, an adjunct simply enters his or her user name and password into the system (Tr. 47-48, 485).[12]

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address outside of negotiations."); GC Ex. 34(c) ("BS – Although I like to steer clear of these things in negotiations, there is a pressing issue that needs to be addressed.")).

[12] Under "Course Catalog," the various departments within the College are listed (Resp. Ex. 27, p. 1). The adjunct can click on "Hum/History/SocScience" to pull up a list of all HHSS courses on the schedule, as he or she can for any department (Tr. 486; Resp. Ex. 27, pp. 2-6). Then, by clicking on a course number, the adjunct can pull up a page entitled "Section Schedule" that lists all sections of the course on the schedule, along with the name of the

P-Fac representatives knew that this information was available to them on OASIS, and in fact used the system to develop their own lists of sections being held long before P-Fac sought any information from the College. After being confronted with his affidavit on cross-examination, Stevenson admitted that immediately following Wynter's November 3 email, P-Fac representatives looked at the course assignments on OASIS to determine how many faculty were "affected by the change" they believed Wynter had announced. They determined the number to be in excess of 30 (Tr. 114-15). After being confronted with her affidavit, Vallera made a similar admission (Tr. 320-22). Indeed, Vallera testified that she provided a spreadsheet containing detailed information about unit members' course assignments to the Region during its investigation (Tr. 316-18).

As to item 1(b), there was no responsive information because adjuncts do not have "individual eligibilities" (Tr. 361). As to item 2, on January 13, 2011, Wilkin provided P-Fac with two lists, each with the names of all adjuncts employed by the College, by department. The first list contained their accumulated credit hours as of fall semester 2010; the second their accumulated hours as of January 10, 2011 (Tr. 205, 359; Resp. Ex. 5). As to items 3-5, Love testified that other than Wynter's November 3, 2010 email (GC Ex. 5) which the Union already had, there was no responsive information (Tr. 364). The record contains no evidence to the contrary.

In any event, neither Tusin nor anyone else from P-Fac ever complained to Love that information responsive to the December 15 request was not provided or was inadequate (Tr. 364). Indeed, in her affidavit given to the Region during its investigation of the underlying unfair labor practice charge, Vallera testified that "[t]he employer did not respond to Tusin's December

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instructor assigned to teach the section (Tr. 488-89; Resp. Ex. 27, p. 8). By clicking on "Set Options," the adjunct can get the same information about past semesters as well (Tr. 488; Resp. Ex. 27, p. 7).

15th, 2010 information request. However, the Union has not done anything to follow up on his request, or clarified that the information has not been provided" (Tr. 315, 325).

B. December 20, 2010 Request

On December 20, 2010, as part of its grievance, the Union sought additional information (GC Ex. 15). Although the second request was limited to HHSS, it contained 18 separate requests. Again, the Union requested no information about any alleged change to the rollover system. To the contrary, it requested only information comparing fall semester 2010 to spring semester 2011, not information comparing successive spring semesters.

Marcus discussed the December 20 request with P-Fac during their meeting on December 21. The P-Fac representatives insisted that she respond immediately to the request, "at that moment" (Tr. 389). Marcus told them that she was not in a position to do that, explaining that she had just received the request and that it was lengthy and unclear. She further noted that the College was about to close for the holiday break (Tr. 389).[13] Although she did not point this out at the meeting, she later realized that she would not be able to provide some of the information P-Fac had requested until after spring semester 2011 began, because it would not exist until then (Tr. 390-91).

Sometime after the holiday break, Marcus started gathering information responsive to P-Fac's December 20 information request. On January 20, 2011, she sent an email to P-Fac letting them know that she was working on the request and that she would be in touch when her response was complete (Tr. 396-97; Resp. Ex. 13). The record contains no evidence of any protest or other response from P-Fac to Marcus' email. On February 21, 2011, Marcus completed the College's response and submitted it to P-Fac (Tr. 396; Jt. Ex. 1).

[13] The College shuts down entirely for about 10 days during the holidays; no one works during the break (Tr. 355).

It took Marcus two months to respond to the December 20 request for three reasons. First, she was dealing with several information requests from P-Fac at the same time; some were even more extensive than the December 20 request (Tr. 397). Indeed, in the late 2010-early 2011 time frame, Marcus was spending 50-75% of her time dealing with P-Fac's various grievances and information requests, rather than the 5% that she had spent when she first started in her role as P-Fac liason. Marcus had significant other responsibilities for the College, and was doing the best she could to get everything done (Tr. 384-86).[14] Second, much of the information P-Fac had requested simply did not exist until after spring semester started on January 24, 2011, "because courses aren't finalized until then" (Tr. 397). Third, Shonekan – with whom Marcus was working to collect some of the information requested – left the College in early February. Wynter told Marcus that it would take some additional time to get departmental information together because she was not sure where Shonekan kept it and she and her staff had to search for it to ensure they had located everything that was available (Tr. 398-99).

QUESTIONS PRESENTED

1. Whether the ALJ violated the College's due process rights by finding a violation that was not alleged in the amended complaint and was not fully and fairly litigated? (Exceptions 1, 8-10, 12, 15, 33-35, 48)

2. Whether the ALJ erred when he found that the College failed to bargain in good faith over the effects of a change in the part-time faculty scheduling system? (Exceptions 2-12, 14-19, 22, 33-46, 48, 49)

[14] She testified, "[W]e had started to get a large amount of grievances and information requests, in addition to meetings and trying to sort that all out was difficult and challenging. A lot of the information that I received and the requests I received were very unclear and I had spent, just a lot of time trying to sort it all out. It was challenging" (Tr. 386).

3. Whether the ALJ erred when he found that the College failed to respond or failed to respond on time to Union information requests? (Exceptions 11, 13, 20, 21, 23-32, 41, 45-47)

4. Whether the ALJ's recommended remedy and order is warranted under the circumstances of this case? (Exceptions 50-53)

ARGUMENT

I. The ALJ Violated The College's Right To Due Process When He Found A Violation That Was Not Alleged In The Amended Complaint And Was Not Fully And Fairly Litigated At The Hearing.

The ALJ did not find that the College had announced or implemented a class-assignment limit as alleged in the amended complaint. Indeed, he largely did not address much less discredit the reams of evidence offered by the College establishing that there was no such limit. Instead, the ALJ found that the College violated the Act "when it failed to bargain with the Union concerning the effects of its decision to modify the rollover scheduling system in HHSS" (ALJD at 15). However, a change to the rollover system was neither alleged in the amended complaint nor litigated by the parties at the hearing. Moreover, the Union never demanded bargaining over any change to the rollover system, either in its initial bargaining demand or at any meeting or bargaining session at which the parties discussed the class-assignment issue. Similarly, the Union's information requests were not directed at any change in the rollover system. In sum, the College had no notice whatsoever of the violation found by the ALJ or any opportunity to defend itself against it. Accordingly, the ALJ's Decision violates the College's due process rights.

