UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PART-TIME FACULTY ASSN. AT COLUMBIA COLLEGE CHICAGO –IEA-NEA,	)	
Charging Party,	)	**Case No. 30-CA-018888**
and	)	
	)	**(formerly 13-CA-046562)**
COLUMBIA COLLEGE CHICAGO,	)	
Respondent	)	

Brief of Charging Party

Part-Time Faculty Association at Columbia College Chicago

In Opposition to the Respondent's Exceptions

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INTRODUCTION

The Charging Party, Part-time Facility Association at Columbia College Chicago Association/National Education Association ("P-FAC"), represents part time faculty at the Respondent, Columbia College of Chicago ("College"). This case involves a change in the procedure used to schedule courses made by the College on or about November 3, 2010. This change led to a one-third decrease in courses offered faculty and a similar reduction in income. The College failed to provide the Union with necessary information regarding this change in timely manner, and failed and refused to engage in effects bargaining regarding the change. On February 6 – February 8, 2012, the parties presented their case before Administrative Law Judge Ringer, who issued his Decision and Recommended Order on July 17, 2012. The ALJ found that the College violated Sections 8(1) and (5) of the Act by failing to provide necessary information to P-FAC, and failed to engage in effects bargaining regarding the College's November 3, 2010 change in policy. The ALJ ordered a *Transmarine* remedy of limited back pay, along with an order that the College provide all information and bargain with the Union.

STATEMENT OF FACTS

A. The Parties

Charging Party, P-FAC, is a local union and member of the Illinois Education Association ("IEA"), which represents faculty at the Respondent, Columbia College ("College"). P-FAC represents part time faculty throughout the College, including faculty in the School of Fine and Performing Arts, the School of Liberal Arts and Sciences, and the School of Media Arts (Tr. 335-336). Each school has several departments which are managed by Department Chairs (Tr. 336). For example, the

Department of History, Humanities and Social Sciences Department ("HHSS") was previously chaired by Dr. Lisa Brock, later managed by Acting Chair Cadence Wynter (Tr. 48-49; 98).

B. **Past Practice Concerning Scheduling of Courses**

Prior to November 3, 2010, the College scheduled courses pursuant to what then Chair Dr. Brock called the "roll over" method. From at least 2006 through 2010, midway through a semester, the Department Chairs throughout the College received notification from the Assistant Dean that the schedule was about to "roll over." (Tr. 48-49, 51), using the previous semester schedule to create the schedule for the upcoming semester (Tr. 48 – 51). The same adjunct professors were assigned to teach the "rolled over" courses (Tr. 49-50). As part of the process, the Academic Manager for each Department would send out an "Adjunct Faculty Availability Form" to each part time faculty inquiring whether they wished to teach the same class (Tr. 52-53; CP. Ex. 1). Upon receipt of the completed forms, the Academic Manager finalized classes and secured rooms so that the students could view and select classes on the class schedule website, OASIS (Tr. 54, 57-58). Once the classes go "live," faculty can see the classes that they are teaching in the forthcoming semester, can observe how many students may enroll in the course, and how many students have actually enrolled as of the day that they look at enrollment in the OASIS system. (Tr. 104-05). Thereafter, typically early in the new Semester, adjunct faculty would receive an "Adjunct Teaching Assignment Form" which would confirm the classes that the adjunct had agreed to teach that Semester, and his or her rate of pay (dependent upon terms in the CBA) for the class. (Tr. 60, CP Ex. 1) If the class had to be cancelled, the adjunct would receive a $100 stipend. (Tr. 162; GC Ex. 2, CBA Art. VIII, para.7).

From at least 2006-2010, it was the policy and practice of the HHSS Chair, Lisa Brock, to assign three classes each to high performing and senior (51 credit hours) adjunct faculty who were qualified and available. (Tr. 64). For example, John Stevenson, an HHSS adjunct faculty, had been assigned three courses for at least seven semesters, prior to 2010 and MaryLou Carroll, also an HHSS adjunct member, taught three classes per semester from the Fall 2006 through Fall 2010. (Tr. 97, 131, GC Exs. 3, 7, 9 and 10). Thus, typically, using the "roll over" method, faculty members could expect to continue teaching three courses per semester.

C. The College's Change in Procedure of Scheduling Courses

On November 3, 2010, Cadence Wynter, the acting Chair of HHSS, issued an edict by email regarding "schedule changes for the Spring semester 2011," and advising that adjunct faculty would be scheduled for a maximum of two courses for the Spring 2011 semester. (Tr. 98, GC. Ex. 3). Almost immediately, on November 8, 2010, P-FAC protested the decision, sought information about the decision and its implementation, and demanded to bargain with the Employer about the effects of the decision on any and all impacted adjuncts. (Tr. 134, GC Ex. 6). Because P-FAC believed that similar (albeit unannounced) edicts were being acted upon in other Departments, P-FAC also sought information from the College regarding changes in course assignment procedures that were being made in other departments, as well as in HHSS. (Tr. 235, 240, 244-45, 273, CP Ex. 3).

On November 9, 2010, P-FAC representatives met with Dr. Wynter and the HHSS Academic Managers. During that meeting, Dr. Wynter indicated that the unwritten policy originated in the Dean's Office, which had, in turn, received instructions from the Provost. (Tr. 136). Although Wynter confuses the amount of available work and the distribution of work, it is clear that Wynter understood that she made a change to limit initial assignments to two courses. At the hearing, Wynter testified that the change in assigning courses related to the need to have "student enrollment [ ] more closely tied [with scheduling] that it had been in the past." (Tr.

466-67), and that the Department had been offering "too many courses for student registration and wished to avoid cancellation fees (Tr. 438-39). Wynter testified that she "changed" the process for scheduling class assignments for the Spring, 2011, to conform to a more "workable" system. (Tr. 467-68). Wynter testified at trial that she felt that the change that she implemented in dealing with the need to more closely "tie" the schedule to student enrollment was the most "fair" way to do so. (Tr. 547). During her meeting with the P-FAC representatives, Wynter also stated that adjunct faculty could get a third class if the first class filled, and the second class reached "healthy numbers." (Tr. 137) She did not define what constituted "healthy numbers" but surmised it was somewhere in the "teens." (Tr. 137). Dr. Wynter further indicated that she did not feel obligated to abide by past practice or seniority in assigning the third class to adjunct faculty. (Tr. 139). While Wynter agreed to keep P-FAC apprised, Wynter did not schedule any additional meeting with the Union, and never spoke with the Union about this change again (Tr. 138-40).

P-FAC representative Carroll did, however, engage in an email exchange and conversations with Academic Manager, Tomiwa Shonekan, after she received her teaching assignment form on or about December 6, 2010. Specifically, Ms. Carroll inquired about the form's indication that her Gender Class had been "held." (Tr. 141-142, GC Ex. 12). Mr. Shonekan advised Ms. Carroll that Dr. Wynter's new benchmark or definition of "healthy numbers" for a class to be considered full, before a third class could be opened, was now 20-21 students, rather than in the "teens," as Wynter had previously stated. (Tr. 146). When Ms. Carroll confirmed this conversation by email to Mr. Shonekan on December 15, 2010, Mr. Shonekan replied that per instructions of Dr. Wynter, all "held" sections would only be opened upon express approval of Dr. Wynter, and not when the benchmark number for the second class had been reached. (Tr. 148, GC Ex. 13). Ms. Carroll then wrote directly to Wynter asking whether there was any reason that she would not give permission to open a third class after the second class reached her

newly established benchmark, but for the third time, Dr. Wynter did not reply. (Tr. 148, GC Ex. 13). In fact, Wynter has never responded to any questions or requests for information that Ms. Carroll posed. (Tr. 140, 148). Ms. Carroll – a seasoned, long- term employee of the College – has not been offered a third class since the change went into effect, (Tr. 160-61, GC Ex. 19), nor did she receive a $100.00 stipend for the course that she was assigned to teach, but was "held" and never ran in the Spring of 2011. (Tr. 162).

