

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

**SPRINGFIELD DAY NURSERY a/k/a SQUARE
ONE**

and

**UNITED AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS OF
AMERICA, AFL- LOCAL 2322**

**CASES 01-CA-062517
01-CA-064951
01-CA-064955
01-CA-064961
01-CA-074917
01-CA-079132**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF
THE ADMINISTRATIVE LAW JUDGE**

I. INTRODUCTION

This case was heard by Administrative Law Judge Michael A. Rosas at different locations in Western Massachusetts over the course of ten days in July and September 2012. Judge Rosas issued his Decision on March 21, 2013. Respondent filed Exceptions, and a Brief in Support of Exceptions with the Board on April 18, 2013.

**II. COUNSEL FOR THE ACTING GENERAL COUNSEL'S RESPONSE TO
RESPONDENT'S LISTED EXCEPTIONS**

RESPONDENT'S EXCEPTION 1:

1. The finding that, "[a]pproximately 6 years passed without any major disagreement as to the Employer's classification of employees until 2009."

This finding is well supported by the administrative law judge's decision. The record readily supports that between 2003 and 2009, there were no major disagreements between the parties.

RESPONDENT'S EXCEPTIONS 2, 7, 10, 11, 16, and 24:

2. The failure to find that the Employer has made substantial efforts to qualify non-unit employees to become certified as bargaining unit teachers.
7. The failure to find that, in order to qualify for a regular bargaining unit position, a substitute or temporary employee had an affirmative obligation to actually apply for a current vacancy, for which s/he was qualified.
10. The failure to find that non-unit employees who are assigned to regular schedules are "temporary employees" within the meaning of the collective bargaining agreement and not misclassified, except on that basis.
11. The failure to give any weight whatsoever to the clear and unambiguous contract language giving the Employer "unrestricted discretion" to use substitute and temporary employees.
16. The finding that all substitutes who work more than ten (10) hours in a week were eligible to be members of the bargaining unit, regardless of the employee's length of time in that status, whether there was a posted vacancy during his or her employment, whether the employee was qualified for a vacancy, and whether the employee chose to remain a substitute.
24. The failure of the administrative law judge to find that the Union's unfair labor practice charges as to the Employer's use of substitutes was principally an effort to undermine the "unrestricted discretion" provision of the collective bargaining agreement.

Each of the above exceptions to an administrative law judge's finding or failure to find overlooks the controlling question properly identified by the administrative law judge's decision – *whether the employees at issue were, in fact, utilized as substitutes as defined in the CBA.* (ALJD 23: 10-11). In the absence of truly being a substitute employee properly excluded from the unit, none of the exceptions articulated by Respondent is relevant. Importantly, Respondent did not object to this conclusion by the administrative law judge.

Respondent's claim that the administrative law judge should have found that the employees at issue were non-unit "temporaries" is equally spurious. Article 6.2(b)

defines a temporary employee as one “hired for a period of time to fill a vacancy or replace an employee who is on vacation, on a leave of absence or for any other reason not at work, or to complete a special job assignment.” (GC 5, p. 6).¹ Thus, the critical precondition is that the employee *be hired for a period of time*. Extrinsic evidence of past practice regarding Respondent’s use of temporaries was provided through several of Respondent’s witnesses. Their testimony establishes that in hiring temporaries, the employees were indeed hired “for a period of time” as specified by the job postings as well as the hiring document -- the PRFs.² The record evidence is undisputable that not more than two substitute employees were classified as such on their PRF. One of these was in the SACC program, which is no longer an issue, and the other was not converted until after the complaint issued.³ Further still, Article 6.2(b) specifically limits the right of Respondent to use temporaries “to fill a vacant position.” The record clearly establishes that the employees at issue were being used to fill vacancies. Moreover, nothing in Respondent’s Managements Rights specifically covers such actions.

RESPONDENT’S EXCEPTION 3:

3. The finding that the arbitrator found that the Employer’s actions violated the National Labor Relations Act.

¹ “GC” refers to Counsel for the Acting General Counsel’s Exhibits; “Tr.” refers to Transcript cites.

