

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

In the Matter of	)	
	)	
SPRINGFIELD DAY NURSERY,	)	NLRB Case Nos.: 01-CA-062517
a/k/a SQUARE ONE,	)	01-CA-064951
Employer,	)	01-CA-064955
	)	01-CA-064961
and	)	01-CA-074917
	)	01-CA-079132
UNITED AUTOMOBILE, AEROSPACE AND	)	
AGRICULTURAL IMPLEMENT WORKERS	)	
OF AMERICA, AFL-CIO, LOCAL 2322,	)	
Charging Party.	)	
	)	

**BRIEF OF THE EMPLOYER IN SUPPORT OF ITS EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER**

**I. INTRODUCTION**

Square One, formerly known as Springfield Day Nursery (hereinafter “Employer” or “Respondent”), submits this Brief in support of its Exceptions to the Administrative Law Judge’s Recommended Decision and Order (hereinafter “Decision”), which Administrative Law Judge Michael Rosas (hereinafter “ALJ”) issued on March 21, 2013.

In issuing the Decision, the ALJ ignored relevant evidence and misapplied Board law to conclude that the Employer violated the National Labor Relations Act (the “Act”) in several significant respects. More specifically, the ALJ failed to address the Employer’s argument that the dispute between the Employer and the Union (hereinafter referred to collectively as the “Parties) relating to the Employer’s use of substitute and temporary employees should be

analyzed pursuant to the Board's 8(d) framework, and be dismissed under established Board precedent. Alternatively, in finding that the dispute was governed by Section 8(a)(5) of the Act, the ALJ also erroneously concluded that the General Counsel established a unilateral change with respect to the use of substitute and temporary employees in violation of the Act and that the Union had not waived its right to bargain over the alleged change, ignoring past practice and the clear and unambiguous language of the contract, ceding to the Employer unrestricted discretion in using substitute and temporary employees. Additionally, the ALJ erroneously concluded that the charges were not time-barred, by finding that the Union did not have clear and unequivocal notice of the Employer's practices with respect to substitute and temporary employees more than six months prior to the filing of the charge. Moreover, with respect to his findings related to substitute and temporary employees, the ALJ ordered a remedy which is punitive in nature and thus exceeded his authority under the Act.

With respect to the termination of Dorothy Wilson, the ALJ ignored relevant evidence that Ms. Wilson had been counseled regarding her performance issues and based his decision on facts not in evidence. Further, the ALJ ignored the evidence, including Ms. Wilson's own corroborating testimony, establishing her repeated safety violations. The ALJ essentially bootstrapped an issue of the timing, which was never proven, into the rationale for his finding that Ms. Wilson was terminated in violation of the Act.

Finally, with respect to the changes related to the sick and vacation leave policies of the transportation department, the ALJ applied the incorrect legal standard related to repudiation of unlawful conduct by the Employer.

Accordingly, the NLRB should modify those parts of the ALJ's Decision as described more specifically herein.<sup>1</sup>

## II. RELEVANT FACTS

### A. The Employer's Use of Substitute and Temporary Employees

It must be noted at the outset that the Collective Bargaining Agreement between the Parties ("CBA") specifically provides: "Square One *shall not be restricted in its discretion* to employ Limited Part-time, Temporary, Substitute, Casual or Student Employees . . . . Such Limited Part-time, Temporary, Substitute, Casual and Student Employees shall not be covered by this Agreement" (GC Exh. 5, p.3 (emphasis added)).<sup>2</sup> This language has always been in the Parties' CBA, and the Union has failed to achieve any change to the language through collective bargaining over the years. During the entirety of the Parties' lengthy bargaining relationship, this language has remained unchanged (*see, e.g.*, R. Exh. 69, 70; Tr. 1018).

The Union has taken issue with the Employer's use of substitute and temporary employees from time to time since 2003. Indeed, the ALJ specifically found that the only recently bargained change to the Recognition Article of the Parties' CBA "proved unsatisfactory to the Union, who continued to complain about the hiring and utilization of substitute employees" (ALJD 8:3-4). The ALJ did not find, but the record makes it manifest, that the

---

<sup>1</sup> The Employer does not take exception to the findings and conclusions of the ALJ as to Complaint allegations not otherwise discussed herein.

<sup>2</sup> The following abbreviations will be used as citations to the record:

- Transcript: Tr. page.
- Respondent's Exhibits: R. Exh.
- General Counsel's Exhibits: GC Exh.
- Administrative Law Judge Exhibits: ALJ Exh.
- Administrative Law Judge Decision: ALJD page:line.

Union's unfair labor practice charges were essentially based on its belief that the above-cited provision of the CBA gave the Employer the rights the Union sought to deny it.<sup>3</sup>

The record contains a multi-year history of grievances relating to particular substitute and temporary employees being resolved by the mutual agreement of the Parties. More specifically, the following evidence establishes the Union's notice of the Employer's practice:

- GC Exh. 54: Grievance settlement reached in April 2010 relating to classification of substitute employees.
- GC Exh. 60: Correspondence dated September 16, 2009 from Square One's former counsel to the Union providing the Union with information related to substitute employees.
- GC Exh. 90: Correspondence dated October 17, 2003 from the Union to the Employer's former counsel regarding concerns related to the use of substitute employees.
- R. Exh 10: Correspondence dated March 3, 2010 from the Employer to the Union regarding classification of substitute employees.
- R. Exh. 32: E-mail dated May 18, 2012 from the Union to the Employer stating that the Union has had an issue with the Employer's use of substitute employees for "almost a decade."
- R. Exh. 34: Grievance dated September 25, 2003 regarding misclassification of substitute employees.

---

<sup>3</sup> See R. Exh. 31, 32 (correspondence from the Employer reflecting the admission by the Union representative that he had been advised by the Union's legal counsel that addressing the issue of substitute employees at the bargaining table would not result in an outcome favorable to the Union – an admission that the Union did not dispute in its response to the correspondence).