D. The Union's Many Requests for Information and Demand for Effects Bargaining

Concurrent with Ms. Carroll's request for information directed to the HHSS Department interim chair, on or about November 5, 2010, IEA UniServ Director, Dave Walter, sent a request to meet with Interim College Provost Louise Love to discuss the two class restriction imposed by Department Chairs in the HHSS and Marketing Departments. (Tr. 270-71; GC Ex. 26). Despite the clarity of the request, Dr. Love skirted around the issue by contending that she did not know what the Union wished to discuss. *Id.* Mr. Walter provided even more detail and indicated that P-FAC wished to bargain the effects on its members. (GC Ex. 26).

Love's title changed during the course of the events at issue; she became VP of Academic Affairs in June, 2007, and in June, 2011 her title became Interim Provost. (Tr. 335). Interim IEA UniServ Director, Barry Tusin, followed up with a letter to Dr. Love on December 15, 2010, reminding her that Dave Walter had previously requested a meeting on November 5, 2010, regarding the two class limit in the HHSS and Marketing Departments, and that the Union had subsequently become aware that the course reductions had also occurred in the Arts, Entertainment and Media Management Department ("AEMM"). Mr. Tusin also included another detailed request for information. (Tr. 170-171, GC Ex. 27). As it happened, the College and Union had a bargaining session scheduled for December 17, 2010, to discuss a successor agreement. P-FAC requested that the time-sensitive issue of reducing the number of classes

also be discussed at this session. (Tr. 172). When the parties met across the table on December 17, 2010, IEA UniServ Director, Bill Silver, stated that the Union was very troubled about the unilateral change, and that the union had already made two requests to for information and to bargain over the College's change in assignment of classes to adjuncts, *e.g.* that the adjuncts would now be assigned a maximum of *two* rather than *three* courses per semester. (Tr. 174-75). Such change violates the collective bargaining agreement's requirement that faculty teach 18 credit hours per academic year, lowering this to 12 credit hours at the most. At the parties' meeting, Silver also emphasized the time-sensitive nature of the issue, because Spring class enrollment was supposed to close shortly and classes were scheduled to begin on January 17, 2011. (Tr. 175). Ms. Love replied that the College only became aware of this issue on December 15, 2010, as a result of the letter sent by Mr. Tusin, and therefore, the College was not in any position to bargain. (Tr. 175). Mr. Silver re-educated Dr. Love by informing her that the Union had requested to meet on two occasions – November 5 and 7, 2010 – through IEA UniServ Director, Dave Walter. Dr. Love suddenly remembered these requests, but stated that a request to meet was not the same as a demand to bargain, and Silver responded that in fact, it was one in the same with a request to bargain. (Tr. 176, 276). Dr. Love then suggested that P-FAC follow up with her assistant, Susan Marcus, College Associate Vice President for Academic Affairs, to set up a meeting/bargaining session (Tr. 175, 276, GC Ex. 29). This time-sensitive issue was thus never discussed at the December 17, 2010 bargaining session.

In response to the College's across-the-table directive on December 17, 2010 that bargaining over the changes in class assignments be handled away from the bargaining table by Ms. Marcus, later that very day Ms. Vallera sent an email to Ms. Marcus (copied to Dr. Love) asking to schedule a time to "meet to discuss the impact and the changes in our members' class assignments. (TR.178, 279; GC. Ex. 28). We have asked for rationale to be provided and a list of members affected, classes affected and departments, among other information requests." (GC

Ex. 28). She concluded the email by suggesting that the parties meet on December 20 or December 21st.

Concurrently, P-FAC filed a grievance dated November 3, 2010, protesting the unilateral change and reduction in class assignment. A separate information request accompanied the grievance. Ms. Vallera served both of these on Ms. Marcus on the December 20, 2010. (Tr. 149-150, 278; GC Exs. 14, 15). Responsive to Ms. Vallera's December 17, 2010 email request, a meeting was set up for December 21, 2010; Uniserv Director Bill Silver and Ms. Carroll along with Ms. Vallera (telephonic participation) attended a meeting with Ms. Marcus to discuss this time-sensitive matter. (Tr. 181, 278). As is evidenced from Ms. Vallera's email, the clearly articulated purpose of the meeting was to obtain information pertaining to the unilateral reduction in class assignments to adjuncts and to bargain the effects of that decision. (Tr. 180). To that end, P-FAC representatives asked Ms. Marcus to identify the reasons for the change, how many adjunct faculty members were affected, and projected student enrollment dictating the changes. (Tr. 181). Ms. Marcus stated that she was not aware of the changes, and if they had occurred, they were not college-wide. (Tr. 181). At the Hearing, Marcus insisted that "no change had occurred" in the HHSS Department, (Tr. 407-08), and P-FAC pointed out that it understood that the issue was college-wide, because it had learned indirectly that Dean Nichols had sent out a memo asking Departments to adjust their assignments for the upcoming semester. (Tr. 183). Ms. Marcus denied knowledge of any such communication coming from the Deans. (Tr. 244). In order to ascertain the scope of the change being implemented – *i.e.* to determine how many departments had implemented the same or similar changes that Wynter had implemented in the HHSS Department – the Union requested information including email communications, notes or memoranda among and between the Deans and Department Chairs regarding this matter. Although the Employer consistently and adamantly insisted that no such decision was made, and hence that no such documents existed, the Union was able to obtain a

copy of a communication that demonstrated that the College's representation on this issue was simply not true (*See* Tr. 230-36, CP Ex. 3). As noted in the remedy section below, the Union submits that the Employer's conduct of stonewalling in response to the Union's information request should not be condoned. The only way to remedy the Employer's wrongful refusal to respond to the Union's valid information request is to grant a broad remedy, including a remand for further investigation of the Employer's unilateral change in assignment of courses in other departments besides HHSS.

The Union also requested specific information from Ms. Marcus regarding similar changes in course assignments that were being made in other departments. (Tr. 184, 230-36, 290, CP Ex. 3, GC Ex. 27). At the Hearing in this matter, Marcus testified that the Union never asked her about changes in any department other than HHSS. (Tr. 417-18). When confronted with the email that was sent to her in which the Union had clearly requested to meet with her that day regarding "departments" (plural) that were impacted by the policy change being implemented, Marcus responded that she didn't that that she "read it [the Union's email] that carefully." (Tr. 419). Marcus did not keep notes of this meeting, (418) however, Bill Silver's contemporaneous notes of that meeting reflect that he specifically asked Marcus for information regarding changes that occurred in numerous departments – not just HHSS. (Tr. 659, CP Ex. 8). The P-FAC representatives also advised Ms. Marcus that they separately wanted to discuss bumping rights and other issues raised in the grievance at a later step-one grievance meeting to be scheduled. (Tr. 182).