² See Tr. 1031, (hired as a temporary covering a parent worker on maternity leave); Tr. 1106-1107 (temporary employee covering for a leave of absence by a specific employee); Tr. 1371-1380, 1396 (Temporary employee to cover leaves of absence and hold a spot for returning employee on military leave); Tr. 1385 (Temporary positions so designated by postings); Tr. 1436 (A temporary employee is assigned to a location with a start date and an end date); Tr. 1437, 1447, 1457 (six week temporary programs in summer); Tr. 1536 (paperwork is processed for temporary employee); GC 97, GC 58 (PRFs showing temporary designation); Tr. 1915-1916 (Temporary employees have start dates and end dates, and are identified as such in PRFs, with start dates and end dates).

³ One of which occurred post complaint. (GC 97).

The administrative law judge's finding is fully supported. In his award, the Arbitrator wrote, "Simply put, Mr. Baker had a plan, he wrote it up, and attempted to superimpose that plan onto the labor agreement and *it's an unfair labor practice even if it was done with all the best of intentions and even if all the employees make out better in the end.* (Italics added). (GC 7, p. 21).

RESPONDENT'S EXCEPTIONS 4, 5, 14, and 25:

4. The finding that the Employer was able to staff the centers almost exclusively with teachers and lead teachers until 2008.
5. The finding that there has been a diminution of unit classroom staff with a concomitant increase in the use of substitutes since 2009 and the statistics used by the ALJ to support that finding.
14. The finding that the Employer systematically failed or refused to fill teacher vacancies.
25. The finding that the Employer "essentially schemed to sidestep the bargaining unit by consistently employing substitutes in lieu of bargaining unit employees."

These findings are well supported by record testimony and documentary evidence, and Respondent's exceptions related to these findings are simply an argument to reverse the administrative law judge's credibility determinations.⁴ The Board's established policy, however, is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence demonstrates that the findings are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), *enfd.* 188 F. 2d 362 (3rd Cir. 1951).

⁴ See generally key documents admitted into the record – GC 74, 75, 77(a), 82, 83, 94, 95, 106, and 107, 108, and 110. Note that GC 110 is a summary exhibit for GC 74, which the administrative law judge admitted post-hearing pursuant to an unopposed motion.

Respondent can point to no relevant evidence that would warrant a reversal of the administrative law judge's credibility-based findings. To the contrary, the record amply supports each of them. More specifically, Vice President of Operations Patricia Guenette admitted that as a result of the classroom reorganization of 2002, all but one of the classroom aides successfully converted to certified teachers, and that following the arbitrator's decision and award, none opted to return to the aide position. (Tr. 1169). Thus, by 2003, Respondent had added 31 new teachers to its rosters.⁵ Additionally, union seniority lists admitted into the record reflect that Respondent successfully hired at least 4 teachers in 2006; at least 7 teachers in 2007; and at least 9 teachers 2008.⁶

Ms. Guenette also admitted that in the past three years it has been "a challenge" for Respondent to staff its classrooms with teachers, lead teachers, and part time teachers. (Tr. 53:25 through 54:6).⁷ Respondent's records (GC 82 and 83), as well as the seniority lists cited above, reflect that after 2009, Respondent's hiring of unit teachers dropped off precipitously with no more than three teachers in 2009, and two teachers in each of 2010 and 2011 hired into center based positions.⁸ Additionally, the record evidence establishing the large number of substitutes hired is undisputed, and well supported. (e.g. GC 108, 77(a)).

⁵ The figure of 31 Aides added is drawn from GC 7, p. 5. See also GC 6.

⁶ See GC 71 and 106, and R 82-83. Since these seniority lists only reflect the hire date of *current* employees, it does not capture those teachers who may have been hired during those years, but are no longer employed by Respondent.

⁷ MS. HOWLETT: Okay. In the past three years has it been particularly difficult to actually meet the goal of permanent staffing with teachers, and lead teachers and part time teachers to compose your classroom staff?

MS. GUENETTE: It has been a challenge, but I don't think it's been any different than any other early care and education program in the state.

⁸ See GC 71, 106. Although these documents reflect that Carmen Santiago was also hired during those years, this retroactive seniority date was a result of a grievance settlement. (GC 52, 54).

