Columbia College Chicago *and* Part-Time Faculty Association at Columbia College Chicago-Illinois Education Association/National Education Association. Case 30–CA–018888 (formerly 13–CA–046562)

June 11, 2014

DECISION AND ORDER

BY MEMBERS HIROZAWA, JOHNSON, AND SCHIFFER

On July 17, 2012, Administrative Law Judge Robert A. Ringler issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party (the Union) both filed answering briefs, and the Respondent filed a combined reply brief to the answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions to the extent consistent with this decision, to amend his remedy, and to adopt the recommended Order as modified and set forth in full below.[2]

The Respondent operates a private college in Chicago, Illinois. This case revolves around the changes made by the Respondent to its process of scheduling courses taught by the part-time faculty members of the humanities, history, and social sciences department. The complaint alleged, and the judge found, that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union over the effects of the scheduling changes it made, by failing and refusing to provide relevant information requested by the Union, and by unreasonably delaying in providing other requested relevant information. For the reasons discussed below, we affirm these findings. However, we modify the judge's remedy with respect to the effects-bargaining violation, tailoring it to better fit the particular facts of this case.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We have modified the judge's recommended Order consistent with the Board's standard remedial language and the amended remedy, and we shall substitute a new notice to conform to the Order as modified and with *Durham School Services*, 360 NLRB 694 (2014).

I. BACKGROUND

Prior to the spring 2011 semester, the Respondent employed a rollover system for scheduling courses.[3] The first step of the system called for the Respondent to use the final course schedule from the prior year's corresponding semester as a template for the initial course schedule for the upcoming semester: e.g., the Respondent would use the final course schedule for fall 2009 as a template for fall 2010.[4] The judge found that, as part of the rollover system, the Respondent assigned each part-time faculty member to teach up to three courses per semester. The Respondent then opened all of the courses to students for registration. If a sufficient number of students did not enroll in a particular course, that course was cancelled, and the Respondent paid the assigned faculty member a $100 course-cancellation fee.

To reduce the number of course cancellations, the Respondent unilaterally altered its system. Beginning with the spring 2011 semester, if the Respondent assigned a faculty member to teach three courses, the third course would be "held," meaning that the Respondent would not initially offer it to students for registration. It would only release a "held" course for registration once a sufficient number of students had registered for the Respondent's initial course offerings. Under the new system, the Respondent avoided having to cancel unneeded courses by simply not releasing the "held" courses. And because it would not have to cancel nonreleased "held" courses, the Respondent did not pay affected faculty members the $100 course-cancellation fee.

After the Respondent announced this change, the Union sought effects bargaining.[5] The Union also submitted two information requests, the first dated December 15 and the second dated December 20. Of the six questions submitted on December 15, the Respondent provided documents responsive to one of them. The Respondent responded to the December 20 request on February 21, 2011.

II. DISCUSSION

We first address the issues related to the Union's information requests, then turn to the effects-bargaining violation and the remedy for it.

[3] Like the judge, we use the term "rollover system" to refer generally to the Respondent's entire course scheduling process.

[4] Unless otherwise indicated, all dates refer to 2010.

[5] The parties do not dispute that the Union waived its statutory right to bargain over the decision to change the rollover system, by virtue of the management-rights clause contained in the collective-bargaining agreement.

A. Information Requests

The judge found that the Respondent violated Section 8(a)(5) and (1) by failing to respond fully to the December 15 request and by unreasonably delaying its response to the December 20 request. For the reasons stated in the judge's decision, we adopt his conclusions.[6]

In its exceptions, the Respondent argues, among other things, that it had no duty to provide the information the Union requested on December 15 relating to "held" courses. It observes that the requested information was in the Respondent's electronic course registration system, which adjunct professors could access. We reject this argument. The Board has consistently held that the duty of an employer to provide relevant requested information in its possession is not excused by the fact that the union could obtain the information elsewhere. See, e.g., *Six Star Janitorial*, 359 NLRB 1323, 1331 (2013); *Orthodox Jewish Home for the Aged,* 314 NLRB 1006, 1008 (1994); *The Kroger Co.*, 226 NLRB 512, 513–514 (1976).[7]

B. Effects Bargaining

The judge found that the Respondent violated Section 8(a)(5) and (1) by failing to bargain with the Union over the effects of the change to its rollover system. We agree with the judge's conclusion.

In its exceptions, the Respondent argues, among other things, that the judge's decision violates its due process rights. It contends that the complaint alleged a change to the scheduling system that "limit[ed] the number of classes Unit employees could be assigned to teach each semester," but notes that the judge found the effects-bargaining violation based on a change to the rollover system. We reject this argument. It is clear from the judge's decision that he found the initial number of courses opened for student registration on behalf of each professor to be an integral part of the rollover system. The judge properly concluded that a change to the number of courses opened initially would necessarily constitute a change to the system itself. Moreover, the issues decided by the judge were fully litigated by the parties.

The Respondent also argues that the change to the rollover system was too insubstantial to constitute a violation of the Act, because it affected only a few part-time faculty members. But the Board has held that a change affecting just one employee can result in a violation of Section 8(a)(5). See, e.g., *Kentucky Fried Chicken*, 341 NLRB 69, 84 (2004). In any case, we reject the Respondent's characterization of the impact of the change on unit employees. The Respondent significantly changed its system for scheduling part-time faculty members by reducing the maximum number of courses that part-time faculty members could initially offer to students for registration from three to two. This change had substantial effects on part-time faculty, not least of which were the all but certain loss of the $100 course-cancellation fee for the part-time faculty members who were allowed to teach only two courses in a semester and the disruption to their schedules.