On January 6, 2011, Ms. Marcus advised the Union that she had sufficient information to respond to the grievance, even though a step one meeting had never been held. (TR. 284, GC Ex. 30). Ms. Vallera responded by email of January 9, 2011, that Ms. Marcus specifically stated at the December 21, 2010 meeting that the discussion was not a step one hearing of the grievance. (Tr. 283-84). Instead, the meeting had been arranged following the administration's

unwillingness to discuss class reductions at the December 17, 2010 bargaining session, and Dr. Love had instructed the Union to deal with Ms. Marcus directly. (GC Ex. 30). Ms. Marcus responded on January 13, 2011, denying the grievance. (GC 31). Notably – irrespective of what Marcus "understood" the December 20, 2010 meeting to be about (bargaining effects of grievance) – she considered the issue that P-FAC raised to be "fully addressed" because she had "sufficient information" to dispose of the matter. However, at the Hearing in this matter, Marcus admitted that (1) at the time of the meeting, she lacked sufficient time to collect or review the information that the Union was seeking and felt was pertinent regarding the change in assignment of courses (Tr. 408), and (2) that she *never* at any time through the present date, took the time to personally investigate what had occurred in the HHSS Department, or to identify what documents might exist in response to the Union's information requests. (Tr. 410). Instead, Marcus relied exclusively upon Wynter to gather the information that the Union had requested. (Tr. 414). However, the Record evidence indicates that Marcus did not see the documents in response to the Union's information request until sometime in mid- to late January, (Tr. 474, 528-29) and that Wynter provided supplemental information to Marcus (in response to a "second request") sometime in February (Tr. 473). Thus, Marcus' conclusion on January 6, 2011 that she had "sufficient information" to deny the Union's grievance, the "information" that she had was nothing at all, other than her own conclusions regarding a wholly one-sided and un-investigated matter.

The same day that Marcus denied the Union's grievance (January 13, 2011), another bargaining session occurred. On behalf of P-FAC, Ms. Vallera stated that the Union had not received any information, that the problem that the Union had identified had spread to other Departments and the Union still sought to bargain the effects of the decision. (Tr. 189, 289). College General Counsel, Annice Kelly, replied that the College couldn't respond to the Union's information request until the Union identified which Departments and faculty had been

impacted, which was precisely the information that the Union had been seeking! (TR. 189, 191, 289; GC Exs.33a and 33b).

On January 19, 2011, the Union submitted a second request for information, asking for items such as the rationale for the decision to change the class assignment, college-wide enrollment data, criteria employed by the College in selecting classes to be dropped, added, etc., lists of adjunct faculty hired, and by credit hours, and various lists of classes withheld or added for the Spring 2011 semester. (GC Ex. 17). Like its previous obfuscation, the College never responded to this request. (Tr. 299; GC Ex. 17). On January 21, 2011 the parties returned to the bargaining table as part of their schedule to address the issues related to a new contract. (Tr. 291). Although this change was placed on the agenda for discussion, the parties never engaged in substantive discussion regarding this issue. On that date, the Union attempted to address another, pressing time-sensitive issue pertaining to the recently implemented changes and its impact on the bumping rights for senior faculty; it reminded the College bargaining team that when an issue was time-sensitive the Union had been advised to bring the issue to the bargaining table or to Dr. Love directly. (Tr. 292-293, GC Exs. 34a and 34b). Dr. Love responded that even though such topics had been discussed informally in the past, because of the trio of grievances and ULPs by P-FAC, the College was "gun shy" and that she would no longer informally discuss any matters with the Union. (Tr. 193, 293, GC Exs. 34a and 34b). Nothing else was discussed at this bargaining session regarding the change from three to two classes for any adjunct faculty members in any of the Departments in the College. (Tr. 294).

On January 19, 2011, P-FAC submitted a second step grievance to Provost, Steve Kapelke, regarding its November 3, 2010 challenge to the decision to cut class assignments. (Tr. 194-195, GC Ex. 35). In a meeting with Mr. Kapelke, the Union explained that it was unable to either bargain the effects of the College's unilateral change in assignment of courses or process the HHSS grievance because the Union simply did not have the information that they requested,

and needed, in order to address either issue. Specifically, the Union advised the Provost that the Union only had anecdotal evidence of changes in other departments because the College had not responded to their information request. The Union told Kapelke that it nonetheless planned to expand its grievance and demand to bargain to other Departments in the College where the Union believed similar changes had been implemented. (Tr. 195, GC Ex. 35). The Union also attempted to explain to Mr. Kapelke that they wished to engage in effects bargaining with him, but he was not knowledgeable about the process due to his role at the College, and the matter was not discussed. (Tr. 195). The Union subsequently submitted its amended grievance, identifying contract violations with regard to the adjunct faculty in the HHSS, AEMM, Marketing, Radio, Fashion, Art and Design and Photography departments on February 22, 2011. (GC Ex. 36). The grievance was rejected as an improper submission by Susan Marcus on March 18, 2011. (Tr. 202-204, GC Ex. 38). IEA representative Bill Silver protested the College's regressive tactics in an email to Ms. Marcus on March 25, 2011 and requested that the issue proceed to a second step meeting. (GC Ex. 39).

No meeting regarding the Union's expanded grievance ever took place. (Tr. 203-04). Since the College's *fait d'compli* of refusing to provide the Union with timely information or to timely meet with the P-FAC the parties have not met, either through the grievance process or at the bargaining table, nor has the Union received any information in response to its December 15, 2010 request. (Tr. 205). In fact, the only information the Union received from the College with regard to credit hours related to a separate issue of step increases and was not submitted in response to the information request regarding effects bargaining. (Tr. 207-08).

Thus, prior to hearing, the College failed to provide:

(1) a list of individuals who had their class assignments reduced, either in the HHSS Department, or College-wide;

(2) the nature of the notification that was provided to affected faculty;

(3) the reasons for the assignment changes; the efforts the College made to find other classes for affected faculty members;

(4) the rationale to be provided and the list of members; classes and departments affected; or

(5) the reason for and/or what prompted Department Chairs to restrict class assignments.

(Tr. 206).

E. **The December 15 and December 20, 2012 information requests**

As discussed above, the Union made numerous requests for Information and requests to bargain over the November 3, 2010 announcement. The Complaint, and thus, the ALJ's decision, focused on the December 15 (1st Request) and the December 20 request. (2d Request). Both requests were narrowly tailored, seeking information leading to the November 3 announcements, lists of faculty available to teach three courses, information regarding courses that were added or dropped in the Spring semester 2011, and lists of faculty affected by the November 3 decision (GC Ex. 27, 15).

At the hearing that was held in this matter, the Union learned for the first time that in fact, Wynter had collected and given to Susan Marcus information that was directly responsive to the Union's information request, but that Marcus never provided this information to the Union. (*See* Tr. 520). Therefore, the Union now knows that information was culled by Wynter in or about January-February 2011, which was *never* provided to the Union even to the current date. These materials include:

Request No. 1: All facts and rationale, supporting documentation or information, communications, or exchanges between the HHSS Department and the administration that "influenced, directed, or led to the proposed schedule change" announced by Wynter on November 3, 2010.

Employer Response: No documents responsive to this request.

Wynter testified: She did have a rationale, but never shared it with Susan Marcus. (Tr. 546).
Non-produced records: The Union became aware of a document that should have been responsive to this request (CP 3) but which the Employer denied existed.

Request No. 2: College-wide enrollment data for the years 2008, 2009, 2010 and Spring 2011. (Employer responded in February, 2011)

Request No. 3: list of hired adjunct faculty in HHSS Department from January, 2008 to January, 2011.

Employer responded "no documents responsive to this request" (Jt. Ex. 1) and provided no responsive material

Wynter testified that Tomiwa prepared a list of such classes and sent it to Susan Marcus. (Tr. 521).