Respondent's principal argument with respect to these findings centers around the administrative law judge's reliance on the sampling from attendance books in GC 101, with Respondent claiming that these documents are a "manipulation" of evidence.⁹ This argument must fail. First of all, the attendance records were Respondent's own documents. Second, in offering the 52-page record, Counsel for the Acting General Counsel made clear both that it was a sampling of over 1000 pages of attendance records Respondent had provided pursuant to subpoena¹⁰ and that the document was being offered to rebut Respondent's claim that, "there had been no change in the use of substitutes" since 2003.¹¹ Third, the entirety of attendance records were, at all times, in Respondent's possession and control. If the sampling was not representative, or was somehow a manipulation of the facts, Respondent had every opportunity to establish that either by offering additional documents or eliciting further testimony.¹² Respondent failed to do either. Thus, in failing to rebut the trend readily established by the sampling, Respondent's claims are unpersuasive. Moreover, as described above, there is substantial other record evidence that corroborates these findings.

The administrative law judge's finding that the Employer systematically failed or refused to fill teacher vacancies is also fully supported by the record evidence. The administrative law judge credited Roslyn Frazier's testimony that on August 27, 2011,

⁹ This evidence was also summarized in Appendix A to Counsel for Acting General Counsel's Brief the Administrative Law Judge.

¹⁰ See GC 10, p. 2-3, item 19. Although the subpoena was only for attendance books dating back to 2007, more were provided. See also Tr. 1185-1190.

¹¹ See Tr. 1185: 12-15. GC 101 was presented to the witness immediately after the witness confirmed her claim that there had been "no change" in the use of substitutes at the Agency.

¹² Tr. 1188-1189.

she submitted an application for a full-time preschool teacher position. On her application, she indicated that she was “teacher” certified in both preschool and infant/toddler.¹³ She placed no limitations on her availability and indicated that her “preference” was to work at Chestnut Street. (GC 110, GC 74, Bates 3003). Between January and June 30, 2011, Respondent had posted 14 open full-time teacher positions for which Frazier was qualified, including three posted at Chestnut Street on March 10, 2011. (GC 75). Yet, Respondent did not hire a single person into any unit position at Chestnut Street in 2011. Rather, on October 4, 2011, Respondent hired Frazier as a per diem substitute at Chestnut Street. (GC 77(a)).

Frazier testified that she learned through her niece, whose son attends childcare at the Chestnut Street facility, that they had openings for teachers. She spoke first with Vernita Reid, who told her to go to Respondent’s office, and fill out an application to make arrangements to get hired. Reid told Frazier they had openings in the toddlers’ class, as well as a couple of pre-school openings. As instructed, Frazier filled out an application with Mary Jane Carter, who works at Respondent’s main offices. She then returned to Chestnut Street and told Reid that she had done as instructed, and Reid told her “welcome aboard.” Reid initially asked her if she could work from 8 a.m. to 4 p.m., but later told her they needed her earlier at 7:15. Thereafter she began her workday at 7:15 a.m., working full-time Monday through Friday. (Tr. 607-609).

After receiving a paycheck, Frazier noticed on her hours that she was being called a substitute. She approached Reid, pointing out that she understood she was hired as a teacher. Reid told her that they had hired her as a sub. Frazier indicated that she would not be able to live on \$8.25 per hour, and Reid responded by telling her

¹³ Available certifications are either Teacher or Lead Teacher, and infant/toddler, and preschool.

that there should be some openings that she could apply for in the future. Frazier testified that she “waited and waited” to hear from Reid about the openings, and then approached Reid again, telling her that she couldn’t live on \$8.25 an hour. Moreover, Frazier testified that she did not know that she had to “reapply” or fill out another application for a job that she had applied for in the first place, nor did it make any sense to her that she should. (Tr. 628). Although Respondent’s Counsel repeatedly attempted to imply that it was necessary for an applicant to “reapply” in order to transition from substitute to teacher, there is no record evidence that supports this.¹⁴

Frazier continued her regular schedule working at Chestnut Street until February.¹⁵ Thereafter, after starting her day from 7:15 to about 9 a.m. daily at Chestnut Street, she was instructed to work at several locations including the YWCA, and a place called the Village, and at times, King Street. (Tr. 610-612). In about late June 2012, Reid advised her that she was going to be “on call” due to low enrollment, and her hours were reduced. (Tr. 613).¹⁶ If Ms. Frazier needed time off, she was to fill out a request form to have the day off two weeks in advance. (Tr. 616).