A. Due process principles require notice of the charges.

Fundamental due process principles require the GC to advise a charged party of the allegations against it; that is the very purpose of a complaint. *Reebie Storage & Moving Co., Inc.*, 44 F.3d 605, 608 (7th Cir. 1995); *see also* Section 102.15 of the National Labor Relations Board's ("Board") Rules and Regulations (29 CFR §102.15) (a complaint must contain a "clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed"). Although "the Board may find and remedy a violation even in the absence of a specific allegation in the complaint," it may do so only "if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Piggly Wiggly Midwest, LLC*, 357 NLRB No. 191, at *2 (2012) (citing *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989), *enforced* 920 F.2d 130 (2d Cir. 1990)); *accord Allied Mech. Servs.*, 346 NLRB 326, 329 (2006) ("A respondent cannot fully and fairly litigate a matter unless it knows what the accusation is."). Moreover, the GC does not satisfy the "fully and fairly litigated" requirement simply by presenting evidence on a theory not alleged in the complaint. *United Mine Workers of America, District 29*, 308 NLRB 1155, 1158 (1992) (citing and quoting *NLRB v. Quality C.A.T.V., Inc.*, 824 F.2d 542, 547 (7th Cir. 1987) ("the simple presentation of evidence important to an alternative claim does not satisfy a requirement that any claim at variance from the complaint be 'fully and fairly litigated' in order for the Board to decide the issue without transgressing [the respondent's] due process rights.") The Board (or the ALJ) cannot find a violation where the charged party does not have an opportunity to litigate the alleged violation fully and fairly. *Allied Mech. Servs.*, 346 NLRB at 329; *accord Conair Corp. v. NLRB*, 721 F.2d 1355, 1372 (D.C. Cir. 1983) (when notice required by due process is not

provided by full and fair litigation, there is "prejudice requiring reversal" unless the record reveals "uncontrovertibly" that the party "could not have prevailed in any defense" to the claim).

B. This case was never about the rollover system; it is about a two-course limitation allegedly implemented by the College's HHSS department.

This case is not and never has been about a change to the rollover scheduling system. Instead, both the underlying facts and course of proceedings before the Board make abundantly clear that it is about a much narrower issue: an alleged two-course limitation on teaching assignments for part-time faculty in HHSS during spring semester 2011.[15]

As detailed above, the starting point for this case is Dr. Wynter's November 3, 2010 announcement that adjunct faculty who had requested to teach three courses during spring semester 2011 would initially be assigned to teach just two, with the possibility of a third assignment "as student enrollment deems it necessary" (GC Ex. 5). Immediately following Dr. Wynter's email, the Union sought to "discuss the two class restriction" (GC Ex. 26). Dr. Wynter met with the Union and attempted to clarify its misunderstanding that "no one would receive three classes" (Tr. 466). Then, on December 15, 2010, the Union sought to bargain the effects of what it claimed were "widespread course reductions" and requested information relating to its belief that the College had imposed a class-assignment limit for spring semester 2011 (GC Ex. 27). Similarly, the Union's December 20 grievance and information request related to an alleged two-class limit on teaching assignments (GC Ex. 15), and that is what was discussed at P-Fac's meeting with Marcus on December 21 and the parties' bargaining session on January 13. Certainly, this record reveals no demand by the Union to bargain over the effects of a broader change to the rollover system or any discussion by the parties on that subject at their meetings or bargaining sessions (GC Exs. 25(a), (b), 29, 33 (a), (b); 34(a), (b), (c)).

[15] The ALJ's description of the 9-step scheduling system does not include any reference to a two-class restriction (ALJD at 4).

The manner in which this case progressed through the Board's unfair labor practice process is further proof that it is and always has been about an alleged two-class limit. In its 36-count amended charge, the Union separately alleged that the College violated the Act by "announc[ing] that it was unilaterally changing the maximum number of courses that adjuncts would be permitted to teach, *e.g.*, *from three courses to two or fewer* courses per semester … (GC Ex. 1(e) at p.1. ¶ 5) (emphasis added), and by "eliminating its practices with respect to 'roll-over' of classes…" (GC Ex. 1(e) at p. 2, sixth full paragraph). Yet, only the former allegation made it into the complaint. The latter allegation did not; either the Region dismissed it or the Union withdrew it. Whatever its disposition, it was not included in any version of the complaint in any form. This alone compels the conclusion that the rollover allegation formed no part of this case.

Even the Union's litigation strategy reveals that its rollover allegation was not at issue. In preparation for trial, the Union served two subpoenas on the College. The first mirrored its December 20 information request, and sought "any and all" information related to the alleged "schedule change" set forth in Dr. Wynter's November 3, 2010 email (Jt. Ex. 2), as well as information comparing class schedules and assignments for fall semester 2010 to spring semester 2011. The Union's second subpoena similarly sought information related to the alleged class-assignment limit (Jt. Ex. 3). Neither subpoena sought information comparing class schedules in successive spring semesters, which would have been necessary to prove an allegation about a change in the rollover system. Plainly, the Union sought no such information because the rollover system was not the issue.

At trial, the GC framed the issue as one involving "… the effects of a change Respondent announced and implemented which limited the number of classes Unit employees in [HHSS]

could be assigned a semester" (GC Ex. 1(n); Tr. 10) and explained in his opening statement that, "The change is simple. Dr. Wynter announced in writing that the maximum number of classes that would be assigned per semester would be two across the board. That was what the announcement in writing stated … [It] amounted to a 30 percent wage decrease for those instructors that were routinely assigned three classes a semester to teach" (Tr. 23). Likewise, counsel for the Union promised to prove that "instead of getting [their] standard three classes, [part-time faculty] were all cut to two classes" (Tr. 29).

Indeed, the record is replete with short-hand references to the issue such as the "three-to-two" or the "two-class limit." At no time, not even during the trial itself, was the College put on notice that a broader change to the rollover system was at issue. Although Union witness Brock testified generally about the rollover system, her testimony was simply background evidence (Tr. 46-59, 73, 80). The bulk of her testimony focused on an alleged historical practice of assigning three courses to experienced part-time faculty who wanted three (Tr. 60-81). Likewise, Union officer Stevenson's testimony described what he believed was a change in course assignments for spring 2011 from three to two (Tr. 95, 97-8, 104). Neither the GC nor the Union presented any evidence at trial about class schedules for successive spring semesters. If the issue was that the spring semester 2011 schedule was different than the schedules for previous spring semesters, they surely would have done so. The ALJ erred by finding a change other than the one alleged and litigated.

C. The College was not afforded a full and fair opportunity to defend itself.

The College would have litigated this case differently if the GC had included a rollover allegation in the amended complaint or otherwise put the College on notice that he intended to prosecute an alleged change to the rollover system. *See, e.g.*, *Piggly Wiggly Midwest, LLC*, 357 NLRB No. 191, at *2; *United Mine Workers of Am., Dist. 29*, 308 NLRB 1155 (1992); *Waldon,*

Inc., 282 NLRB 583 (1986). Because no such notice was provided, the College took the amended complaint at face value, reasonably expecting the GC to attempt to prove that it had imposed a two-class limit for part-time faculty for the spring 2011 semester. Accordingly, the College defended itself by offering evidence that there was neither a "two-class limit" nor a "change" as defined by law.