Request No. 6: List of classes that have been withheld from Spring 2011 registration roster. Employer responded: No documents responsive to this request.
Wynter testified she prepared a list of such classes and submitted it so Susan Marcus. (Tr. 521). Wynter also testified on direct examination that she had not seen CP 4 or 5 – the compilation of letters that went out from her Department to the adjuncts that stated "held" in red handwriting, until shortly before the trial. (Tr. 480). However, these documents clearly existed and were in the College's possession, since they were ultimately produced to the Union's counsel in response to Charging Party's Subpoena Request. (*See* Jt. Ex. 2 and 3). The Employer never proffered any explanation regarding where these documents were, who had them, and how they finally discovered and produced them in response to counsel's Subpoena request. Nor did the Employer ever explain why it failed to produce the list that Wynter admitted preparing, and which was squarely responsive to the Union's information request.

Request No. 7: List of classes that hae been added to Spring 2011 registration.

Wynter testified: "we should have been able to pull that up if any were added…I think we had a response to all of these…maybe the response wasn't complete, but there was some response." (Tr. 522).

Request No. 8: List of classes that have been substituted for other classes or sections to Spring 2011 registration roster.

Employer response: None.

Wynter testified: "we didn't understand what it meant by substituted or other classes or sections." (Tr. 522). She further testified that she asked Susan Marcus for clarification regarding what this meant, and Marcus responded, "if you don't understand what it says, then you can't respond." (Tr. 522). When questioned about the information requests that she, or Wynter did not understand, Marcus forthrightly admitted that her position on this matter was that "I didn't feel that [asking for clarification] was my responsibility." (Tr. 413).

Request No. 9: List of classes that have been dropped from Spring 2011 registration roster. Employer response: None

Wynter testified: "I believe we were able to pull that up, yes, [and gave that to Susan]." (Tr. 522).

Request No. 10: List of classes that have been claimed pursuant to "bumping" privilege on Spring 2011 roster.

Employer response: None.

Wynter testified that she "could not remember" whether there were such persons, but that "if there were, it would have shown up…" (Tr. 524).

Requests No. 11, 12, 13: Sought lists of adjunct faculty who indicated their availability to teach three courses, a list of adjunct who were available to teach 3 courses and were assigned to teach less than 3 courses in the Spring, 2011, a list of adjunct faculty who indicated their availability to teach 3 courses in Spring 2011 and who received three courses in the Spring, 2011 semester.
Employer response: the employer provided *only* teacher availability reforms – which provide what the teachers are requesting to teach, but not what they are given.
Wynter testified: she prepared a list or a chart that included all responsive information. (Tr. 526-27). Wynter provided this information to Marcus. (Tr. 527).

Request No. 14: List of adjunct faculty who lost classes in any combination for Spring 2011 semester.

Employer Response: "There is no category of 'lost' courses.

Wynter testified that she did not know what was meant by "combination" (Tr. 527), that she asked Marcus for clarification (Tr. 528), and that Marcus responded "if you don't understand the question, then leave it alone." (Tr. 528).

Thus, Wynter testified that as of ***January, 2011***, she had gathered all of the above information and provided it to Marcus, (Tr. 529), but none of the information was provided to the Union until February 21, 2011. (Jt. Ex. 1, Tr. 210). The information that Wynter collected in January apparently sat on Marcus' desk during January and February – during the only time that would be most helpful to the Union to engage in effects bargaining and support its grievance processing. (Tr. 520-521). When questioned about the delay in providing information to the Union – such as the teaching assignment forms which were clearly available as of December 6, 2010 – Marcus responded that she decided that it was best to "wait[] until the information was complete to hand it over." (Tr. 412). The decision to "wait" was made despite Dr. Love's admitted knowledge that the matter was of "some urgency" to the Union. (Tr. 372). In addition, *no* information responsive to the Union's November 7, 2010 and December 15, 2010 information request was ever received from the Employer. (Tr. 206-10).

F. **The ALJ Decision and Remedy**

On July 17, 2012, the ALJ issued his Decision and Recommended Order. Based on the evidence described above, the ALJ found that in fact the College violated Sections 8(a)(1) and (5) of the Act by failing to provide the Union with all the information needed concerning the November 3, 2010 change in policy. The ALJ likewise found that the College violated Sections 8(a)(1) and (5) of the Act by failing and refusing to engage in effects bargaining with the Union regarding the change in policy. In addition to an Order requiring that the College provide any information not yet given to the Union, and to bargain the effects of its November 3 Decision with the Union, the ALJ issued a *Transmarine* back pay remedy, since without such remedy it is impossible to restore any balance of power and some economic strength is necessary for meaningful bargaining. (ALJ Decision at 18). The Board should uphold this Decision and Order in its Entirety.

ARGUMENT

I. **The Board Should Uphold the Factual and Legal Findings of the ALJ, as the Findings are Supported by Substantial Evidence and Law.**

The College makes a number of blanket exceptions of fact and law that it fails to support in its Supporting Brief, or explain how the ALJ allegedly erred. While it cites to apparent record evidence in its exceptions, in its brief, the College fails to identify the argument supporting each exception as required. *See NLRB Rules and Regulations*, 29 CFR Section 102.46(c). The Board need not, therefore, consider the 53 individual

exceptions filed by the College.[1] In any case, in considering factual exceptions, the Board will only set aside factual findings that are contrary to a preponderance of the evidence. *NLRB Rules and Regulations,* Section 102.48(c); *Permaneer Corp.*, 214 NLRB 367 (1974); *Standard Drywall Products,* 91 NLRB 544 (1950), enf'd 188 F.2d 362 (3d Cir. 1951). While the College differs from the ALJ in its account of certain facts, nowhere in its brief does the College suggest or establish that the ALJ's factual findings were contrary to a preponderance of the evidence presented in the record. In stark contrast, the ALJ methodically described the evidence considered, describing witness testimony in detail along with examined exhibits. As explained in greater detail below, the ALJ's findings were based on evidence presented, and any exceptions to factual findings (included in Exceptions 1 – 51), should be dismissed by the Board. In addition, the ALJ's findings of law are not contrary to law but supported by Board precedent.

II. The ALJ Properly found that the College Violated the Act by Failing to Timely Provide the Union with Information Requested (Exceptions 11-19, 20 – 33, 45).

A. College Had a Duty to Provide Information Requested

The College makes the specious argument that it had no duty to answer the Union's December 15 information request. First, it is well settled law that an employer must provide the Union with information requested regarding changes to terms and conditions of employment. *Miami Rivet,* 318 NLRB 769, 771 (1995). As described below, *infra*, at 22-25, the College absolutely made a unilateral change to the terms and conditions of part-time faculty employment when it eliminated assignment of three courses through the "roll over" method, reduced teachers course load to two courses

[1] Indeed, while Charging Party attempts to determine the arguments made on behalf of each exception, since the College failed to identify the exceptions it was supporting, the

unless a third is deemed necessary based on enrollment, and eliminated the $100 cancellation fee (*Infra,* at 22-25; GC Ex. 3, Tr. 64-65, 97-98). The College announced such change by email of Dr. Cadence Wynter on November 3, 2010 (GC Ex. 5). In response, the Union immediately sought information and demanded to bargain with the College regarding this announcement (GC. Ex. 6, 27, 15). The Union sought information and questioned the College in contract negotiation meetings regarding this change and continuously sought information and follow up meetings (Tr. 135- 49, 174-75, 276-79). On December 15 and December 20, 2010, the Union served the College with formal yet narrow information requests, seeking information relating to the announcement of November 3, lists of faculty available to teach three courses, information on changes in the schedule for the Spring semester of 2011, and lists of faculty affected by the College's November 3 announcement.[2] (GC Exs. 27, 15). These requests were narrowly tailored to gather information directly related to the College's November 3 announcement, and the impact on the entire bargaining unit (GC Exs. 27, 15). Accordingly, these requests are presumptively relevant, and the College was obligated to provide the requested information. *See A-Plus Roofing, Inc.*, 295 NLRB 967, 970 (1989) *San Diego Newpaper Guild Local 95 v. NLRB*, 548 F.2d 863 (9th Cir. 1977). Any meaningful ability to engage in effects bargaining over a unilateral managerial decision requires that the Union be provided the information requested regarding such decision. *Miami Rivet*, 318 NLRB at 772. Thus, the duty to provide information includes the duty to gather and provide the information as quickly as circumstances permit. *Postal Service,* 352 NLRB 923 (2008).