On January 6, 2012, Kimberly Cortez applied for any open full-time Preschool Teacher positions with Respondent. On her application, she indicated that she was teacher certified for both preschool and infant/toddler. She did not place any limit on her availability. On February 27, 2012, despite all the unfilled positions, Respondent hired her as a per diem substitute at HHC. Between September 20 and November 2,

¹⁴ The records reflect that a number of persons initially hired as substitutes were later converted to or applied to be teachers, yet Respondent did not produce or enter a single second written application for such persons. For example, Teresa Sanchez, Babilonia Damara, and Christine Burgos. (GC 110).

¹⁵ See also, GC 47, a time card report for Frazier from October 4, 2011 through December 16, 2011.

¹⁶ This was after the Consolidated Complaint dated May 31, 2012 (GC 1(v)) had issued.

2011, Respondent posted 16 open part-time and 3 open full-time preschool or infant/toddler teacher positions. Respondent did not fill a single one of those open unit positions between September and December 2011.

On February 2, 2012, Jasmine Colon applied for any open "Infant/Toddler" or Preschool Teacher Position. She was teacher certified for each of these groups. She gave no indication of any limitation on her availability in her application. (GC 110). On March 15, 2012, Respondent posted an open full-time infant toddler teacher position at HHC. (GC 110). Respondent did not fill any HHC unit positions in March or April of 2012. (GC 8X, GC 106). Instead, on May 3, 2012, Respondent hired Jasmine Colon to work for Respondent at HHC as a "per diem" substitute. (GC 77(a)).

On May 31, 2011, Christine Burgos sought to apply for an open teacher position after completing her "internship" period working at the King Street facility with Director Gail Price. She interviewed with Vernita Reid, letting her know at the time that she had completed her requirements toward teacher certification (Tr. 373). Although she was seeking specifically a regular position, she was told she had to "start" as a substitute. (Tr. 366, 395). Although she initially worked on an "as needed" basis, by September 2011, she took over the hours of a departing educator, Tricia Taylor, and began a regular schedule from 8:30 a.m. to 5 p.m. (Tr. 374, 397) (GC 55). Thereafter, she worked from 8:30 a.m. to 5 p.m. daily, under Center Director Reid at the Chestnut Street Center, until April 2012, when she was advised that she would be "on call" and her hours were reduced. Not being able to survive, she sought work elsewhere.

During her time there, she performed all of the duties of the Classroom Aide, except that she did not attend conferences, and that was because she was not told to.

(Tr. 377-378). When she needed a day off, she submitted a written request to Reid. (Tr. 378, 404). By May of 2012, she had received her teacher certification, qualifying her for any open teacher position. (Tr. 387). However, Respondent did not hire her into any open position. (GC 77(a)). Thus, as the above confirms, there is no basis to warrant a reversal of the administrative law judge's findings.

RESPONDENT'S EXCEPTION 6:

6. The finding that the Employer had an affirmative obligation to "offer to reclassify" employees into vacancies for which they did not apply, upon attainment of the proper certification.

This Exception misstates the administrative law judge's finding. There was no finding that the Employer had an "affirmative obligation" to offer to reclassify. Rather, the administrative law judge's finding was that Respondent's failure to reclassify "substitute" employees who later obtained teacher certification, tends to support the conclusion that Respondent was intentionally seeking to avoid extending contract benefits to qualified employees.¹⁷

RESPONDENT'S EXCEPTIONS 8, 9, and 12:

8. The finding that most of the 49 employees hired as substitutes worked more than ten hours per week, based on the time sheets of only 13 of those employees.
9. The finding that substitute teachers are assigned regular schedules.
12. The finding that "day to day" means that work is scheduled from one day to the next, without considering the past practice of the parties.

The administrative law judge's finding that most of the substitutes hired were regularly scheduled to work more than ten hours per week, and not on a "day to day

¹⁷ See also GC 110, reflecting that a number of hired substitutes applied for teacher positions, and indicated their teacher certification on their applications.

basis to fill a vacancy,” is amply supported by record evidence. Contrary to Respondent’s contention, the records include time sheets of many more than just 13 employees.¹⁸ The administrative law judge’s finding regarding the regular schedules of the employees at issue is supported by credited testimony and voluminous other business records, including “leave request forms” (GC 63-63A, 68) and posted schedules (GC 69, 78), all of which establish the regular, i.e., non “day-to-day” assignment of the employees at issue. The administrative law judge cites the testimony of Center Director Gail Price, who explained that she had been regularly using four “half-time aides” --- Tiffany Rodriguez, Mara Laviera, Danielle Robinson, and Blossom Hutchins, for about a year. (Tr. 1563, 1567, 1571-72). The credited testimony of employees Roslyn Frazier, Teresa Sanchez, and Christine Burgos (described above) provides further support for the administrative law judge’s findings.