There is, of course, a significant difference between the change alleged in the amended complaint and the one found by the ALJ. While the alleged two-class limit might fairly be characterized as one of many hypothetical by-products of a change to the rollover system, the change found is much broader than the one alleged. This is most evident in the number of adjuncts affected. As the College proved at trial, only 40 of the 129 unit members who taught in HHSS during academic year 2010-11 even requested a third course for spring semester, and 22 of those in fact received a third. Of the remaining 18, 12 had no consistent history of teaching three courses per semester anyway (Resp. Exs. 6, 7, 16, 17). Of the six who did have such a history, three turned down a third course assignment for spring semester (Resp. Ex. 6-8), leaving only three (2.3%) who were conceivably adversely affected by the change alleged in the amended complaint. In contrast, the change found by the ALJ affected all adjuncts in HHSS, at least according to his logic. Accordingly, he ordered a remedy for all, the vast majority of whom did not even request a three-course teaching load. Indeed, based on the ALJ's reasoning, faculty who had requested to teach only one or two courses for spring semester (and in fact received what they requested) and even faculty whose teaching loads *increased* during spring semester 2011 were adversely affected by the rollover change and are entitled to a remedy. The College simply had no notice of this possibility.

As the ALJ himself found, the rollover system consisted of multiple steps and variables (ALJD at 4), all of which could have involved a variety of legal and factual issues at trial and unique potential defenses for the College. It is sufficient to reverse the ALJ's decision on due process grounds if the College simply *might* have presented evidence in its defense had it known that the GC was pursuing or the ALJ was considering a violation for an alleged change to the rollover system. *NLRB v. Quality C.A.T.V., Inc.*, 824 F.2d 542, 547-48 (7th Cir. 1987); *Drug Package, Inc. v. NLRB,* 570 F.2d 1340, 1345 (8th Cir.1978) (due process requires a new hearing if company "*might have* litigated the matter differently").

The College's due process rights were no less violated because the record contains general testimony regarding the rollover system through witnesses like Brock, Stevenson and Wynter. The "simple presentation of evidence important to an alternative claim does not satisfy the requirement that any claim at variance from the complaint be 'fully and fairly litigated' in order for the Board to decide the issue without transgressing the [charged party's] due process rights." *Quality C.A.T.V., Inc.*, 824 F.2d at 547, *citing NLRB v. Pepsi-Cola Bottling Co. of Topeka,* 613 F.2d 267, 274 (10th Cir. 1980)*; accord United Mine Workers of Am., Dist. 29*, 308 NLRB 1155, 1158 (1992)(simple presentation of evidence does not satisfy due process requirement that a claim has been fully and fairly litigated where respondent lacks notice that it faces liability for the particular conduct); *Champion Int'l. Corp.*, 339 NLRB 672 (2003)(same).

In sum, the ALJ's Decision does not comport with accepted due process principles and must be reversed for that reason alone.

II. The ALJ Erred When He Found The College Violated A Duty To Engage In Effects Bargaining.

A. Contrary to the ALJ's findings, the College made no change that gave rise to an effects-bargaining obligation.

Inexplicably, the ALJ made no finding relative to the class-limit change alleged in the amended complaint. Instead, he referred several times to a modified rollover system (ALJD at 15, lines 5, 22, 25; 16, line 10), or to the College's "decision to modify its procedure for scheduling unit HHSS teaching assignments," (ALJD at 17, lines 25-26), but never explained exactly what he believes the College modified. It is not enough simply to say generally that the College modified its scheduling procedure given that the procedure involved at least nine steps (ALJD at 4). In reality, there was no change at all.

The law is straightforward. An employer may violate the Act if it makes a unilateral change in wages, hours, or other terms and conditions of employment without first giving its employees' union representative notice and an opportunity to bargain. *See, e.g.*, *NLRB v. Katz*, 369 U.S. 736, 743 (1962). "[T]he vice involved in [a unilateral change] is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge." *Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994), *enforced*, 73 F.3d 406 (D.C. Cir. 1996) (quoting *NLRB v. Dothan Eagle*, 434 F.2d 93, 98 (5th Cir. 1970)) (emphasis in original). In order for a unilateral change to be unlawful, it must have been "material, substantial and significant." *Berkshire Nursing Home*, 345 NLRB 220, 221 (2005). *See also Mitchellace, Inc.*, 321 NLRB 191, 193 n.6 (1996) (listing examples of such changes); *United Techs. Corp.*, 274 NLRB 609, 621 (1985). The GC failed to prove that *any* "material, substantial and significant" change occurred, much less the change alleged in the amended complaint.

Wynter's November 3, 2010 email expressly allowed for the possibility that third courses would be assigned as "student enrollment deem[ed it] necessary" (GC Ex. 5; ALJD at 4-5). Wynter also explained, as noted by the ALJ, that: "most HHSS part-timers, who sought a third course, received one;" other part-timers rejected the offer to teach a third course; and she "added third courses in accordance with demand" (ALJD at 9, lines 5-7; 5, line 15). Indeed, it is undisputed that 22 adjuncts in HHSS received a third course assignment for spring semester 2011 (Resp. Exs. 6-8), and another three adjuncts were offered but turned down a third assignment (Resp. Exs. 9-11).

Only three adjuncts (Beecham, Carroll, and Grossman) who had been fortunate enough to receive three course assignments for several semesters running did not receive a third (or an offer for a third) for spring semester 2011. Given that student enrollment dropped by 8% and course offerings in HHSS by 13.5% that semester (Resp. Exs. 2-4), it is hardly surprising that there were not quite as many third assignments to go around. In any event, a "change" that affected only three of 129 adjuncts in the department (2.3%) cannot be deemed "material, substantial and significant."

Even with respect to these three, the GC failed to prove any "past practice" of automatically assigning three courses per semester to experienced faculty who wanted three. His evidence consisted of 1) Brock's testimony about her assignment practices when she chaired the department; 2) Stevenson's and Carroll's testimony about their own experiences as adjuncts in HHSS previous to spring semester 2011; and 3) teaching availability forms and teaching assignment forms showing that some adjuncts in HHSS requested and received three assignments for two semesters (GC Ex. 41), three semesters (GC Ex. 42), and four semesters (GC Ex. 43). Although it is not clear from his decision whether the ALJ relied on all of this

evidence to reach his conclusion there was a change, the evidence falls far short of establishing the "past practice" claimed by the GC.

Brock's testimony actually demonstrates that no such practice existed. According to the former Chair, she tried to give "*up to*" three assignments to experienced faculty who wanted three "*if in fact we need[ed] them to teach that*" (Tr. 64 (emphasis supplied)). Thus, as under Wynter's leadership, assignments to adjuncts when Brock was in charge were contingent upon the department's needs for their services; they were never automatic or guaranteed (Tr. 63).