- R. Exh. 46: Correspondence dated August 8, 2010 from the Employer to the Union, providing information related to non-unit employees allegedly working in bargaining unit positions.

The Employer introduced evidence regarding its historical use of substitute and temporary employees and evidence regarding its historical interpretation of the Recognition Article of the Parties' CBA, all of which was completely ignored by the ALJ when he ascribed his own meaning to the language of the Parties' CBA (*see, e.g.*, Tr. 1034, 1551-52, 1605-06, 1494-99 and Exhibits referenced above).

Furthermore, the General Counsel contended, and the ALJ found without any substantive analysis, that there had been an increase in the use of substitutes in 2009, based on pages of attendance books submitted by the ALJ from the Employer's King Street and Chestnut Street centers. This finding is flawed in several respects. Primarily, it is clear that Counsel for the General Counsel manipulated the evidence to support her argument that there was an increase in the use of substitutes in 2009, by strategically selecting pages of the King Street attendance books that supported her case to submit into the record (*see* GC Exh. 101 & Appendix A to the GC's Post-Hearing Brief). Further, in contending that there was an increase in the use of substitutes in 2009 at the Chestnut Street center, data was only submitted from 2009 and later; one can hardly draw the conclusion that the use of substitute employees increased in 2009, without prior data. In addition, in contradiction to the ALJ's finding that the Union was not on notice of this alleged increase, Counsel for the General Counsel concedes in her Post-Hearing Brief that in 2009, "[t]he Union learned of these [alleged] increases" (GC Post-Hearing Brief, p. 53-54).

The ALJ found that during the period of January 2009 to June 2012, the Company hired 49 employees to work as substitutes at its centers and that “[m]ost of these employees consistently worked more than 10 hours per week” (ALJD 9:13-15). Somehow, based on the time records of 13 employees (ALJD 9:fn. 52), the ALJ reaches the conclusion that “most” of the substitute employees hired since 2009 have worked more than 10 hours. This finding is not supported in the record at all.

The ALJ also ignored evidence demonstrating the significant amount of absences of bargaining unit members that require the coverage of a substitute (*see* R. Exh. 11-12) (for example in June of 2011, there were 22 work days and 22 bargaining unit absences in two classrooms alone). Moreover, the General Counsel’s own witness testified as to why substitute employees are used in the classrooms (Tr. 463, Testimony of Vanessa DeJesus indicating that substitutes cover when the teachers call out sick, go on vacation, or go on a medical leave).

**B. Dorothy Wilson**

The ALJ’s findings with respect to Dorothy Wilson are inconsistent and not supported by facts in evidence. At one point in his decision, the ALJ finds that “Buijnarowski, the transportation director, also observed Wilson drive *and spoke to her on numerous occasions about several safety issues*. During Wilson’s three months of employment, the Company received several complaints regarding her performance. The incidents included parent complaints in February that Wilson failed to ensure that a child was buckled into her seat, failed to properly buckle in another child, and yelled at two other children.” (ALJD:17:6-10). The ALJ went on to note in a footnote that, “*Wilson corroborated Buijnarowski’s testimony about his conversations with her about the incidents.*” (ALJD 17:10 & fn. 103). Yet, inexplicably, in

finding that Wilson was terminated in violation of Section 8(a)(3), the ALJ concluded that the decision to terminate Wilson “was not preceded by any counseling, warning or other form of communication to Wilson regarding her performance.” (ALJD: 18:1-2).

Additionally, in concluding that Wilson was terminated in violation of the Act, the ALJ relied on facts not in evidence. Namely, without any evidence to support his conclusions, the ALJ decided that “it [was] a virtual certainty” that someone other than Tony Buijnarowski made the decision to terminate Wilson (ALJD 17:fn. 106). Further, the ALJ also erroneously concluded that Buijnarowski had knowledge that Wilson had signed a Union dues authorization card prior to March 21 (ALJD 17:21-22). This conclusion is based on Wilson’s testimony regarding a conversation she had with the dispatcher, Louis Denson. However, Wilson was unable to recall the date on which she signed the dues authorization card or the date on which she spoke with Denson (Tr. 653-54).

### **III. ARGUMENT**

#### **A. The Issue of the Employer’s Use of Substitute and Temporary Employees Should be Dismissed Under Board Precedent Applying Section 8(d).**

##### **1. The ALJ Failed to Apply the Appropriate Legal Standard.**

In concluding that the Employer violated Section 8(a)(5) of the Act “failing to provide contract benefits to certain employees,” the ALJ erred in his analysis by applying the incorrect legal standard. The ALJ failed to even address the Employer’s Motion to Dismiss argument<sup>4</sup> that the issue was a classic Section 8(d) contract modification issue, and thus should be dismissed because resolution of the issue requires an interpretation of the Parties’ CBA and the Employer

---

<sup>4</sup> Additionally, the ALJ failed to rule on the Employer’s Motion to Dismiss asserting the same argument, which was filed at the close of the General Counsel’s case (ALJ Exh. 4).

had a sound arguable basis for its interpretation of the contract, which is not adequate to constitute a violation of the Act..

An alleged violation of Section 8(d), commonly referred to as a “contract modification” allegation, requires the General Counsel to show a contractual provision, and to show that the Respondent has modified the provision. Where the General Counsel’s sole allegation is unlawful modification of the contract within the meaning of Section 8(d), the Board is limited to determining whether the Respondent has altered the terms of a contract without the consent of the other party. *Bath Iron Works*, 345 NLRB 499, 501 (2005), *affd.* 475 F.3d. 14 (1st Cir. 2007) (*citing Oak Cliff-Golman Baking Co.*, 207 NLRB 1063 (1973)). In short, “[t]he allegation is a failure to adhere to the contract.” *Id.* at 501. Hence, an employer can defend itself by showing that the alleged “modification” did not violate the contract’s terms.