[2] The ALJ provides a more comprehensive list of information sought (ALJ Decision at 6-8), as do the parties post hearing briefs presented to the ALJ.

Board law is well settled that an employer must provide the Union with requested information that is relevant to its role in carrying out its statutory duties and responsibilities to represent bargaining unit members. *Monmouth Care Center,* 354 No. 2, Slip. Op. at 41 (2009); *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *National Broadcasting Co.*, 352 NLRB 90, 97 (2008). The Union is entitled to the information necessary to determine whether the filing of a grievance or unfair labor practice charge may be necessary to represent its members. *Beth Abraham Health Services,* 332 NRLB 1234 (2000). In this case, on November 3, 2010, the College issued a decision to eliminate the usual three course assignment to a limit of only two, potentially decreasing wages and hours by one third. In light of such drastic changes to working conditions, the Union certainly was entitled to the information to determine whether the filing of a grievance or unfair labor charge was appropriate.

Last, the College attempts to argue that it had no duty to provide the information requested because the Union had access to the information (Exceptions, at 26, Brief in Support, at 44). In support of its argument, the College cites *the Kroger Company*, 226 NLRB 512, 513 (1976). The page cited by the College, however, reviews the Administrative Law Judge's incorrect determination in that case that the Respondent was relieved of its duty to furnish information since it was available to the Union in another method, but that the full Board *disagreed*. *Id.* In fact, despite other avenues available to the union for obtaining information, the Board in *Kroger* found that the Employer violated Section 8(a)(5) of the Act by failing to provide requested information. *Id.* The Board went on to affirm the well settled rule that a union's right to information is not defeated merely because the Union had another source of obtaining

information and that the Union need not engage in a burdensome exercise to obtain the information. *Id. See also King Soopers, Inc.,* 354 NLRB 842, 844 (2005); *Yeshiva University*, 315 NLRB 1245, 1250 (1994). *Orthodox Jewish Home for the Aged,* 314 NLRB 1006 (1994).

Here, the College alleges that the Union could have gathered the information from the College OASIS registration system (Exceptions, at 26, Brief in Support at 44). Yet because the College "held" classes until sufficient enrollment numbers were registered, no extensive and in any case, burdensome search by the Union through the OASIS system would have revealed the departments and faculty members affected by its announcement. Rather, Professor (and Union President) Vallera testified that the Union was unable to gather the necessary information to determine the breadth of the College's unilateral change. Most importantly, the College has failed to identify any "special circumstances to justify its not providing the requested information to the Union, *Monmouth Care Center,* 354 No. 2, at 47; *Yeshiva University*, 315 NLRB at 1250 (1994). Accordingly, the ALJ did not err in finding that the College had a duty to provide the requested information (ALJ Decision, 13).

B. **The College Failed to Meet its Duty in a Timely Fashion and Failed to Provide all Necessary Information (Exceptions, 11-43, 45-49).**

The evidence and Board law support the ALJ's decision that the College failed to respond to the Union's information Request No. 2, in a timely manner.[3] To engage in any meaningful effects bargaining, the Union required the information, and the parties

[3] The College does not except to the ALJ's finding that it failed to respond to the December 15 information request in its entirety (Exceptions, 1-53). Accordingly, the Board need not consider this finding, and the findings stand. *NLRB Rules and Regulations*, Section 102.46 (b)(2).

needed to bargain, prior to the unilateral decision taking effect. *Miami Rivet,* 318 NLRB at 772, *Southern Mall, Inc.,* 345 NLRB 644, 647-48 (2005). It is an employer's obligation to furnish the information as promptly as possible, and a period of months can be unreasonable. *See Woodland Clinic,* 331 NLRB 735, 737 (2000); *Bundy Corp.,* 292 NLRB 671 (1989). Here, the College failed to provide a timely response within the meaning and mandates of Board precedent.

The ALJ carefully reviewed the information requests and circumstances surrounding the requests (Decision at 13-14). Indeed, the ALJ reviewed the items requested, all of which narrowly sought information regarding courses assigned, communications concerning the November 3 announcement, lists of faculty available to teach three courses, and lists of faculty affected by the College's November 3 announcement (GC. Ex. 15; ALJ Decision at 8). In evaluating the requests, the ALJ properly found that the Union's requests were neither overly complex or voluminous (ALJ at 14; GC Ex. 15). Rather, the Union simply sought to determine the breadth of the November 3 decision seeking primarily faculty lists and changes in course assignments for the Spring 2011 semester (*See* GC Ex. 27, 15). Accordingly, the College should have been able to easily comply with the requests made.

Instead, the College delayed at every opportunity. The College on November 5, two days after its unilateral change in policy, stated that it did not know what the Union wished to discuss (Tr. 270-71). The Union requested information in November (GC Ex. 27, Tr. 170-71), yet in December the College claimed that it only just became aware of the issue (Tr. 175). In response to the Information Requests of December 15, and December 20, the College claimed that that it did not have to provide the information

(Answer, GC Ex. 1-(h)). The College did not respond to the Union's information request until February 21, 2011 (Jt. Ex. 1), well after Spring semester had begun, and thus after any meaningful bargaining could have taken place.

The ALJ did not find that the College eventually complied with the information request, but found that regardless of the dispute on this matter, the College failed to comply in a timely fashion, thus preventing meaningful effects bargaining (ALJ Decision 14, 14 n. 27). Again, the College did not gather information until January 2011 (Tr. 250, 520-21). When it did finally provide some information, such as faculty availability forms, it did not provide timely any communications regarding the November 3 announcement, information regarding courses dropped for Spring 2011, new classes added, or lists of affected faculty (GC Ex. 15, Jt. Ex. 1).[4] Then at hearing, College witness Wynter acknowledged that certain information, such as the rationale for the November 3 decision and lists of courses removed and added for the Spring semester had in fact been available and not provided prior to hearing (Tr. 521 -29). The College even admitted to making a decision to wait until handing over the information that was available early, despite understanding the urgency of the matter (Tr. 372, 412).

The College complains that the ALJ did not consider the holidays immediately following the December 20 request, the unavailability of certain individuals at the College needed to gather the information and the fact that on January 20, 2011, the College notified the Union of its progress (Brief in Support of Exceptions, at 47). Such concerns do not justify the delay. Since the Union initially requested information by

[4] The ALJ's summary of the information provided is supported by the College's production (Jt. Ex. 1).

letter of November 5, 2010 (GC. Ex. 6), the College was on notice in early November that the Union sought information relating to the November 3 announcement.