The ALJ erred in relying on Carroll's and Stevenson's testimony that they had requested and received three courses consistently for several semesters before spring 2011 (ALJD at 4, lines 8-12). That evidence was merely anecdotal and, in Stevenson's case, demonstrably false. While Carroll taught three courses per semester for a multi-year period until spring semester 2011, no evidence was offered that she was assigned courses on anything other than an as-needed basis. As Wynter explained, the College simply did not need Carroll to teach three courses during spring semester 2011 because other course offerings in the history division had plenty of openings for student enrollment (Tr. 481-83).

Stevenson gave false testimony. He admitted on cross-examination that his testimony that he "had been assigned three courses [for] probably about seven semesters" prior to spring 2011 was false (Tr. 97).[16] In fact, Stevenson taught only two courses during fall semester 2010 (GC Ex. 4, p. 1; Resp. Exs. 6, p. 5 and 7, p. 6). Like Brock's, both Carroll's and Stevenson's testimony fails to establish that three assignments were given to all experienced adjuncts who wanted three, regardless of the circumstances. In fact, Stevenson's testimony establishes the

[16] Stevenson also gave false testimony on this point during the Region's investigation of the underlying unfair labor practice charge when he swore in his affidavit that "I taught three classes in the fall of 2010." On cross-examination, Stevenson admitted that this testimony was not true (Tr. 111).

opposite. His third course for fall semester 2010 was cancelled (along with approximately 39 others) due to low enrollment (Tr. 124-25, 128).

Finally, GC Exhibits 41 through 43 establish only that *some* adjuncts who requested three assignments received three *in the first instance.* They do not establish that *every* adjunct who requested three received three, and in fact, do not establish the number received at all. Even the GC admitted that the forms do not prove that the adjuncts "actually taught those classes" (Tr. 331), but only that as of the date on the forms, they had been assigned those classes (Tr. 332). As Wynter testified, the schedules indicated on the forms are subject to change (Tr. 481). Indeed, the forms themselves contain a caveat to that effect (*see, e.g.*, GC Ex. 41, p. 2 ("In the event your teaching assignment changes . . .")). In sum, the GC failed to prove and there is no basis upon which the ALJ could have concluded that third course assignments were ever automatic or guaranteed for anyone. Rather, just as under Wynter's leadership, assignments prior to spring semester 2011 were based on HHSS's needs. Indeed, as P-Fac conceded on its website, uncertainty from semester to semester was the status quo for part-time faculty (Resp. Ex. 21, p. 1, first paragraph).

Absent evidence sufficient to establish that the College imposed a "two-class limit" as alleged in the amended complaint, the ALJ apparently picked through Wynter's cross examination testimony in search of any potential violation (Tr. 498-508). During her testimony on cross, Wynter acknowledged that she scheduled differently for spring 2011 than Shonekan had for fall 2010. For fall semester 2010, Shonekan apparently simply "rolled over" the schedule from fall 2009, assigned faculty the same courses they had taught previously, and then cancelled the 40 or so courses that did not fill. Determined to avoid these disruptive and costly cancellations for spring semester 2011, Wynter decided to "hold" adjuncts' third assignments

until student enrollment firmed up. Then, as enrollment grew, Wynter released the courses for registration and assigned them to faculty to teach. In short, instead of assigning third courses and then cancelling them due to low student enrollment as Shonekan had done for fall 2010, Wynter held off on assigning them until she was sure she would not have to cancel them. In either case, assignments were contingent on enrollment. The only difference was that for spring semester 2011, the College did not have to pay $100 stipends for 40 cancelled courses (Tr. 498-508).

The ALJ's finding that the College changed the rollover system emerged from Wynter's testimony (ALJD at 5, lines 8-16), but it should not have. Apart from the fact that this "change" was not alleged in the amended complaint as argued by the College above, it was insufficient to trigger an effects-bargaining obligation.

For years, Wynter did the scheduling for the history division of HHSS just as she did it for spring 2011 (Tr. 438, 441, 467-68). Shonekan scheduled for the first time for fall semester 2008 (Tr. 84). Even after he came on board, the norm was to cancel only five to 10 courses per semester, not the 40 that were cancelled for fall semester 2010 (Tr. 79; ALJD at 4, n. 9). Clearly, then, fall semester 2010 was an aberration, not a "practice."

The ALJ failed to analyze the past practice issue, but settled law requires it in these circumstances. Only practices that are regular and longstanding can become terms and conditions of employment. To establish such a practice, the GC must prove that "[t]he change complained of must be of an activity which has been "satisfactorily established by practice or custom; an 'established practice,' or an established condition of employment." *Exxon Shipping Co.*, 291 NLRB 489, 492 (1988) (holding that union's participation in government investigations two of five times in three years was not a past practice). A single-semester anomaly does not qualify.

The ALJ apparently assumed that before spring semester 2011, the class schedules posted on OASIS and made available to students for registration each semester were identical to the schedules posted the previous spring or fall semesters, as applicable. The facts, however, establish no such thing. The GC offered only Brock's testimony on this subject, and it establishes that changes were in fact made to the schedule each semester before it was posted. The previous spring/fall semester's schedule served merely as a "template" that changed based on a variety of factors (Tr. 49).

Indeed, over the course of time, both Brock and Wynter made numerous changes to the scheduling process in HHSS (e.g., the "roll-over," universal start times, teaching availability forms, etc.; *see e.g.* Brock's testimony at Tr. 49-52 discussing "changes" to rollover, that "roll-over was just a starting point," and "one of the things that's important is that these things [rollover components] changed"). None of these changes were bargained with P-Fac (Tr. 84-85), and none were acknowledged by the ALJ. These changes were made pursuant to the College's sweeping "sole discretion" over scheduling and assignments provided for in the CBA (GC Ex. 2, p.2) and in the normal course of doing business. Moreover, P-Fac acquiesced in them. The College was under no more obligation to bargain Wynter's correction of Shonekan's scheduling mess than it was any of the many changes it had made to the scheduling process during Brock's tenure as Chair. Simply put, scheduling changes from semester to semester were the status quo.

The Board has held that schedule changes made in a normal, routine fashion in the operation of an employer's business that are consistent with its prior practice are not violations of the Act. *See, e.g.*, *Berkshire Nursing Home*, 345 NLRB 220 n.2; *Post-Tribune*, 337 NLRB 1279 (2002); *KDEN Broadcasting Co.*, 225 NLRB 25 (1976); *Kal-Die Casting Corp.*, 221 NLRB 1068, n.1 (1975). Wynter's effort to tie scheduling for spring semester 2011 more closely

to student enrollment as she had done in the past before Shonekan took over in 2008 was "consistent with an established past practice." *Berkshire Nursing Home*, 345 NLRB at 220 n.2. The fluctuations in course offerings and adjunct assignments were of the same type to which the Union had acquiesced in the past. *See Courier-Journal*, 342 NLRB 1093 (2004); *Berkshire Nursing Home*, 345 NLRB at 220 n.2.