Sections 8(a)(5) and 8(d) define an employer’s obligation to bargain collectively with its employees’ representatives regarding wages, hours and other terms and conditions of employment. An employer unilaterally changing the terms and conditions of employment without bargaining is a failure to bargain in violation of Section 8(a)(5). An employer unilaterally modifying the terms and conditions of a contract already in place is a failure to bargain in violation of Section 8(d) (notwithstanding that it is technically also a Section 8(a)(5) violation). *See generally Bath Iron Works Corp.*, 345 NLRB 499 (2005).

The Section 8(a)(5) “unilateral change” case and the Section 8(d) contract modification case are different in terms of principle, possible defenses and remedy. *Id.* at 501. The applicable standard is often very clear, depending upon whether the allegation is a unilateral change without bargaining to impasse or the allegation is a modification in violation of an existing contract without Union consent.

Given that there is a contract provision which specifically addresses the issue at hand, the Employer maintains that this case is clearly one that falls within the ambit of Section 8(d). It is a dispute which turns solely on an interpretation of the Recognition Article of the Parties' CBA. The law is clear that Section 8(d) is not meant to confer on the Board broad powers to interpret collective bargaining agreements. "The Board is not the proper forum for parties seeking an interpretation of their collective-bargaining agreement." *Vickers, Inc.*, 153 NLRB 561, 570 (1965). Instead, in cases where the resolution turns solely on a question of contract interpretation, the Board generally declines to "enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct." *NCR Corp.*, 271 N.L.R.B. at 1213; *see, e.g., Bath Iron Works Corp.*, 345 NLRB at 503 ("[W]e find that both the General Counsel and the Respondent have presented reasonable interpretations of the applicable contract language. We do not pass on which of these contract interpretations is the better view; the arbitration process and the courts are well equipped to deal with such matters if the parties choose those avenues of redress").

Throughout the ALJ's decision, he engages in contract interpretation, often ascribing his own meaning to the terms of the contract. As this dispute is plainly governed by the terms of the Parties' labor agreement, the instant dispute is a classic "contract modification" case, subject to the Board's Section 8(d) analysis. Because resolution of the issue turns solely on an interpretation of the Recognition Article of the Parties CBA, in accordance with longstanding Board precedent, the allegations relating to this issue should be dismissed. No statutory policy is intertwined with this issue of the use of substitutes, such as to invoke the Board's interpretation of the contract pursuant to Section 8(d); any arbitrator can address any issue as to the meaning of the contract language.

2. The ALJ Failed to Consider Whether the Employer Had a Sound Arguable Basis for Its Interpretation of the Contract.

The Board will not find a Section 8(d) violation if Respondent has a “sound arguable basis” for its interpretation and is not motivated by other unlawful considerations. *Bath Iron Works*, 345 NLRB at 502. If the Board determines that “an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it, the Board will not enter the dispute to serve the function of arbitrator in determining which party’s interpretation is correct.” *NCR Corp.*, 271 NLRB 1212, 1213 (1984).

In determining whether a Respondent’s contract interpretation has a sound arguable basis, the Board applies traditional principles of contract interpretation. *Conoco, Inc.*, 318 NLRB 60, 62 (1995), *enf. denied* 91 F.3d 1523 (D.C. Cir. 1996). The Parties’ actual intent as reflected by the underlying the contractual language is paramount and is determined by reviewing the plain language of the agreement. *Mining Specialists*, 314 NLRB 268, 269 (1994). The Board will also consider extrinsic evidence, such as past practice and bargaining history relating to the provision itself. *Id.*

Here, the ALJ did not consider any of these factors. Rather, he glossed over the intent of the Parties as reflected by the contractual language; specifically, that the Union contractually authorized the Employer to exercise unrestricted discretion to employ substitute and temporary employees. Further, the ALJ gave absolutely no consideration to the Employer’s evidence relating to the past practice and bargaining history of the Recognition Article of the CBA. Under Respondent’s interpretation of “regularly scheduled,” to qualify as a “regular” bargaining unit employee, an individual must have been hired into a permanent vacant position (i.e., of

indeterminate length) and have committed to the fixed, regular schedule and the fixed, regular assignment of that position. Employees who are not qualified for a vacancy, or who are unable or unwilling to commit to working a permanent regular schedule, or who are only available for a limited period of time (e.g., a college student only available during school breaks), do not constitute “regular” employees and therefore are neither members of the bargaining unit, nor hired into a bargaining unit vacancy (*see, e.g.*, Tr. 1441, 1444, 1493). In the case of teacher substitutes, it is common practice to use a substitute to cover teacher absences, such that the substitute can work in one Center but from day-to-day or week-to-week be assigned to a different classroom due to absences among the staff in that Center. They often are placed on the Center’s schedule once they agree to a temporary assignment or a series of “day-to-day” assignments. This has always been regarded as proper use of substitutes. Respondent has applied this interpretation consistently for years, with the full knowledge of the Union.

Not only did the ALJ not deal with the meaning of the words “regularly scheduled” (other than to ultimately decide in his remedial order that working ten hours in a single week rose to the level of being “regularly scheduled”), but he ignored the fact that the distinction between “substitute” and “temporary” employees is an important contract interpretation matter. While common usage was to distinguish the latter from the former by reference to a specific replacement for a longer term teacher absence (e.g., a medical leave or an investigation by the State into a report of abuse or neglect of a child), the CBA does not make such a distinction; therefore, the person substituting for a bargaining unit employee taking a vacation or out with the flu for three days or for ten days could contractually be identified as either a substitute employee or a temporary employee. Had the ALJ actually applied the contract, therefore, it would be clear that much (or most) of the alleged increase in substitute hours relied upon to support these

charges were for employees acting in the temporary employee classification, not the substitute classification, and the theoretical bricks supporting the Complaint would be seen as made from straw. The ALJ simply overrode all of the issues the Parties would or could raise in an arbitration, ignored the “plain” language of the contract, and dispensed his own brand of labor relations justice.