Moreover, the College is responsible for producing the information on time for meaningful effects bargaining, even if, which the Union denies, it did not have much time to do so. The College chose to make its announcement on November 3, and not to respond to the Union's initial requests for information (Gc. Ex. 5, Tr. 206-10). It was not until trial in this matter that the Union learned that the College had certain documents which it chose not to produce, such as a list of classes withheld from the Spring 2011 registration roster (Tr. 521-22). The ALJ thus properly found that waiting until after the decision had been implemented was unreasonable, and thwarted any efforts at meaningful bargaining.

III. The ALJ Properly Found that the College Violated the Act by Failing to Engage in Effects Bargaining Over the Substantial and Material Change in Manner in which it Assigned Courses, Including Number of Courses, to the Union's Adjuncts.

A. The ALJ Properly Found Violation Concerning Modification of the Previous "Roll Over" System of Assignment of Courses to Limiting Courses to a Guarantee of Two Courses (Exceptions, Paragraphs 1-2, 5-19).

1. The College's Attempted Distinction between the Allegations as Worded in the Complaint and the ALJ's description of the College's Modified System Lacks Merit (Exceptions Paragraphs 1, 4, 8, 10, 34, 35).

Despite the egregious failure to provide necessary information to the bargaining representative of its part-time faculty, the College suggests that it benefit from its failure, arguing that it had not received proper notice of the allegations against it (College's Exceptions, Brief in Support of its Exceptions, 22-28). The distinction the

College attempts to draw between the Complaint allegation and the finding of the ALJ simply does not exist, and the College's argument amounts to semantics, at best.

As explained in the College's Brief Supporting its Exceptions (College's Brief in Support of Exceptions, at 23), the "Board may find and remedy a violation even in the absence of a specific allegation in the Complaint. *See Pergament United Sales, Inc.*, 296 NLRB 333, 329 (1989), enf'd 920 F.2d 130 (2d Cir. 1990)(finding that since related facts alleged, appropriate to find 8(a)(4) violation not specified in Complaint). Indeed, where the Respondent is apprised of the alleged relevant facts, and has the opportunity to cross examine witnesses, the Board may find a violation not specifically articulated in Complaint. *Casino Ready Mix, Inc v. NLRB*, 321 F.3d 1190, 1200 (D.C. Cir. 2003). For example, where the Board alleged a retaliatory termination of employees, finding that Respondent may instead have accelerated a layoff of certain employees, such finding was appropriate because it related to the same set of facts and Respondent was on notice of the general facts and circumstances of the violation. *Amglo Kemlite Laboratories*, 2012 NLRB LEXIS 140, at **20-22 (2012).

The Complaint against the College alleges that since on or about December 15, 2010, the Union requested information regarding an announcement and implementation of a change limiting the number of classes that could be assigned to part time faculty. The Complaint further alleges that the Union requested, and the College refused, to bargain regarding the effects of the change the College announced and implemented limiting the number of classes to which bargaining unit employees could be assigned (Complaint, Paragraph 7(a), 8(a), 9(a)). Thus, the Complaint alleged that the College made a change in the College's course scheduling procedure that could

limit teaching assignment to two three credit hour courses per faculty member, and that the College refused to provide necessary information and bargain with the Union regarding the effects of this unilateral decision. The College was thus on notice that an alleged change in the process of its course scheduling was at issue. The ALJ conducted a full hearing on these allegations, in which the College had ample opportunity to describe its past and current course scheduling procedure, and to explain the email from Dr. Cadence Wynter, acting chair of the HHSS department, announcing "schedule changes" the following spring and that adjunct faculty will be scheduled "for a maximum of two classes next semester, with a possibility of a third class if deemed appropriate." (GC Ex. 5). At hearing, the College heard the testimony regarding the previous "roll over" scheduling procedure and had ample opportunity to cross examine witnesses regarding the "roll over" process, regarding the previous expectation of teaching three courses being reduced to two, and regarding the loss of the $100 cancellation fee (Tr. 47-52, 97, 131). Indeed, the College presented Dr. Wynter and other College administrators regarding their understanding of events. After hearing all of the evidence presented, the ALJ appropriately determined that in fact, the College failed to provide information relevant to this change in its scheduling procedure and failed to engaged in effects bargaining concerning the College's unilateral decision to modify the previous system known as the "rollover system" to this new system of limiting classes to two classes "unless a student enrollment deems" a third necessary (GC Ex. 5, Decision 13-16). The College had ample notice of the facts at issue and that the Board alleged that it unlawfully modified it process for scheduling courses.

2. **The College Was Afforded Full and Fair Due Process**

Since, as discussed above, the College was put on notice of the allegations at issue, and the matter was fully litigated, the College was afforded full and fair due process and the Board should adopt the ALJ's recommended Decision and Order. Indeed, where the witnesses to the events in question were available, and Respondent had the opportunity to cross examine the witnesses, the matter has been fully litigated and Respondent afforded due process. *See International Union of Operating Engineers, Local 627*, 2012 NLRB LEXIS 58 at ** 30 (2012); *Casino Ready Mix,* 312 F.3d a 1200 (respondent aware of set of facts at issue, had opportunity to cross examine). Here, the College had the opportunity to examine professors John Stevenson and Mary Lou Carroll, who testified regarding the previous rollover system that kept their three course schedule (Tr. 97, 131). Even more to the point, the College's own witness, prior Department Dr. Lisa Brock testified regarding the previous "roll over system," (Tr. 47-65), and Cadence Wynter, acting HHSS chair as of the hearing date, also testified at trial. Wynter addressed the previous rollover system, and in fact described the new system as initially limiting class to two, and having eliminated the $100 cancellation fee to be paid faculty (Tr. 438-39). Accordingly, the College had every opportunity to litigate the facts and issues involved and was afforded full and fair due process. Indeed, the fact that the College's own witnesses testified regarding the matter that it claims it lacked notice of, defeats the due process argument that the College attempts to mount here. *See, e.g. Meisner Electric, Inc. v. Brotherhood of Electrical Engineers Local 756*, 316 NLRB 597 (1995).

B. **The ALJ Properly Found that the College Failed to Engage in Effects Bargaining Over the Change in Assignment and Number of Courses, Creating Up to One-third Reduction in Wages.**

1. **The College Made a Unilateral Change Resulting in a One-third Reduction of Wages, Requiring Effects Bargaining (Exceptions 1-2, 5-10, 12, 36-39)**

Despite its own email of November 3, 2010, through acting chair of the HHSS Department Cadence Wynter informing faculty of "schedule *changes* for the Spring semester 2011," the College suggests not only that the College made no change that gave rise to an effects bargaining obligation, but that the College made no change at all. (GC Ex 5, emphasis added). The record fully supports the ALJs decision that the College made a unilateral change requiring effects bargaining.

The ALJ correctly determined that by moving from the "roll over" method of scheduling courses, in which faculty could depend upon continued three course assignments, to a method that initially limits faculty assignments to two courses, with the possibility of a third, but providing no cancellation fee, the College made a unilateral change in terms and conditions of employment that required effects bargaining. (Decision, 3-5). The NLRB and the Supreme Court have long held that an Employer violates Sections 8(a)(1) and (5) of the Act by failing to bargain regarding unilateral changes to bargaining unit employees' terms and conditions of employment. *NLRB v. Katz*, 369 NLRB 1236 (1994); *Bituminous Roadways of Colorado*, 314 NLRB 101 (1994). An Employer must bargain about changes when they result in material, substantial and significant changes to working conditions. *The Bohemian Club,* 351 NLRB 1065, 1066-67 (2007). The Employer must bargain about the effects of any decision, like here, affecting wages, hours and working conditions. *See NLRB v. Borg-Warner Corp., Wooster*

Div., 356 U.S. 342 (1958); *Caterpillar, Inc.*, 355 NLRB 91 (2010). Specifically, the Board has established that assignment of college courses constitutes terms and conditions that require bargaining. *Kendall College*, 228 NLRB 1083 (1977).