In *Courier Journal*, the employer had made annual changes to its health-care program pursuant to discretion granted in its management-rights clause and without union objection. 342 NLRB at 1093. The Board held that "[t]he significant aspect of [*Courier Journal*] is that the Union acquiesced in a past practice under which" the employer had made routine changes to premiums and benefits. *Id.* at 1094. Similarly here, P-Fac agreed in the parties' CBA that the College would have "sole discretion" over scheduling and assignments and then repeatedly acquiesced when the College exercised these management rights.

The Board reached a similar conclusion in *Manitowoc Ice, Inc.*, 344 NLRB 1222 (2005). There, the company had a history of changing its profit-sharing plan without complaint from the union. When the union finally challenged a company change to the plan, the Board found no violation and concluded that due to the union's historic inaction in response to the company's unilateral changes, the union was equitably estopped to challenge the company's conduct. *Id.* at 1223 (citations omitted). The Board's explanation for its decision is instructive and applies with full force to his case:

> There was a clear understanding that the profit-sharing would remain a management prerogative and that the Union, by its conduct set forth above, 'bargained away its interest in the plan . . .' the Union is, in effect, attempting to deprive the Respondent of the benefit of its bargain. Accordingly, because the Respondent has done 'no more and no less for its Union employees than its collective bargaining agreement with them was called for,' we decline to find that its conduct constituted an unfair labor practice.

Id. at 1224 (internal citations omitted)

The ALJ found that the College's change to the roll-over system led to four consequences for unit employees that collectively added up to a "material, substantial and significant" change to the terms and conditions of their employment (ALJD at 15). All of the consequences found by the ALJ share a common theme: lost opportunity. But lost opportunities represent neither meaningful consequences nor a "material, substantial and significant" change where the College indisputably has exercised virtually unlimited authority to schedule adjunct faculty teaching loads.

Without any supporting evidence, the ALJ speculated that adjunct faculty lost the chance to have the courses they had previously taught offered to students for registration on OASIS, lost the same degree of assurance that they would be offered three classes to teach, and were subjected to the College's "unbridled discretion" regarding whether they would receive a third course later (ALJD at 15 and n. 30). The other consequences found by the ALJ fall into the same "lost opportunities" category, *e.g.*, "popular" faculty lost the chance to have a third course offered to students who "likely" would have registered for this "almost-guaranteed third course;" "creative" or "aggressive" marketers lost the chance to secure a third course and thus were relegated to the same status as unimaginative and passive faculty; and faculty who had previously taught a third course lost the chance to pick up a $100 cancellation check (ALJD at 15-16 and nn. 30-32).

These speculative "lost opportunities," however, are not supported by the record evidence and do not represent a change to the status quo. To the contrary, abundant record evidence establishes that the College has a collectively bargained right to exercise sole discretion over adjunct scheduling which it has exercised on a regular basis, without complaint from P-Fac. As

even P-Fac concedes, its members "… are contingent faculty; that is, our jobs are contingent upon the College's need and desire for our services from semester to semester" (Resp. Ex. 21, p. 1, first paragraph). Thus, contrary to the ALJ's finding, adjuncts have no right, no reasonable expectation and no level of assurance that they will be scheduled for *any* courses, let alone three, in any particular semester. Rather, the College's "unbridled discretion" over scheduling and assignments noted by the ALJ *is* the status quo, as set forth in the parties' CBA and exercised by the College.

B. P-Fac waived any right to engage in effects bargaining.

Even if a "material, substantial and significant" scheduling change occurred, P-Fac clearly and unmistakably waived any right to bargain over its effects as well as its implementation. This is because the parties already bargained over the College's right to determine part-time faculty workloads and the effects of any workload reductions. The CBA specifically addresses these subjects.

The ALJ took an unjustifiably narrow view of the waiver issue (ALJD at 16). His analysis consisted solely of a determination that the CBA does not say "the Union waives its right to engage in effects bargaining." But the waiver analysis is more nuanced than that and, properly applied, establishes that the ALJ erred when he concluded that P-Fac had not waived its right to effects bargaining. *See, e.g.*, *Omaha World-Herald*, 357 NLRB No. 156 (2011); *accord Allison Corp.*, 330 NLRB 1363, 1365 (2000).[17]

Clear and unmistakable evidence of the parties' intent to waive a duty to bargain "is gleaned from an examination of all the surrounding circumstances including but not limited to bargaining history, the actual contract language, and the completeness of the collective-

[17] The ALJ mistakenly viewed the College's sweeping effects bargaining waiver proposal as evidence that no such waiver existed in the parties' current CBA (ALJD at 16). The fact that the College sought the broadest waiver possible does not, however, mean that a more limited waiver over adjunct course assignments did not already exist.

bargaining agreement." *Id.* (citing *Columbus Electric Co.*, 270 NLRB 686, 686 (1984)). The totality of the circumstances provides the clear and unmistakable evidence of the parties' intent to waive bargaining over the effects of adjunct course scheduling.

Several provisions of the CBA establish that the Union waived its right to bargain over the effects of any "change." Although the College's implementation of the "change" alleged in the amended complaint is not at issue, it is nevertheless important to note that the CBA expressly allows the College to make any changes in course scheduling that it pleases. As discussed above, the College has retained "sole discretion" to determine which and how many courses to offer, how to schedule them, and how to staff them. Indeed, the CBA grants the College the right to "establish, modify, and discontinue . . . policies … and practices relating to the performance of work, including workload [and] scheduling of work" (GC Ex. 2, Art. II(C), p. 2). Moreover, "the final decision of who teaches each course is the sole prerogative of the department Chairperson" (GC Ex. 2, Art. VII(2), p. 9; Tr. 338).

In Article XIV, the zipper clause, the parties agreed that they each had the opportunity during negotiations to make demands and proposals on any subject and that the CBA itself is the sole agreement between them regarding wages, hours, and other terms and conditions of employment (GC Ex. 2, Art. XIV, p. 15). Thus, the Union acknowledged that it exercised its statutory right to bargain over the implementation of course scheduling when it negotiated the management-rights clause; it was not entitled to any further bargaining on subjects covered by that clause.

The CBA specifically addresses the effects of the College's exercise of its exclusive right to implement changes in course scheduling. That is, it provides "instructional continuity" to unit members under certain limited circumstances. Under Article VII, unit members with 51 or more

accumulated credit hours who have not been assigned a class they have "routinely taught" have limited bumping rights (GC Ex. 2, Art. VII(2), pp. 8-9). If certain conditions are met, the member may bump another adjunct with fewer than 21 accumulated credit hours out of a course he or she has been assigned to teach (GC Ex. 2, Art. VII(1), p. 8). Indeed, the CBA specifically addresses the "three-to-two" scenario alleged in the amended complaint. The parties agreed that no unit member who has already been assigned two courses would have any bumping right whatsoever (GC Ex. 2, Art. VII(1), p. 8).[18] By agreement of the parties, the bumping rights set forth in the CBA constitute a unit member's sole remedy for losing courses "routinely taught."