In leaping to his conclusion that the contract provisions in Article Section 6.2(a) of the Parties’ CBA were in no way modified by the obvious restrictions and definitions of Paragraph 6.2(b), the ALJ also dismissed as insignificant extensive record evidence that Respondent for years had addressed a shortage of certified teachers (i.e., a person who has taken one three-credit course in early childhood education) by encouraging substitutes and temporary employees to become certified, helping them find the time and resources as well as making the coursework readily available (R. Exh. 33). In addition, he ignored evidence that any alleged increase in Respondent’s use of substitutes was affected not only by the shortage of certified teachers but by its own expansion of services, and the increase of bargaining unit member absences both from their exercise of contract benefits (vacation, other leaves) but also due to such outside factors as state-assessed suspensions, rise and fall of enrollments, and mergers of as well as renovation issues and classroom mergers within the various Centers run by Respondent (Tr. 1472-1479, 1610-12, 1692-93, 1757, 1798-99). Counsel for General Counsel may have formed the belief that the Employer’s managers were “not bad people” (Tr. 20-21), but the ALJ had nothing to say to this point other than that they “schemed” to avoid their responsibilities to the Union as he deemed them to be (ALJD 32:9).

The record reflects that in exercising its unrestricted discretion in the use of non-unit supplemental personnel, Respondent took care, in the interests of the principles of early

childhood education, to employ qualified people, to minimize constant change of classroom staff because of its negative impact on children, and to engage, as required and incentivized by the State, in a constant upgrading of the quality of its staff. Thus, the lawful change, in 2003, from uncertified aides to certified teachers; by taking one course, the aides would become certified teachers and be eligible for a bargaining unit position. The ALJ essentially found that Respondent's hiring rules were of no legitimacy: the rule that to become a member of the bargaining unit, one needed to be a certified teacher; the rule that one had to actually apply to the Human Resource Department for any openings; the rule that there had to be an opening; the rule that one had to pass a probation period; the rule that one had to be able to commit to a permanent schedule. All of these rational and normal school requirements, in the decision of the ALJ, were apparently just part of the unlawful scheme to avoid hiring people into bargaining unit jobs. The evidence of this? Just the selected statistics allegedly showing more use of substitutes that under the record can easily be explained. Where are the specific examples that might show a practice that was changed? With hundreds of hiring and substitute or temporary employment issues each year, one might expect, if there were a "scheme" as found by the ALJ, that tens or dozens of examples would prove the case. In this record, there is no such evidence.

The sound understanding of the labor agreement starts with the premise that Section 6.2(a) describes the unit as consisting of employees regularly scheduled to work at least ten hours per day in a posted permanent position as a teacher or driver in one of the bargaining unit positions. As a major exception to this general statute, Section 6.2(b) gave the Employer carte blanche to use non-unit employees to fill in on bargaining unit jobs from which a unit employee was absent for any reason for any length of time, or which was not filled for any of a number of business-dictated reasons such as an absence of applicants, a delay in filling due to time during

which seniority transfer rights were able to be exercised, or similar situations, such as the merger and post-tornado situations described in the record where union seniority and transfer rights were bound up in labor-management discussions as to how to protect contractual rights. Under years of practice, substitutes who more accurately would be temporary employees under the principles of Section 6.2(b) were considered day to day when they were not committed to long stretches of time, or were subject to rescheduling from room to room or Center to Center as required by the absences of bargaining unit employees.

Only in one precisely negotiated set of circumstances would a non-unit person “automatically” become a member of the bargaining unit, i.e., after sixty days of filling in for an employee on a long-term leave of absence (GC Exh. 5, p.3, § 6.2(b)) (“Such Temporary Employees shall not be covered by this Agreement, except that a Temporary Employee hired to fill a vacancy created as the result of a voluntary or involuntary resignation, who meets the qualifications for the position specified by the Square One job description and Department of Early Education and Care (“EEC”) regulations, shall become a regular Employee if employed more than sixty (60) consecutive working days, and shall receive all the benefits and seniority retroactive to the date of hire.”). Nothing in the contract language states otherwise: there is no other exception under which a substitute, by whatever title, would go into the bargaining unit – only with achievement of the qualifications and an application for a specific opening would a substitute, or anyone else, move into a bargaining unit position and begin the probation period. This is a sound interpretation of the Agreement and, in its application, requires dismissal of the related Complaint allegations. It is not a violation of law, and it is not an unlawful “scheming” of any kind, for an employer to exercise its contractual rights.

Because the record clearly supports the finding that the Employer had a sound arguable basis for its interpretation of the contract, these unfair labor practice findings should be dismissed.

**B. Alternatively, if the Board Finds the Issue of the Employer’s Use of Substitute and Temporary Employees is Governed by Section 8(a)(5) of the Act, it Should Be Dismissed.**

1. The ALJ Incorrectly Found that There Was a Unilateral Change.

A “unilateral change” allegation requires the General Counsel to show that there is an employment practice concerning a mandatory bargaining subject, and that the Respondent has made a significant change thereto without bargaining. *Bath Iron Works*, 345 NLRB at 501. If a change is shown, the Board will then consider whether the Union has clearly and unmistakably waived its right to bargain over the change. *See, e.g., Trojan Yacht*, 319 NLRB 741, 742 (1995). The remedy for a unilateral change is an order to bargain. *Bath Iron Works Corp.*, 345 NLRB at 501.

Here, the ALJ concluded that the Employer’s “failure to classify substitute employees hired since March 21, 2011 as part-time teachers and van drivers, and who regularly worked in excess of 10 hours per week, constituted a unilateral change in violation of Section 8(a)(5).” However, there is no evidence to support the finding that there was any change to the Employer’s classification of employees.