In this case, the testimony of former HHSS Chair Lisa Brock, and faculty members John Stevenson and Mary Lou Carroll, established that the former method of scheduling courses was what Dr. Brock referred to as the "roll over" method (Tr. 48-49, 51). This meant that the College began scheduling by "rolling over" assignments from the previous semester to create the schedule for the upcoming semester (Tr. 48-49, 51). The Academic Manager in each Department sent out a form to determine if faculty wished to continue teaching the same courses (Tr. 52-53; CP. Ex 1). The faculty members provided completed forms, and the Academic Manager then finalized classes for student enrollment (Tr. 54, 57-58). If an offered and accepted course was then cancelled, the faculty member was paid a $100 cancellation fee (GC Ex. 2). Under this "roll over" system, the College regularly offered the same faculty the same three courses per semester (GC Ex. 3-4, 9-10, Tr. 64, 97, 131), so many faculty members have taught three courses for a period of many years (Tr. 97, 131). The "roll over" method was used throughout the College (Tr. 233-34, 244-45).

On November 3, 2010, the College, through acting HHSS chair, sent an email informing faculty of schedule changes for the Spring semester 2011 (GC Ex. 5). The email described a deviation from past practice in that faculty members would initially be assigned only two courses, with a third only if deemed necessary by student enrollment (GC Ex. 5). Dr. Wynter admitted that this was a change which she implemented in order to avoid offering too many classes, and avoid cancellation costs

(Tr. 438-39). Employer witnesses confirmed that the change reduced course assignments from three to two courses and that no prior notice of the change was provided to the Union (Tr. 463, 505). Dr. Wynter testified that the decision had been made to hold a third class back from at least 40 adjunct faculty in scheduling the Spring semester (Tr. 509-511). Dr. Wynter further testified that the reason for this change was that the College initially offered too many courses, which then required cancellations due to low registration, and required the College to incur cancellation fees (Tr. 438 – 39). Thus, the College certainly enacted a change, leaving faculty to suffer a decrease in hours and wages of one-third less income, along with increased uncertainty in course load and income. Such change certainly is substantial and material, thus requiring effects bargaining. *Wpix, Inc.*, 299 NLRB 525 (1990).

2. **The College Failed to Satisfy its Obligation to Engage in Effects Bargaining (Exceptions, Paragraphs 14-17, 36 – 43, 45, 49).**

Interestingly, while it claims that it created no change in terms and conditions in employment, the College maintains that it satisfied its obligation to engage in effects bargaining by meeting with the Union (Brief in Support of Exceptions, at 40-41). Yet to have any meaningful bargaining, the employer must first provide timely notice of its decision to the union. *Metropolitan Teletronics Corp.,* 279 NLRB 957, 959 (1986), enf'd 819 F.2d 1100 (2d Cir. 1987). The Employer must also provide the information necessary to the Union, which the College did not do in this case. *See Miami Rivet*, 318 NLRB at 77; *(*GC Ex. 1(h), Tr. 386, 520, R-13). As late as January 20, 2011, the College assured the Union that it was *in the process of gathering information* (R-13; Tr. 522), then it provided some of the requested information in February. Yet, with Spring

semester having already started, any information provided was after implementation of the decision, and after meaningful bargaining could take place.

Moreover, the College did not engage in any bargaining concerning the decision to change the roll over method to the two course limit method. Immediately after receiving notice that the College unilaterally made this change, the Union demanded to bargain with the College (Tr. 134, GC Ex. 6). Dr. Wynter spoke with Union representatives about the change on November 9 but simply stated her reasons for the change (Tr. 137, 467-68, 547). The Union sought follow up meetings but never spoke with Wynter again on the issue (Tr. 140). Despite several requests for effects bargaining from the Union (Gc. Ex. 28, Tr. 178, 279), at the December 17, 2010 contract bargaining meeting, Dr. Love, on behalf of the College stated that the College was not yet ready to bargain (Tr. 277). At a grievance meeting also scheduled to discuss the unilateral changes College representative Ms. Marcus indicated that she was unaware of changes (Tr. 181). Then, without having met with the Union on the issue, on January 13, 2011, the College simply denied the grievance (GC Ex. 31). While the Union spoke with Dr. Wynter, the Dean did not negotiate with the Union but said the change was needed (Tr. 137, 467-68). Similarly, the Union held one so-called grievance meeting with Ms. Marcus, who was not prepared for the meeting, had not read the Union's information request carefully (Tr. 419), and then later summarily denied the grievance with no further discussion (Tr. 284; GC Ex. 30). At a meeting on January 13, 2011, the College indicated that it would not provide the Union with information until the Union informed it which faculty members were impacted, some of the very information sought

by the Union (GC Ex. 33-A). Accordingly, even the evidence provided by the Employer supports the ALJ's finding that the College did not engage in effects bargaining.

3. The Union did not Waive its Right to Engage in Effects Bargaining (Exceptions, Paragraph 3, Paragraph 44).

Contrary to the College's suggestion, the ALJ correctly determined that the Union did not waive its right to engage in effects bargaining (Exceptions, at 3, 44, Brief in Support at 37-39). The Board will only find that the Union waived a statutory right if the parties agreed to a clear and unmistakable waiver. *Provena Hospitals d/b/a St. Joseph Medical Center,* 350 NLRB 64. The Supreme Court has confirmed this standard, requiring that any waiver be "explicitly stated." *Metropolitan Edison Co. v. NLRB*, 460 NLRB 693, 708 (1983). Thus, "contract language must be specific, or it must be shown that the party alleged to have waived its rights consciously yielded its interest in the matter." *Allison Corp.*, 330 NLRB 1363, 1365 (2000). Generally worded management rights clauses are not construed as including waivers of statutory rights. *See, e.g., Control Services, Inc.,* 303 NLRB 481 (1991). Thus, the ALJ was correct in finding that a generally worded management rights clause did not waive the Union's right to engage in effects bargaining over the unilateral decision to change the scheduling procedure.

Without argument, the College suggests that the ALJ erred in relying on evidence that it submitted a management rights proposal to prohibit effects bargaining in finding that the parties' agreement did not in fact include such a waiver. (Exceptions, Paragraph 3). Of course, such evidence is probative of the fact that the parties had not agreed to explicitly agreed to the stated waiver. *See Metropolitan Edison Co,* 60 NLRB at 708. In addition, it is well settled that if a party attempts, but does not succeed in obtaining contract language, arbitrators will conclude that such proposal is not

contained within the agreement. Rather, arbitrators recognize the principle that a party cannot obtain through arbitration what it could not in negotiations. *See, e.g., U.S. Postal Service Workers,* 204 F.3d at 530. Thus, reliance on a failed bargaining proposal in finding lack of explicit waiver is perfectly appropriate.

IV. The ALJ's Order of a *Transmarine* Backpay Remedy is Necessary to Effectuate the Purposes of the Act.

A. The Imposition of a *Transmarine Remedy* on Behalf of HHSS Adjunct Faculty is Appropriate.

Contrary to the College's exceptions, the ALJ's imposition of a *Transmarine* backpay remedy is not impermissibly punitive, is clear, and is formulated to take actual damages into account, given the semester system utilized by the College (*See* Columbia Collage Chicago Exceptions, Paragraph 50-52; Columbia College Brief in Support of Exceptions, 48-49). The *Transmarine* remedy is the standard remedy in effects bargaining cases, designed "to make employees whole for losses caused by the violation and to create a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent." *Liberty Source W,* 344 NLRB 1127, 1128 (2005), enf'd 478 F.3d 172 (3d Cir. 2007), cert. denied. 552 U.S. 818, *Stevens International*, 337 NLRB 143 (2001), *Cargill, Inc.*, 294 NLRB 867, 870 (1989).