Respondent’s claim that the term “day to day” means anything other than the plain meaning of the words is also unsupported by the evidence. Respondent can point to no record evidence establishing a past practice whereby the parties had accepted that “day to day,” as applied to substitutes, meant regular daily work, or was otherwise different than the plain meaning of the words. To the contrary, Center Director Price testified that her understanding of “day to day” use in connection with substitute employees was *not* to use them every day. (Tr. 1572).

RESPONDENT’S EXCEPTIONS 15, 17, 20, 21, 22, and 23:

15. The finding that the Employer’s failure to classify substitute employees as part-time teachers and van divers constituted a unilateral change in violation of Section 8(a)(5).

¹⁸ See e.g., GC 64, timesheets for fifteen substitute employees; GC 14-27, time sheets for 13 substitute employees; GC 66, substitute Tricia Taylor timesheets; GC 67, substitute Teresa Sanchez time sheets.

17. The finding that any substitute who worked more than ten (10) hours in a week is entitled to a remedy.
20. The finding that the case involves issues of statutory policy other than contract interpretation.
21. The finding that the contract language is clear and unambiguous.
22. The finding that, “[b]y failing to provide contract benefits to certain employees hired since March 21, 2011, to wit, substitute van drivers and all employees hired as substitute teachers who worked more regularly than 10 hours per week, the Employer has failed and refused to bargain collectively and in good-faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(5) and (1) of the Act.”
23. The failure of the ALJ to properly apply Board case law under Section 8(d) of the Act.

Respondent argues at length that the administrative law judge applied the incorrect legal standard in analyzing the case, contending that under the “contract coverage” approach, Respondent had a “sound arguable basis” for its interpretation of the contract, and, therefore, the allegations related to both the substitute classroom staff, and the van drivers, should be dismissed. The Board’s very recent decision in *Walt Disney World Co.*, 359 NLRB No. 73 (March 13, 2013), articulates the proper legal standard for analyzing 8(d) cases:

It is well established that Section 8(a)(5) and (1) and Section 8(d) of the Act prohibit an employer party to an existing collective-bargaining agreement from modifying the terms and conditions set forth in that agreement without the consent of the union. See *Bath Iron Works Corp.*, 345 NLRB 499, 502 (2005), *affd.* Sub nom. *Bath Marine Draftsmen’s Assn. v. NLRB*, 475 3d 14 (1st Cir. 2007). Accord *Nick Robilotto, Inc.*, 292 NLRB 1279. (1989). The Board applies the “sound arguable basis” standard to determine whether a particular midterm unilateral change constitutes an unlawful contract modification within the meaning of Section 8(d). See *Hospital San Carlos Borromeo*, 355 NLRB 153 (2010); *Bath Iron Works*, *supra* at 502. Under that standard, the Board will not find a violation of the Act if, in making the change, the employer relied in good

faith on a sound and arguable interpretation of the contract. *Bath Iron Works*, supra at 502.

Moreover, the Board assesses whether a party's contract interpretation has a sound arguable basis by applying traditional principles of contract interpretation. *Conoco, Inc.*, 318 NLRB 60, 62 (1995), enfd. denied 91 F. 3d 1523 (D.C. Cir. 1996). The parties' actual intent, as reflected by the underlying contractual language, is paramount and is determined by reviewing the plain language of the agreement. The Board will also consider extrinsic evidence, such as past practice and bargaining history relating to the provision itself. *Resco Products Inc.*, 331 NLRB 1546 (2000). In *Resco*, the Board described its method of interpreting collective-bargaining agreements as follows:

In interpreting a contract, the parties' intent underlying the contract language is paramount and is given controlling weight. To determine the parties' intent, the Board looks to both the contract language and to the relevant extrinsic evidence, such as the parties' bargaining history and past practice. When there is no extrinsic evidence, the Board looks to the ordinary meaning of relevant contract terms as applied to the facts of the case. 331 NLRB at 1548.