Relying on the General Counsel’s strategic manipulation of the evidence, the ALJ, without conducting an analysis of his own, adopted the statistical figures advanced by the General Counsel to conclude that the Employer began using more substitute employees in 2009. However, both the General Counsel and the ALJ failed to take into account the fact that existing

employees often were transferred internally to fill posted vacancies; that the vacancies posted on the website often were reposted automatically, creating the impression of more vacancies than there actually were; and that many of the vacancies were part-time positions, which applicants were not interested in accepting. Without comment, he dismissed the testimony of all witnesses with years of experience at the Employer, who testified that there had been no change in the use of substitute employees. Further, the ALJ failed to take into account any additional reasons for the alleged increased use of substitute employees such as covering the absences of regular employees resulting from their use of paid time off;<sup>5</sup> the absences of regular employees resulting from the employee's suspension, whether disciplinary or arising out of a DCF investigation; to cover vacancies until a qualified individual can be hired or transfers into the position; to cover breaks of regular employees,<sup>6</sup> so that mandated staffing ratios are met; or to cover for an employee who is out on a leave of absence<sup>7</sup> (*see, e.g.*, Tr. 1472-1479, 1610-12, 1692-93, 1757, 1798-99).

Regardless of the reason for the alleged increase in the use of substitutes and temporary employees, there was no change to the Employer's practice in violation of the law. The Employer has always used substitute and temporary employees to meet its staffing needs where bargaining unit members were absent or unavailable. The record demonstrates that the Employer continued to recruit certified teachers, that it made significant efforts to assist substitutes to attain

---

<sup>5</sup> The parties' labor agreement provides bargaining unit employees with up to thirty-seven (37) days of paid time off per year (*see* GC Exh. 5, p. 18-19) (providing for twelve (12) sick/personal days and up to twenty-five (25) vacation days, depending on an employee's length of service).

<sup>6</sup> The parties' labor agreement provides for up to one (1) hour of break time each day for full-time employees (*see* GC Exh. 5, p. 12) (providing for a fifteen (15) minute break for each four (4) hours worked as well as a thirty (30) minute break in the middle of the day).

<sup>7</sup> The parties' labor agreement provides for up to one (1) year of job-protected unpaid leave, depending on the circumstances of the leave (*see* GC Exh. 5, p. 22).

the education necessary to become certified as a teacher, and that upon a substitute's attainment of the necessary certification, the Employer would accept applications to open vacancies as a member of the bargaining unit. While the Employer recognizes that, at times, it was difficult to recruit and hire certified teachers, no reading of the CBA or application of the law can support the contention that the Employer was required to hire non-certified personnel into certified teacher positions.

If any unilateral change of a kind rising to the level of a federal law violation has taken place, as alleged, would there not be some evidence of a practice, pre-2009, under which substitutes were automatically made members of the bargaining unit after some duration of work in a regular schedule? In the absence of such evidence, how can the Complaint be supported? There is no evidence whatsoever to support an allegation that the Employer's practices with respect to substitute employees has changed, at any time, let alone during the 10(b) period. The ALJ failed to make any analysis of the record to support his conclusions.

Moreover, would there not be record evidence of some reasonable number of employees who met the Employer's qualifications for a bargaining unit job but were not given a bargaining unit job for which they applied? The record does not support any finding that qualified employees were denied bargaining unit positions for which they applied, in order for the Employer to keep them as substitutes. The General Counsel presented testimony from a small number of employees who believed that the Employer should have automatically moved them into positions as they became vacant. Not only would this have been a violation of the Employer's hiring rules, but it would be a violation of the rights of bargaining unit employees with seniority rights. In any event, their testimony was in no way sufficient to support a finding of a change in practice. Moreover, there is no evidence whatsoever, even tending to suggest that

there was a reduction in the number of bargaining unit employees as a result of the Employer's alleged "scheme" to hire substitute employees.

Because General Counsel did not show that there was any change to the Employer's practices with respect to classification of substitute employees, the finding of a unilateral change in violation of Section 8(a)(5) should be overturned.

2. If There Was a Unilateral Change, the Union Clearly and Unmistakably Waived its Right to Bargain Over the Change.

Though the Employer vehemently disputes that there was a unilateral change with respect to its classification of employees, even if the Board finds that there was a unilateral change, the Union has waived its right to bargain over such change. The contract provides the Employer with *unrestricted discretion* to use substitute and temporary employees. The ALJ summarily dismissed this unambiguous language which clearly supports the Employer's position that it is entitled to use substitute and temporary employees at its discretion. While the language is unfortunate to the Union in that it provides the Employer with the ability to use non-unit employees to perform bargaining unit work at its discretion, it is the language that the Union agreed to and has been unable to change during collective bargaining. Thus, by agreeing to this language and refraining from any attempt to find an arbitrator's interpretive help, the Union has waived the right to bargain over any alleged change in the use of substitute and temporary employees.

The ALJ went on to note that "the facts do not demonstrate contractual authority or a past practice that "unequivocally and specifically" reveal a mutual intention to permit use of substitutes to an extent equivalent with the role of permanent part-time teachers aides or drivers."

(ALJD 23:26-30).<sup>8</sup> To the contrary, the contract language does permit the employer to use non-unit employees to an extent equivalent with the role of any bargaining unit vacancy. (“The term ‘Temporary Employee’ shall be defined as an Employee hired for a period of time to fill a vacancy. . . .”). If the Employer is culpable for any misclassification of employees, it is for identifying non-unit employees who should have been classified as non-unit temporary employees as non-unit substitute employees. Regardless of their non-unit classification, the Union waived its right to raise this issue when it agreed to the language permitting the Employer with unrestricted discretion in its use of non-unit employees. No arbitrator would read the contract language otherwise.