The parties had invoked this sole remedy for years without objection from P-Fac. Brock testified that she was "very familiar" with the bumping rights provision because she dealt with it as Chair (Tr. 64-65). She knew that faculty with more than 51 credit hours would invoke it if they lost a class they routinely taught (Tr. 65-66). Indeed, the Union invoked it at the parties' January 21, 2011, bargaining session when they insisted on discussing the bumping rights of an instructor (Tr. 192, 582-84, 618-19; Resp. Ex. 15, p. 2). The CBA clearly and unmistakably defines this limited effects remedy in Article VII. It specifically proscribes any bumping rights, bargaining rights, or other remedies for unit members who have received at least two course assignments.

When, as here, a union agrees to a management-rights clause that gives the employer exclusive rights as well as other provisions that govern the effects of management's exercise of those rights, the NLRA requires no further bargaining on those issues. *See, e.g.*, *Good Samaritan Hosp.*, 335 NLRB 901, 902 (2001); *United Technologies Corp.*, 300 NLRB 902, 903 (1990); *S-B Mfg. Co.*, 270 NLRB 485, 489-191 (1984)(authority under management rights clause to

[18] Similarly, the CBA also prescribes the "effects" or "impact" of a course cancellation: the unit member receives $100 (GC Ex. 2, Art. VIII(7), p. 11). The CBA constitutes a waiver of bargaining rights in this instance also.

determine number of employees, number of hours, and schedules established a clear and unmistakable waiver of union's right to bargain over reduction in employees' hours of work).

Instead, as the Court of Appeals for the District of Columbia has observed, "[t]he union may exercise its right to bargain about a particular subject by negotiating for a provision in the collective bargaining contract that fixes the parties' rights and forecloses further mandatory bargaining as to that subject." *Local Union No. 47, IBEW v. NLRB*, 927 F.2d 635, 640 (D.C. Cir. 1991); *accord Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 937 (7th Cir. 1992). This principle applies equally to effects bargaining. *See, e.g., Enloe Med. Ctr. v. NLRB*, 433 F.3d 834, 838-39 (D.C. Cir. 2005); *Allison Corp.*, 330 NLRB 1363, 1365 (2000).

In evaluating these cases, the D.C. and Seventh Circuits apply a "contract coverage" test to determine whether an employer may invoke contract language as a defense to an alleged failure to bargain over changes in mandatory subjects of bargaining. *Local Union No. 47, IBEW*, 927 F.2d at 640; *Chicago Tribune Co.*, 974 F.2d at 937. As discussed above, the CBA details the "effects" or "impact" of course reductions on part-time faculty (GC Ex. 2, Art. VII(1), p. 8). The Union exercised its statutory right to bargain over these terms of employment, "but it gave up that right, so far as the subjects comprehended" by the CBA are concerned by agreeing to the provisions of the CBA. *Chicago Tribune Co.*, 974 F.2d at 937.

C. The College satisfied any obligation to engage in effects bargaining.

Even if the College had a duty to engage in effects bargaining, it satisfied it. Following P-Fac's December 15 bargaining demand, the College met with P-Fac promptly and regularly, giving it a meaningful opportunity to bargain, until P-Fac abandoned its bargaining demand. "[J]ust as a response to a demand for bargaining must be continuous so must the demand be continuous. Any unexplained hiatus or abandonment of the demand is perilous to a continuing obligation to bargain." *Reynolds Metal Co.*, 310 NLRB 995, 1000 (1993). Once a union demands

bargaining over an issue, it "must continue to do so . . . . Failure of the union to bargain continuously, particularly in the absence of any reason for the failure, constitutes inaction on the part of the union and results in abandonment of its right to bargain." *Id.*

The ALJ's conclusion that the College did not meet its bargaining obligation (ALJD at 16) is deficient. First, the ALJ incorrectly concluded that the Union sought to bargain the effects of a change to the rollover system (ALJD at 16, lines 9-10). The facts establish that the Union sought to bargain a more limited issue: an alleged "two-class limit" and related course reductions (GC Exs. 26, 27).[19]

Further, the ALJ wrongly concluded that bargaining never occurred in a "meaningful manner" because of the College's failure to fulfill the Union's information requests and its "piecemeal discussions" (ALJD at 16). The ALJ's conclusion consists of two substantive sentences and reflects that he could not possibly have considered the evidence that detailed the College's bargaining efforts and the Union's conduct which served to derail bargaining over the relevant issue.

The College deals with the information request issue below. As to its bargaining efforts, the facts show that P-Fac first requested effects bargaining over course scheduling for spring semester 2011 by its December 15 letter (GC Ex. 27). The parties had a pre-scheduled bargaining session two days later where the issue came up in a "roundabout" way (Tr. 606-08). At that meeting, and in response to P-Fac's request to address the issue before the holiday break, the College made Marcus available to discuss it within days of P-Fac's demand, and agreed to place the matter on the agenda for the very next bargaining session on January 13, 2011 (GC Ex. 32).

[19] The ALJ relied on GC Exs. 6 and 27 for his conclusion, but both documents clearly refer to the perceived "two-class limit" and course reductions.

After filing its grievance about the alleged "two-course limit" in HHSS, P-Fac met with Marcus on December 21, 2010, and discussed the issue with her for about an hour (Tr. 152, 180-81, 387-89). After completing her investigation of the grievance, Marcus denied it by letter dated January 13, 2011, both because there was no "two-course limit" and because, even if there were, the parties' contract would have allowed the College to impose one (Tr. 395-96; GC Ex. 31). That same day, the parties met for bargaining as scheduled (Tr. 575, 611). According to bargaining notes taken by both College and Union negotiating-team members (Wilkin and Silver), the parties discussed the course-scheduling issue at length (Tr. 577; Resp. Ex. 15). The College specifically asked P-Fac whether it had any proposals on the course scheduling issue; P-Fac responded that it did not (Tr. 239-40; Resp. Ex. 26, p. 5).[20]

Then, the parties' placed the course-scheduling issue on the agenda for their next bargaining session on January 21, 2011 (Tr. 579-80, 618; Resp. Ex. 22 ("2. Scheduling/Assignments (Effects/Impact bargaining)"). The College went to that session prepared to discuss it, but P-Fac preferred to discuss another issue it deemed to be more urgent (Tr. 192, 582-84, 618-19; Resp. Ex. 15, p. 2). Although the FMCS mediator tried to get P-Fac back on track, he was not successful, and the issue was not discussed that day (Tr. 583, 619). Thereafter, P-Fac never again requested to resume effects bargaining over the issue (Tr. 584; 619).

[20] As discussed below, P-Fac's stated reason for making no proposals – that it allegedly did not have any information about who may have been affected by the "change" – is demonstrably false. In reality, the Union had far more information than the College did; in early November 2010, it used OASIS to prepare spreadsheets on the subject.