The *Transmarine* remedy, as explained by the ALJ, is a limited backpay award, and thus is not punitive in nature. *See Stevens International*, 3373NLRB at 144; *Liberty Source*, 344 NLRB at 128. Indeed, the remedy requires only backpay in the form of the lost three credit hour class, from 5 days of the date of the Decision and Order (as opposed to the date of violation), until the earliest of the four conditions: (1) the date the Respondent bargains to agreement with the Union, in this case on those subjects

pertaining to the effects of its decision to modify the previous "roll over" policy to its new "two course" policy; (2) a bona fide impasse in bargaining, (3) the Union's failure to request bargaining within five business days after receipt of the Board's Decision and Order, or (4) the Union's subsequent failure to bargain in good faith. At a minimum, the remedy requires that employees shall at least receive the equivalent of two weeks pay at their normal wages prior to the violation. *See Cargill Inc.,* 294 NLRB at 870. If one of the four requisite circumstances that can limit the back pay award occurs, backpay may be limited.

The College alleges that the remedy is unclear (Exceptions, Paragraph 52). The only clarification added by the ALJ in this case that is different from any other *Transmarine* remedy case is that the backpay period remains open and continues to run semester by semester because the College assigns courses on a semester to semester basis (Decision 18-19). Thus, for any teacher employed by the College five days after the date of the Board's Decision and Order, they shall receive the monetary equivalent of wages for teaching a three hour course, or least two weeks at such wage rate if one of the four above conditions occur. If, then, the following semester after the Board's Decision and Order, the College insists on continuing with its "two course" limit procedure, it again must pay the faculty member the value of teaching a three credit hour class unless backpay is limited by one of the above four conditions. Such clarification in the award is appropriate because without a broad remedy that includes back pay, each semester the College will continue to violate the Order, assigning courses according to its new "two course limit" policy, failing to bargain over the effects until the assignment is a *fait accompli*, if at all, and the teachers will be required to live in

constant uncertainty as to their course load or income. In fact, while the College alleges that the ALJ failed to take actual damages into account, the opposite is actually true: the ALJ recognized that damages will continue to accrue each semester when courses are assigned pursuant to the new policy, and took this detail into account.

The College can limit backpay to a reasonable amount by complying with the ordered remedy, and bargain with the union over the effects of its unilateral decision to change its scheduling procedures. Previously, faculty were essentially guaranteed three courses each semester; the College has now changed this to limit faculty to two courses, with the possibility of a third. Without a monetary remedy, there is simply no incentive for the College to comply with the order, thus permitting, against Board precedent, a bargaining position "entirely devoid of economic consequences for the Respondent." *Liberty Source W,* 344 NLRB at 1127, *Stevens International*, 337 NLRB 143 (2001), *Cargill, Inc.*, 294 NLRB 870.

The College incorrectly suggests that the remedy is not appropriate because the faculty members have not lost their jobs. A *Transmarine* remedy is appropriate in any case involving the employer's failure to bargain over the effects of a managerial decision affecting terms and conditions of employment, *Nurminco, Inc., d/b/a/ Union Health Center,* 274 NLRB 764 (1985), not only in plant closures or loss of jobs. Indeed, in *Rochester Gas & Electric Corp. and Local Union 36*, 355 NLRB 507-508 (2010), the Board found a *Transmarine* remedy appropriate where the employer failed to bargain over the effects of its decision to discontinue the practice of allowing employees to drive company vehicles to and from work. *See also Union Child Day Care Center*, 304 NLRB 517 (1992)(decision to discontinue use of employer vehicles during

lunch breaks). In *Rochester Gas & Electric Corp.*, the Board recognized that while employees did not lose their jobs, they did in fact incur economic losses. 355 NLRB at 508. In the instant case, not only did the faculty incur economic loss, but they incurred one third reduction in wages, and the loss as to certainty of course load and income.

Finally, the College conveniently ignores its past history and the likelihood of further violation absent an effective remedy. The Board, however, looks to the totality of the circumstances in issuing a *Transmarine* remedy. *Nurminco Inc.,* 274 NLRB 764 . In this case, immediately previous to a violation at issue, the College made a unilateral change by changing four credit hours courses to three; the dispute was resolved by Settlement Agreement in October 2010 with the Board in which the College agreed to effects bargaining (GC Ex. 23). Then, that same month, during collective bargaining, the College proposed to prohibit bargaining over the effects of managerial decisions because of this previous matter. (GCS Exs 23-24, Tr. 269). Such evidence demonstrates how, without a remedy to permit the Union and faculty to bargain the effects of a managerial decision *before* a managerial decision is implemented, it will continue to make managerial decisions without bargaining the effects with the Union, in violation of Section 8(a)(5) of the Act.

B. The Remedy Should Include All Adjunct Professors Throughout the College.

As explained in the ALJ's decision, the Union sought information pertaining to changes in class assignments of adjunct professors throughout the college to determine the extent of the College's violation (Decision, 6-8; GC Ex. 27). The ALJ likewise found that the College failed to provide the information relevant to course changes in all departments within the College (Decision, at 13-14, 17). Since the College never

provided the Union with information sought departments in addition to those within HHSS (Jt. Ex. 1), the remedy should apply to all departments. Indeed, without the information, the Union has been unable to bargain in a "meaningful manner" regarding the College's unilateral decision and how if at all the decision caused damages to faculty in other departments. *See Miami Rivet,* 318 NLRB at 771; *Rochester Gas and* Electric, 355 NLRB at 507-508. Indeed, the Union is entitled to all information relevant to its role in carrying out its statutory duties and responsibilities in representing employees, including those teaching in departments outside of HHSS. *See NLRB v. Acme Industrial Co.*, 385 U.S. 423 (1967); *Dodger Theatricals*, 347 NLRB 853, 867 (2006). The Board should expand its remedy to require production of information and the imposition of a *Transmarine* remedy to all affected faculty throughout the college.

C. The Board Should Uphold the Additional Remedies Set Forth in the ALJ's Decision (Exceptions, Paragraph 47, 48).

While not specifically argued in its Brief in Support of its Exceptions, the College also appears to except to the ALJ's order that the College furnish the requested information and bargain with the Union over the effects of its November 3, 2010 modification of it roll over system to the "two course limit" system. (Exceptions, Paragraph 37, 38). Yet clearly, an order to provide information statutorily required, to the extent not already provided, is the appropriate remedy in cases concerning a Respondent's failure to provide information. *Postal Service,* 337 NLRB at 822. Likewise, an order that the parties engage in effects bargaining is the appropriate remedy where Respondent has failed to do so. *Miami Rivet*, 317 NLRB 769. Accordingly, such remedy is supported by Board law and should be thus upheld by the Board.

Conclusion

For all the reasons set forth above, the Charging Party respectfully requests that the Board adopt the ALJ's Decision and Order in its Entirety, with the addition that the Board apply the remedy College wide, rather than simply in the HHSS Department.

Respectfully Submitted,

P-FAC, IEA-NEA

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that she caused a copy of the foregoing Brief of Charging Party Part-Time Faculty Association at Columbia College in Opposition to the Respondent's Exceptions to be filed and served via electronic mail this 10th day of October, 2012 as follows:

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