3. If There Was a Unilateral Change, it is Time-Barred by Section 10(b) of the Act.

The ALJ erred in finding that the Union did not have clear and unequivocal notice of the Employer’s use of substitute and temporary employees prior to the applicable statute of limitations period (i.e., prior to March 21, 2011). Section 10(b) provides that “no complaint shall be based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . .” 29 U.S.C. § 160(b). The 10(b) limitations period begins to run when the charging party has “clear and unequivocal notice,” either actual or constructive, of a

---

<sup>8</sup> In reaching this conclusion, the ALJ asserted that the “Board’s recent decision in *Ampersand Publishing, LLC*, 358 NLRB No. 141, slip op. 45 at 5 (2012), is directly on point.” (ALJD 23:44-45). The cited case, however, is nowhere near on point. In that case, there was a three year break in the use of non-unit employees to perform bargaining unit work. Here, there was no break in the Employer’s use of substitute and temporary employees. Rather, the record established, and the ALJ correctly found that “[t]he Company has, over the last several decades, used substitute and temporary employees.” Thus, the practice was one that occurred “with such regularity and frequency that employees could reasonably expect the ‘practice’ to continue or [recur] on a regular and consistent basis.” Moreover, in *Ampersand Publishing*, the Union was not provided with notice and an opportunity to bargain when the Employer hired the non-unit employee. Here, the Parties have bargained regarding the use of non-unit employees to perform bargaining unit work, resulting in the longstanding contract language providing that “Square One shall not be restricted in its discretion to employ Limited Part-time, Temporary, Substitute, Casual or Student Employees.”

violation of the Act. *Leach Corp.*, 312 NLRB 990, 991 (1993), *enfd.* 54 F.3d 802 (D.C. Cir. 1995). A party will be charged with constructive knowledge of an unfair labor practice where it could have discovered the alleged misconduct through the exercise of reasonable diligence. *Moeller Bros. Body Shop*, 306 NLRB 191, 193 (1992) (“While a Union is not required to police its contracts aggressively in order to meet the reasonable diligence standard, it cannot with impunity ignore an employer or a unit . . . and then rely on its ignorance of events occurring at the shop to argue that it was not on notice of an employer’s unilateral changes.”). *See also John Morrell & Co.*, 304 NLRB 896, 899 (1991) (10(b) period begins to run when “aggrieved party knows or should know that his statutory rights have been violated.”).

The ALJ’s decision was inconsistent with respect to the Union’s knowledge of the use of substitute employees. At one point in his decision, the ALJ found that, after 2003, the Union “continued to complain about the hiring and utilization of substitute employees” (ALJD 8:3-4) but later in the decision he asserts that “the Union can only be assessed with notice of the Company’s divergent practices involving substitutes at some point after” 2009 (ALJD 25:15). These two positions are patently inconsistent.

The ALJ attempted to sidestep this issue completely by ignoring evidence establishing that the Union has been on notice of the Respondent’s use of substitute and temporary employees for at least nine (9) years. The record is rife with instances of the Union challenging and disputing and trying to negotiate new language as to the Employer’s use of substitute and temporary employees since 2003. Ostensibly adopting the theory of the General Counsel that the Employer began having staffing problems in 2009, the ALJ glossed over a multitude of evidence whereby the Union asserted concerns with the Employer’s practices, many of which were resolved through the grievance and arbitration process.

Moreover, the ALJ's findings themselves are inconsistent with respect to the Union's notice of the change and not supported by the record. As stated above, at one point, the ALJ finds that the Union continued to complain, since 2003, about the Employer's hiring and utilization of substitute employees, but yet, somehow the ALJ concludes that the Union did not have notice of the practice until it filed the charges in 2011. By the Union's own admission, "[t]he issue of the use of substitutes and aides has been a conflict between Square One and the Union for almost a decade, not just one year." (R. Exh. 32). Indeed, Counsel for the General Counsel pointed out in her Brief that the Union learned of alleged increases in the use of substitute employees in 2009 (GC's Post-Hearing Brief, p. 53-54).

Even accepting the General Counsel's theory and the ALJ's adoption of same, that the Employer began using substitute and temporary employees with increased frequency beginning in 2009, the evidence clearly establishes that the Union was on notice of the practice by virtue of its pre-2009 repeated demands for information related to substitute and temporary employees and grievances regarding substitute and temporary employees. And of course the Union failed to address the issues in collective bargaining three times during the decade. Any allegedly unlawful conduct by Respondent occurred well outside the 10(b) limitations period. The evidence is clear that the Union has been asserting its objections to the Employer's use of substitute and temporary employees for almost a decade and thus, the charge should be barred by Section 10(b) as the Union has certainly been on notice of the practice.

#### 4. The Union Cannot Avail Itself of a Continuing Violation Theory.

When an alleged unfair labor practice may be characterized as a contract repudiation, the unfair labor practice occurs at the moment of the repudiation, and the 10(b) period begins to run

at the moment the Union has clear and unequivocal notice of that act. “Once a party has notice of a clear and unequivocal contract repudiation . . . a dispute is clearly drawn. Indeed, it is at the moment of that repudiation that the unfair labor practice – the refusal to bargain – fundamentally occurs . . . .” *A&L Underground*, 302 NLRB 467, 469 (1991). Under these circumstances, if the repudiation occurred outside the 10(b) period, all subsequent failures of the respondent to honor the terms of the agreement are deemed consequences of the initial repudiation for which the Union may not recover. *Id.*

By contrast, cases not barred by Section 10(b) “include cases in which a respondent has not given clear notice of a total contract repudiation outside the 10(b) period, but has simply breached provisions of the collective-bargaining agreement to a degree that rises to the level of an unlawful unilateral change in contractual terms and conditions of employment . . . . That the respondent might, for example, have failed to make some contractually required payments in the past is immaterial, because those occurring within the limitations period form self-contained unfair labor practices and bear no real relation to the past breaches.” *Id.*; *see also Farmingdale Iron Works*, 249 NLRB 98, 99 (1980), *enfd.* 661 F.2d 910 (2d Cir. 1981).