This course of events confirms that the College satisfied any obligation it might have had to bargain and belies the ALJ's conclusion that the College was somehow responsible for "non-substantive" and "piecemeal discussions" (ALJD at 14). The College bargained until P-Fac abandoned its demand. The Board has long held that a union must act with due diligence to preserve its request to bargain. *See, e.g.*, *Goodyear Tire & Rubber Co.*, 312 NLRB 674 (1993) (citing *Golden Bay Freight Lines*, 267 NLRB 1073, 1080 (1983)). As here, where the parties have no agreement on a future date to engage in effects bargaining, "prudence dictates that the Union follow[s] up on its demand." *Id.* P-Fac's subsequent silence indicates a lack of due diligence. If P-Fac had any right to effects bargaining, it consciously yielded it through its inaction. *See, e.g.*, *Alcoa, Inc.*, 352 NLRB 1222, 1224 (2008); *In re AT&T Corp.*, 337 NLRB 689, 692 (2002).

III. The ALJ Erred When He Concluded That The College Did Not Meet Its Duty To Provide Information In Response To The Union's Requests.

The ALJ concluded that the College did not "comprehensively reply" to one of the Union's information requests and did not reply in a timely manner to the other (ALJD at 13-14). Contrary to the ALJ's conclusion, the College met its legal duty, if it even had one.

A. The College had no duty to respond to the Union's December 15th information request.

The December 15th information request was made in the context of a demand for bargaining (GC Ex. 27). Because the College had no duty to bargain with the Union over the alleged "change" or its effects, it had no duty to provide information that might otherwise have been relevant to effects bargaining concerning it. The duty to provide information derives from the duty to bargain. *See Nat'l Broadcasting Co.*, 352 NLRB 90, 97 (2008); *Pulaski Constr. Co.*, 345 NLRB 931, 935 (2005). Because the duty to furnish a union with information exists only

where an employer has a duty to bargain, the College was not obligated to provide any information in response to the Union's December 15 request. *Ingham Reg'l Med. Ctr.*, 342 NLRB 1259, 1262 (2004); *Detroit Edison Co.*, 314 NLRB 1273, 1274-75 (1994); *BC Indus.*, 307 NLRB 1275 (1992); *Cowles Communications*, 172 NLRB 1909 (1968).

However, there is a more fundamental problem with the way the ALJ considered and ruled on the GC's allegations regarding the December 15 and, for that matter, the December 20 information requests. At its core, the issue in this case relates to the impact of the "change," if any, on P-Fac members. All the information P-Fac needed to assess the impact of the "change" and engage in related effects bargaining was related to "held" courses. That information was and always has been available to P-Fac (Tr. 484, 517), and P-Fac had already used OASIS to prepare spreadsheets regarding "held" courses in HHSS long before it ever submitted information requests to the College (Tr. 114-15, 320-22).[21] The information available to the Union on OASIS was superior to any soon-to-be out of date list the College might have provided, since "held" courses were released on a real-time basis (Tr. 656). Since the Union already possessed current and complete information about "held" courses, it had no need for it from the College. Accordingly, the College did not violate the Act by not providing it.

In *The Kroger Company*, 226 NLRB 512 (1976), an employer had refused to provide the union with information concerning a new 24-hour work schedule implemented at some stores. Kroger argued that the union, by contract, already had access to the payroll records that would demonstrate where the schedule changes had taken place. The Board discussed two possible

[21] On the page entitled "Section Schedule" that lists all sections of a course, the name of the instructor assigned to the section as well as the "Reg/Limit" for the section is listed. The "Limit" is the enrollment cap; the "Reg" is the number of students actually registered (Tr. 489-90; Resp. Ex. 27, p. 8). The fact that a section was being "held" would have been evident from a "Reg/Limit" of 0/0, indicating that students were not being allowed to register for that section (Tr. 494-95). Indeed, Stevenson understood that his third course for spring semester 2011 was being held by looking at this very information (Tr. 105-06; GC Ex. 7).

scenarios: first, as in *Kroger*, where the union did not possess the requested information but could access it, and second, where the union unknowingly possessed the requested information. *Id.* at 513.

The first situation is obviously distinguishable from this case. In *Kroger*, the Board held that the union was entitled to the information it sought because the Act did not require it "to utilize a burdensome procedure of obtaining desired information," but rather, that it was entitled to the information when the employer possessed it "in a more convenient form." *Id.* at 513. Here, the College did not have "a more convenient form." The most convenient form—OASIS—was equally available to the Union. Nor did the Union face a "burdensome procedure" to obtain the desired information; it created its own lists without any assistance from the College, a fact completely ignored by the ALJ.

The Board in *Kroger* continued by explaining that in the second situation, where a union "unknowingly already possessed all of the necessary information, [a] [r]espondent would at least be obligated to notify the Union that it could furnish no information which the [u]nion did not already possess." *Id.* at 513 n.10. But this case does not involve an "unknowing" possession. Instead, the Union *knowingly* possessed all of the necessary information about held courses in HHSS before it ever made its information request.

Unlike the union in *Kroger*, P-Fac was in knowing possession of the OASIS data since immediately after November 3, 2010, more than a month before it first requested any of that same information from the College (*see* Tr. 114-15, 320-22). The Union developed lists of classes and instructors, as well as a spreadsheet from that OASIS data, all before making its December requests to the College. The Union even provided this information to the Region during its investigation (Tr. 316-18). Given the fact that—prior to requesting the OASIS data

from the College—the Union accessed the OASIS data and created its own lists and spreadsheet from that information, the Union cannot assert it was unaware it had this data. Similarly, because it possessed the OASIS data and used it as the basis to request bargaining in the first place, the Union cannot plausibly claim that it was prejudiced in any way. *See, e.g.*, *Woodland Clinic*, 331 NLRB 735, 727 (2000) (failure to comply with information request "severely diminished [the information's] usefulness" to the union).

Under all the circumstances, the College had no duty to respond and nothing to produce in this situation. Both the College and the Union had access to the same freely available source for the information. Vallera and Stevenson admitted that the Union in fact already possessed all of the information it requested. It even supplied this information to the Region as part of the Region's investigation.[22] Under *Kroger*, the College had no obligation to provide the Union with information that the Union knowingly possessed. The Union did not have "an ongoing need for the information requested" at the time it requested it. *See Borgess Med. Ctr.*, 342 NLRB 1105, 1106 (2004). Accordingly, under the totality of the circumstances, the College could not have violated the Act when it did not provide information that the Union already knowingly possessed, to the extent it existed.