The administrative law judge's analysis in the decision supports a finding that Respondent could not rely on a sound and arguable interpretation of the contract. The administrative law judge properly found that there is no ambiguity as to how the contract defines substitutes. The definition of substitutes is "employees hired on a day-to-day basis to fill a vacancy." Respondent ignored the unambiguous requirement that their assignments be "day to day." The administrative law judge properly concluded that the overwhelming evidence established that the employees were not hired on a "day to day" basis, including that Center Director Price considered her substitute employees as "part-time aides." (ALJD at. 23:17). Respondent's contentions regarding its interpretations of the contract are implausible, and insufficient to show a sound arguable basis. *Hospital*

San Carlos Borromeo, 355 NLRB at 153 (2010) (no sound arguable basis where Employer's claimed right of contract privilege is implausible). Additionally, the administrative law judge properly concluded that the management rights clause "does not entitle the Company to unilaterally misclassify employees or create new classifications." Finally, the administrative law judge determined that nothing in the parties' past practice demonstrated an agreement to permit the use of substitutes to the extent equivalent with the role of permanent part-time teacher's aides, or drivers. (ALJD 23: 25-42).

Thus, although the administrative law judge's decision does not expressly reference the contract coverage standard in concluding that 8(d) had been violated, it is clear from his reasoning that the proper legal standard was applied, or alternately, that a finding that Respondent violated 8(a)(5) by failing to apply the contract terms to the employees at issue is supported under the applicable standard. In the absence of a waiver, or *some* plausible evidence on which to base its claim that the employees at issue were hired on a "day to day" basis, Respondent cannot claim that it relied in good faith on a sound and arguable interpretation that they were substitute employees excluded from the contract's benefits and protections. Accordingly, the administrative law judge's findings should be affirmed, and the related Exceptions by Respondent should be dismissed.

Additionally, Respondent's claim by Exception 17 that the administrative law judge found that any substitute who worked more than ten hours per week was entitled to a remedy, misstates the administrative law judge's finding. The finding was that, "[b]y failing to provide contract benefits to certain employees hired since March 21, 2011, to

wit, substitute van drivers and all employees hired as substitute teachers who regularly worked more than ten hours per week, the Employer has failed and refused to bargain collectively and in good-faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(5) and (1) of the Act.” (ALJD 31:22-27). Thus, the administrative law judge’s finding makes clear that only those substitute teachers who “regularly worked more than ten hours per week” are subject to the remedy. The full extent of the remedy regarding substitute teachers is properly left to the compliance stage of the proceedings. Since all of the substitute van drivers were hired with the understanding that they would regularly work 20 hours per week, they are all properly included in the remedy. (ALJD 11:6-9)

The administrative law judge properly found this case to present issues of statutory policy other than interpretation of the contract. Among these is the failure to provide relevant information. Moreover, the information at issue was relevant to the central question, whether the employees at issue are properly included in the unit.

RESPONDENT’S EXCEPTION 18:

18. The failure to find that the Union had clear and unequivocal notice of the Employer’s practices with respect to substitutes more than six months prior to the filing of the charge and that the charges should be dismissed under Section 10(b) of the Act.

The 10(b) limitations period does not begin to run until the charging party has “clear and unequivocal notice,” either actual or constructive, of a 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.”).

Where a contract is in place between the parties, and the employer has refused to apply one or more of its terms, the Board will find a “continuing violation” with each discrete breach of the contract, provided that respondent’s actions do not amount to a complete breach of the collective-bargaining agreement. *St. Barnabas Medical Center*, 343 NLRB 1125, 1129-1130 (2004). Where a continuing violation is found, relief may be sought for conduct within the 10(b) period that would constitute a separate and distinct substantive violation in its own right.

Respondent contends that the issue is barred by 10(b), arguing that Respondent’s use of substitutes has not changed since 2003, and that the Union has been on notice of the use of substitutes for nine years. Respondent cites the administrative law judge’s finding that the Union “continued to complain about the hiring and utilization of substitute employees” back in 2004 as notice of the continuing violation at issue. (ALJD 8:3-4). Counsel for the Acting General Counsel does not dispute that the unlawful conduct with respect to classroom substitutes began outside the 10(b) period. However, as the administrative law judge properly found, the credible record evidence establishes that the problematic and unlawful change in the use of classroom substitutes began in 2009, at which time the Union began making reasonable efforts to police its contract, including by seeking information on behalf substitutes who had achieved their teacher certification, and achieving a grievance that settled in April

2010. Given these efforts, Respondent cannot successfully argue that the Union ignored the unit and attempted to rely on its ignorance of the misclassification of aides to avoid the limitations of 10(b).