The record is clear that the Respondent has never applied the contract to the “disputed” employees – those employees it has classified as substitute or temporary, who work more than the threshold number of hours required to be part-time – and thus, if it has committed an unfair labor practice charge, it would constitute a contract repudiation as to the disputed employees. As such, the 10(b) period begins to run at the moment the Union has clear and unequivocal notice of that act.

The substitute and temporary employees here are analogous to the disputed employees in *St. Barnabas Medical Center* in that the employer characterized the employees as not within the

scope of the unit and, as a result, did not apply any of the contract's terms to any of those employees, thus establishing a repudiation as to the disputed employees. 343 NLRB 1125 (2004). Thus, any allegedly unlawful conduct by Respondent occurred well outside the 10(b) limitations period, and the Union cannot now try to clear that legal hurdle by asserting a theory based on a continuing violation.

**C. The ALJ Exceeded His Authority With Respect to the Punitive Remedy Related to Substitute and Temporary Employees**

While the Act provides the Board broad authority to fashion a make-whole remedy, this authority does not extend to the imposition of punitive measures. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940); *Aneco, Inc. v. NLRB*, 285 F.3d 326, 329 (4th Cir. 2002). Each back pay remedy 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, 902-04 (1984).

Here, the ALJ specifically found that:

*Although I concluded that a many substitute classroom staff and drivers were “employed and regularly scheduled to work for a minimum of ten (10) hours or more . . . per week,” the CBA does not define “regularly.” Since I also concluded that the Company has, during the period of March 21, 2011 through the present, essentially schemed to sidestep the bargaining unit by consistently employing substitutes in lieu of bargaining unit employees, I will issue an Order requiring the Company to provide back pay and benefits to each substitute classroom staff person and van driver for every week after March 21, 2011 that he/she worked a minimum of ten hours.*

ALJD 32:6-12.

The ALJ's order with respect to this charge, by its terms, is clearly punitive in nature. This order would require the Employer to provide back pay to any substitute employee who worked for the Employer for the equivalent of two workdays in a single workweek then never returned. Moreover, this remedy would require the Employer to provide back pay to employees

who voluntarily were employed in a substitute status because they appreciated the flexibility of the position (e.g., Erin Noone, see ALJD 9: fn. 47). The contract itself speaks to a minimum period of sixty days as a trigger for bargaining unit status in the case of temporary staff in rare circumstances, but this too was ignored by the ALJ. It is clear, that rather than engage in an analysis of the evidence presented, tending to show that there were substitute employees employed who were not employed “regularly,” the ALJ ordered this remedy against the “schemers,” which is clearly punitive in nature as indicated by the plain language of the order (“Since I also concluded that the Company has . . . essentially schemed to sidestep the bargaining unit by consistently employing substitutes in lieu of bargaining unit employees, I will issue an Order requiring the Company to provide back pay and benefits to each substitute classroom staff person and van driver for every week after March 21, 2011 that he/she worked a minimum of ten hours.”).

The ALJ’s remedy related to substitute employees goes beyond that which is within the authority of the Board and thus, at the very least, should be more narrowly tailored. Further, the Employer must again assert its position that the instant dispute is one of contract interpretation, which is outside of the ALJ’s province. The ALJ’s own remedy again affirms that this is clearly an issue of contract interpretation: “Although I concluded that a many substitute classroom staff and drivers were ‘employed and regularly scheduled to work for a minimum of ten (10) hours or more . . . per week,’ *the CBA does not define ‘regularly.’*”

Astonishingly, although the ALJ states that the CBA does not define “regularly”, he concludes that any employee who worked more than ten (10) hours in a single work week since March 21, 2011 was a “regularly” scheduled employee entitled to bargaining unit status. This conclusion completely flies in the face of the Parties’ negotiated contract language and punishes

the Employer for having successfully negotiated language that is favorable to it, rather than to the Union, by completely and effectively eradicating its bargained-for right to employ substitute and temporary employees.

**D. The Record Does Not Support the Finding that Dorothy Wilson Was Terminated for Engaging in Protected Activity.**

The ALJ's finding that Dorothy Wilson was terminated in violation of Section 8(a)(3) of the Act is not supported by the record. The ALJ reached this conclusion based on his findings as to the timing of the decision to terminate and the Employer's failure to counsel Wilson prior to her termination, neither of which are supported by the record. The ALJ, who had an obvious disdain for the supervisor involved in the termination decision, gave no weight or consideration to Wilson's serious performance issues, which led to her termination.

In his findings of fact, the ALJ found that "Buijnarowski, the transportation director, also observed Wilson drive and spoke to her on numerous occasions about several safety issues. During Wilson's 3 months of employment, the Company received several complaints regarding her performance. The incidents included parent complaints in February that Wilson failed to ensure that a child was buckled into her seat, failed to properly buckle-in another child, and yelled at two other children." Wilson corroborated that she was spoken to regarding this issue.

Despite this specific finding of fact related to counseling of Wilson regarding her performance issues, the ALJ then makes the contradictory conclusion in his legal analysis that "Wilson was never counseled nor warned regarding her performance issues," despite the Employer's testimony and Wilson's corroboration of that testimony indicating that she was, in fact, counseled regarding her performance issues prior to her termination.

The ALJ essentially based his finding that Ms. Wilson was terminated in violation of the Act on the issue of the timing of the decision to terminate, which was never proven. Without any evidence to support his conclusions, the ALJ decided that “it [was] a virtual certainty” that someone other than Tony Buijnarowski made the decision to terminate Wilson. This conclusion is without any support in the record. Further, the ALJ also erroneously concluded that Buijnarowski had knowledge that Wilson had signed a Union dues authorization card prior to March 21. This conclusion is pure speculation, based on Wilson’s testimony regarding a conversation she had with the dispatcher, Louis Denson. However, Wilson was unable to recall the date on which she signed the dues authorization card or the date on which she spoke with Denson (Tr. 653-54). Drawing the conclusion that all “three key supervisors – Guenette, Tremblay and Buijnarowski – knew of (albeit after the termination memo) Wilson’s request to be classified as a bargaining unit employee,” the ALJ found that Wilson was terminated for discriminatory reasons.