B. The College met its duty with respect to the Union's December 20 information request.

The ALJ did not find that the College failed to respond to the December 20 request, but only that the College took too long to respond. The ALJ failed, however, to appreciate that under

[22] The Union's submission of the OASIS information to the Region is effectively a confessionary pleading, and the ALJ should have found that this submission alone is conclusive proof that the College could not have violated the Act with respect to the Union's information requests. *See Consol. Bus Transit*, 350 NLRB 1064, 1065 n.6 (2007); C*.P. Associates, Inc.*, 336 NLRB 167 (2001) (citing *Boydston Elec., Inc.*, 331 NLRB 1450, 1451 (2000)); *Academy of Art Coll.*, 241 NLRB 454, 455 (1979).

all the circumstances, which Board precedent commands be taken into account, the College fulfilled its duty to provide information.[23]

In *West Penn Power Co.*, 339 NLRB 585 (2003), the Board set forth the test for determining if a delay in furnishing information violates the Act:

> In determining whether an employer has unlawfully delayed responding to an information request, the Board considers the totality of the circumstances surrounding the incident. "Indeed, it is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow." *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). In evaluating the promptness of the response, "the Board will consider the complexity and extent of information sought, its availability and the difficulty in retrieving the information." *Samaritan Medical Center*, 319 NLRB 392, 398 (1995).

339 NLRB at 587. The GC has the burden to establish that an employer's delay is unreasonable based on all the underlying circumstances (*Id.*)

Here, the GC did not meet his burden and the ALJ failed to fully consider the underlying circumstances. As detailed in the facts above, the underlying circumstances include: the Union's numerous, extensive, and unclear information requests to the College just prior to its holiday break (Tr. 389); a flood of P-Fac information requests that near-monopolized Marcus' time (Tr. 397); the loss of personnel to help Marcus respond (Tr. 398-99); and the unavailability until late January 2011 of some of the scheduling information P-Fac requested (Tr. 390-91, 397). After the holiday break, the College began gathering responsive information. On January 20, 2011, Marcus notified the Union by email about her progress (Tr. 396-97; Resp. Ex. 13). The record contains no evidence that P-Fac ever responded to this update, much less objected to it. Then, on February 21, 2011, the College submitted its response to P-Fac (Tr. 396; Jt. Ex. 1).

[23] The College excepts to the ALJ's Order, as explained in footnote 27 of his Decision, to the extent it requires the College to "engage in a revised and thorough search of all its records in order to verify that it has fully complied with [Request #2]." The ALJ has no authority to order a remedy where he has not found a violation.

The Board's precedent cited above is clear that the scope of the request and time sensitivity are relevant factors. In this case, the request was substantial and burdensome and made in the context of an upcoming holiday break and a large volume of other requests. P-Fac's exhaustive information request had no time-sensitivity concerns, given that it requested information that it knew would not be available for more than a month. Under these circumstances, the College made a "reasonable good faith effort to respond to the request as promptly as circumstances allow[ed]." *Good Life Beverage Co.*, 312 NLRB at 1062 n. 9; *West Penn Power,* 339 NLRB at 587 (information request made at the time of numerous other requests as well as volume of information requested and lack of time sensitivity justified timing of employer's response; *In re Piggly Wiggly Midwest, LLC*, 357 NLRB No. 191 (2012)(timing of information request "cannot transform the [College's] response into an unreasonably delayed one, given the size of the information request").

IV. The ALJ's *Transmarine* Backpay Remedy Is Impermissibly Punitive.

The ALJ's Decision and Order includes a remedy pursuant to *Transmarine Navigation Corp.*, 170 NLRB 389 (1968) (ALJD at 17-19). In the typical effects bargaining case, employees have lost their jobs because an employer closed a facility or subcontracted an operation. A *Transmarine* remedy is standard in such cases and requires an employer to pay back pay to affected employees and bargain with the union over the effects of the closing or subcontracting. Even if there were an effects-bargaining violation here, however, there is no justification for the ALJ's order requiring the College to pay "each unit employee in HHSS the value of a three-credit course" (ALJD at p. 20, lines 9-10).

This is not a case where adjunct faculty members were laid off or lost their jobs. Here, it is undisputed that only three adjuncts (2.3% of those who taught in HHSS during the 2010-11

academic year) were adversely affected by the College's decision. As a result, the ALJ's order requiring the College to pay the value of a three-credit course to 129 unit employees is wholly unrelated to actual losses suffered and, accordingly, impermissibly punitive rather than remedial. *NLRB v. Waymouth Farms, Inc.*, 172 F.3d 598 (8th Cir. 1999)(court rejected the Board's *Transmarine* backpay remedy in favor of all unit employees and ruled that the backpay remedy must be limited to the three employees affected by the employer's violation); *Wal-Mart Stores, Inc.*, 348 NLRB 274 (2007) (where the employer lawfully decided to close an operation but failed to engage in effects bargaining, Board declined to modify ALJ's order that did not include a *Transmarine* back pay remedy where employees suffered no losses and where no exceptions filed to ALJ's decision not to order back pay).[24]

In order to fashion an appropriate remedy, the ALJ was required to determine the impact, if any, on unit employees of the College's "change." Back pay remedies "must be sufficiently tailored to expunge only the actual, and not merely speculative consequences of the unfair labor practices." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900, 902-904 (1984).

The ALJ's impact analysis, however, is anchored in guesswork instead of record evidence. As discussed above, the ALJ asserted that faculty lost various opportunities as a result of the "change" (ALJD at 15), but no record evidence supports the ALJ's conclusion and several of the alleged lost opportunities are wildly speculative, *e.g.*, faculty "who were popular with students" and "lost" the opportunity to have students "likely reward[]" them with registrations sufficient to fill a third course and faculty "who were creative or aggressive in marketing their courses" and "lost" the opportunity to "enhance" their ability to secure a third course. Clearly,

[24] Even *Rochester Gas & Elec. Corp.*, 355 NLRB No. 85 (2010) cited by the ALJ, limits *Transmarine* backpay to "affected employees." *See id.*, at n. 5.

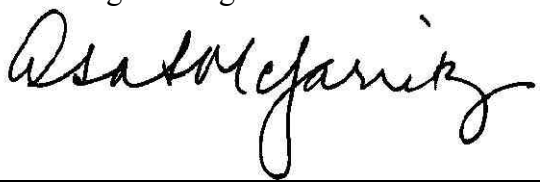
the ALJ's recommended back pay remedy violates the *Sure-Tan* requirement because it goes well beyond the actual consequences of the conduct at issue and, accordingly, cannot stand.[25]

CONCLUSION

For all of the foregoing reasons, the ALJ's Decision and Order should be reversed and the amended complaint should be dismissed in its entirety.

Respectfully submitted,

Columbia College Chicago



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[25] The ALJ's remedy is further flawed for its lack of clarity. In particular, although the ALJ rejected the GC's request for a "three semester" remedy (ALJD at p. 18 and n. 36), he also stated that the "sum paid to each employee shall not exceed the monetary value of a three-course credit from November 3, 2010 … until the date on which the College shall have offered to bargain in good faith" (*Id*. at p. 18, lines 30-32). But that time period covers several semesters and therefore conflicts with the ALJ's rejection of the "treble *Transmarine* remedy" sought by the GC and is inconsistent with the immediately preceding paragraph of the Decision which states that backpay runs from five days after the Board's decision until one of the standard *Transmarine* conditions occurs.

CERTIFICATE OF SERVICE

The undersigned attorney certifies that she caused a copy of the foregoing to be served via electronic mail 4th day of September 2012, as follows:

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