It was only through the Union's investigation of Respondent's unlawful use of substitutes in the transportation department that the Union began to suspect *the scope* of Respondent's practices concerning aides. That awareness did not occur until months after the Union drafted its information request dated March 24, 2011, which is well within the requisite period to find a continuing violation. At that point, September 21, 2011, the Union filed its unfair labor practice charge. Respondent has not cited any evidence *after* 2009 – when Respondent reverted back to the de facto staffing with Lead Teachers, Teachers, and Aides, to demonstrate the Union's actual or constructive knowledge of a contract repudiation outside the 10(b) period. Thus, even if the Board were to find Respondent's treatment of the misclassified classroom aides to be a contract repudiation, Respondent cannot meet its burden of proving as an affirmative defense of showing the Union's actual or constructive knowledge that this occurred.¹⁹

The administrative law judge properly found that Respondent's actions with respect to the classroom aide did not represent a complete repudiation of the contract's terms. He properly found that Respondent's ongoing conduct of misclassifying aides was a "continuing violation" under applicable Board law. In particular, the administrative law judge noted that Respondent has both continued to recognize the aide classification, and has extended contract benefits to a properly classified aide working in the classroom since 2003. (ALJD 25:10-13). Additionally, Respondent processed

¹⁹ See *St. Barnabas Medical Center*, 343 NLRB 1125, at 1127 (finding the burden of proving the affirmative defense to fall on the party asserting the defense).

grievances contesting the misclassification of substitutes as teachers. The record reflects that settlement was reached in April 2010.²⁰

With respect to the transportation department van drivers, the argument that the issue falls well within the 10(b) period is even stronger. The administrative law judge found, and the evidence clearly establishes, that the Union first became aware of the potential use of substitutes in the transportation department in about March of 2011, within six months of filing the charge. Upon learning of this possibility, the information request dated March 24, 2011 was submitted to Respondent. The administrative law judge properly found that by not later than the first week of June 2011, Respondent had received the Union's March 24, 2011 request pertaining to the use of substitute employees in the transportation department. (ALJD 27:22-28). It is undisputed that the requested information was not provided until November 30, 2011. (GC 41; ALJD 27:43-44). Additionally, the administrative law judge found, and the record readily supports, that prior to November 2011, Respondent had never posted for a "Substitute Van Driver" position, and posting did not occur until November 2011. (GC 43). The Union cannot be charged with knowledge of Respondent's unlawful treatment of van drivers until November 30, 2011, well within the limitations of 10(b).

RESPONDENT'S EXCEPTIONS 26, 27, 28, and 29:

26. The finding that the email message regarding the decision to terminate Dorothy Wilson was not preceded by any counseling, warning or other form of communication to Wilson regarding her performance.
27. The finding that Anthony Bujnarowski did not document Dorothy Wilson's performance issues.
28. The finding that Dorothy Wilson engaged in protected concerted conduct by submitting a dues authorization card to the Employer.

²⁰ GC 54.

29. The finding that the Employer discharged Dorothy Wilson for discriminatory reasons in violation of Section 8(a) (3) and (1).

The administrative law judge's findings and conclusions are well supported by the documentary and testimonial evidence, and by applicable Board law. In large part, Respondent's Exceptions with respect to these findings are exceptions to credibility determinations made by the administrative law judge. As Respondent can point to no record evidence that would warrant a reversal of these findings, the Board's established policy is not to overrule them.

III. CONCLUSION

For all of the above reasons, Respondent's Exceptions should be dismissed in their entirety, and the Decision of the Administrative Law Judge should be affirmed.

Dated this 16th day of May, 2013

Respectfully submitted,



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CERTIFICATE OF SERVICE

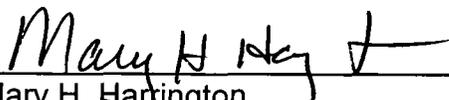
I hereby certify that I served copies of **Counsel For The Acting General Counsel's Answering Brief To Respondent's Exceptions To The Decision Of The Administrative Law Judge** on the parties listed below, by electronic mail, on this date.

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Secretary to the Regional Director
May 16, 2013