The General Counsel’s *Wright Line* burden was not met with respect to the termination of Dorothy Wilson. While the Employer concedes that the documentation related to Ms. Wilson’s termination was not perfect, there is absolutely no evidence (beyond the timing speculation) to support a finding that Ms. Wilson was terminated as a result of the submission of a Union dues authorization card. Buijnarowski made the decision to terminate Wilson’s employment, without having knowledge of the dues authorization card signed by Wilson. Though Tremblay and Guenette knew of the dues authorization card by the time that Buijnarowski made the decision to terminate, that knowledge cannot be imputed to Buijnarowski. Wilson was terminated as a result of serious performance issues, many of which related to the safety of the children served by the Employer. The ALJ relied heavily on the post-decision brief continued employment of Wilson,

but no evidence rebutted the Respondent's evidence that there was a major need for drivers that could not otherwise be met, and that the delayed termination was to await two new drivers becoming qualified.

Respondent submits further that the record does not support a finding of animus here that might support the ALJ decision. There is nothing in the record suggesting individual animus by any management representative. The bargaining and grievance history of the Parties is devoid of any hostility, any indication of animus. The sole possible exception is Respondent's opposition to the Union's sporadic attempts to avoid the consequences of Section 6.2(a) of the Agreement keeping substitutes out of the bargaining unit. This position of Respondent, stated and acted upon for years, was under assault again by the Union in its poorly timed and overbroad and somewhat harassing as well as costly efforts to seek information. Respondent resisted the Union's most recent efforts, but an Employer cannot logically be characterized as having an unlawful animus in this 8(a)(3) case, simply because it was exercising its lawful efforts to maintain its reasonable and sound interpretation of the labor agreement.

The record does not support the inferences and conclusions drawn by the ALJ in support of his finding that Wilson was terminated in violation of Section 8(a)(3). As a result, this finding should be modified to reflect the facts in evidence – namely, that Wilson was terminated for non-discriminatory reasons for her serious performance deficiencies.

**E. Because the Changes to the Sick and Vacation Leave Policies Were Effectively Rescinded by the Employer, There Was No Violation of the Act.**

The facts with respect to the changes to the sick and vacation leave policies in the Transportation Department are largely undisputed. However, the ALJ applied an incorrect legal

standard in determining that the unlawful changes to the policies were not effectively rescinded by the Employer.

The ALJ found that the Employer did not effectively rescind the policy related to sick and vacation time, because it did not inform employees that the actions of Tony Buijnarowski in issuing the policy were “wrong,” citing to *Fresh & Easy Neighborhood Mktg.*, 356 NLRB No. 90 2011 NLRB LEXIS 35 (Jan. 31, 2011) and *Intermet Stevensville*, 350 N.L.R.B. 1349, 1350 n.6 (2007) (ALJD 21:26-31). However, these cases are inapposite, as they dealt solely with alleged violations of 8(a)(1), not 8(a)(5), and involved policies that interfered with employees’ exercise of their Section 7 rights. Here, there was no such allegation.

The ALJ correctly concluded that immediately upon the Union bringing the unilaterally issued policy regarding use of sick and vacation time to the Employer’s attention, the Employer rescinded it, and notified the bargaining unit members that it was rescinded. The Employer then reviewed with the affected bargaining unit members the contract provisions related to use of sick and vacation time. There was no evidence presented even tending to suggest that any employee was adversely affected by the change in policy. Because the change in policy was rescinded before any employee was affected by it, such a change was not a material and substantial change, and thus no violation should be found. Also, because the alleged change did not interfere with employees in the exercise of their Section 7 rights, there is no requirement that they assert to the bargaining unit that the manager’s conduct was “wrong.”

Moreover, “not every unilateral change in employee terms and conditions of employment constitutes a breach of the employer’s bargaining obligation. The change must be ‘a material, substantial, and significant’ one, and the General Counsel has the burden to prove this.” *Fremont Med. Ctr.*, 357 NLRB No. 58 (2011) (citing *Crittenton Hospital*, 342 NLRB 686, 686 (2004)).

The General Counsel did not submit any evidence and the record does not reflect that any employee was adversely affected by the issuance of this policy prior to its rescission by the Employer. The General Counsel did not meet its burden in proving that the issued policy constituted a material, substantial or significant change to the working conditions of bargaining unit members. This allegation should be dismissed as the General Counsel did not meet its burden in proving a unilateral change. At most, this allegation should be dismissed as *de minimis* as no employee was adversely affected and any ordered remedy would be moot.

#### IV. CONCLUSION

Based upon the foregoing, the allegations with respect to the Employer's use of substitute and temporary employees, the termination of Dorothy Wilson and the change to the vacation and sick policies should be dismissed in their entirety.<sup>9</sup>

Respectfully submitted,

SPRINGFIELD DAY NURSERY,  
a/k/a SQUARE ONE

By its Attorneys,

s/ Richard D. Hayes

Richard D. Hayes, Esq.

s/ Kate R. O'Brien

Kate R. O'Brien, Esq.  
SULLIVAN, HAYES & QUINN, LLC  
Attorneys for the Employer  
One Monarch Place – Suite 1200  
Springfield, MA 01144-1200  
Telephone: (413) 736-4538  
Facsimile: (413) 731-8206

---

<sup>9</sup> If the Board does not dismiss the allegations related to the Employer's use of substitute and temporary employees, at the very least, the proposed remedy should be modified in accordance with the Board's remedial authority.