Finally, we agree with the judge, largely for the reasons he stated, that the Union did not waive its right to engage in effects bargaining.[8]

AMENDED REMEDY

As explained, we agree with the judge that the Respondent violated its legal obligation to engage in timely bargaining about the effects of its decision to change its rollover system by reducing the number of courses part-time faculty members could initially offer. The judge ordered the Respondent to engage in effects bargaining and, under *Transmarine Navigation*,[9] to pay each unit employee his or her salary for a three-credit course from 5 days after the date of the Board's decision until the occurrence of the earliest of the usual *Transmarine* conditions.[10] We agree with the judge that to ensure that

[6] As the judge noted, the Union disputed the Respondent's claim that it fully responded to the December 20 information request. Without resolving that dispute, the judge ordered the Respondent to respond timely to both information requests to the extent it has not already done so.

[7] We note that the Respondent does not specifically contend that, if the judge correctly found it had an effects-bargaining obligation, certain items of information requested by the Union need not be provided because they are only relevant to the nonbargainable decision to change the rollover system.

[8] We do not rely on the judge's statement that the Respondent's October 2010 bargaining proposal to add an express effects-bargaining waiver to the contract "undercut[] its waiver contention."

In arguing for waiver, the Respondent invokes the contract-coverage test endorsed by the District of Columbia Circuit and the Seventh Circuit. The Board, however, has consistently applied the "clear and unmistakable" waiver standard, and we do so here. See, e.g., *Provena St. Joseph Medical Center,* 350 NLRB 808 (2007).

For institutional purposes, Member Johnson agrees to apply the "clear and unmistakable" waiver standard here.

We note that the Respondent does not contend that, if the general effects bargaining obligation was not waived, there was nothing to bargain about because all effects were the inevitable consequences of its nonbargainable decision.

[9] 170 NLRB 389 (1968), as clarified in *Melody Toyota*, 325 NLRB 846 (1998).

[10] Under *Transmarine*, the backpay period runs from 5 days after the date of the Board's decision until the occurrence of the earliest of the following: (1) the parties bargain to agreement concerning the effects of the change; (2) a bona fide impasse in bargaining; (3) the union's failure to request bargaining within 5 business days after receipt of the Board's decision, or to commence negotiations within 5 business days after receipt of the employer's notice of its desire to bargain with the union; or (4) the union's subsequent failure to bargain in good faith. *Melody Toyota*, supra.

meaningful bargaining occurs, and to effectuate the policies of the Act, the Respondent should be ordered to bargain over the effects of its decision and to pay a limited make-whole remedy. But, in our view, the particular make-whole remedy recommended by the judge is not best tailored to the circumstances here.

To begin, it is clear that some make-whole remedy is appropriate. Although the Respondent's decision did not result in a loss of jobs, it may have caused some unit employees to incur economic losses. The Respondent's unfair labor practice thus deprived the Union of an opportunity to bargain at a time when such bargaining would have been meaningful in easing the potential hardship to employees. After all, the Union may have been able to secure additional benefits for the affected employees had the Respondent engaged in timely effects bargaining.

The question is what that remedy should be. "[I]n fashioning a remedy for an effects bargaining violation, the Board may consider any particular or unusual circumstances of the case." *AG Communication Systems Corp.*, 350 NLRB 168, 173 (2007), petition for review denied sub nom. *Electrical Workers Local 21 v. NLRB*, 563 F.3d 418 (9th Cir. 2009); see also *J. A. Croson*, 359 NLRB 19, 26–27 (2012) (recognizing that the Board has broad discretionary authority under Sec. 10(c) to tailor its remedies to the varying circumstances of a case). We do so here.[11]

Based on the particular facts of this case, we believe that a limited make-whole remedy should be based, not on the monetary value of a three-credit course for some limited period of time as the judge proposed, but rather on the $100 course-cancellation fee(s) lost when the change was made. Under the previous system, the Respondent would have opened more courses to registration initially and then canceled those that were under-enrolled, triggering payments to affected part-time faculty members of the $100 course-cancellation fee.[12]

Further, unlike the judge, we conclude that only those unit employees who suffered the lost cancellation fee in the spring through fall 2011 semesters should receive make-whole relief, and that they should be compensated only for the loss(es) incurred in those semesters.[13] Cf. *Heartland Health Care Center-Plymouth Court*, 359 NLRB 1518, 1518–1519 (2013). As stated above, the Respondent's rollover system employed the previous year's corresponding semester to create a template for the upcoming semester. Because the change to the rollover system took effect in the spring 2011 semester, the fall 2011 semester would be the last semester where one could directly compare a schedule developed under the new rollover system with the previous year's corresponding semester as developed under the old system. We believe that determining economic losses after fall 2011 would be too speculative.

Finally, we conclude that the affected employees are entitled to the entire amount of the lost course-cancellation fee(s)—whether that amount is $100 or $200 or more. Given the fee structure of the lost compensation, we do not believe that the four conditions established by the judge, looking to *Transmarine*, that would terminate the limited backpay award early or award only a 2-week minimum are appropriate here.

The backpay amounts due shall be computed in accordance *Ogle Protection Service*, 183 NLRB 682, 683 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). Additionally, we shall order the Respondent to compensate the unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for unit employees.

ORDER

The National Labor Relations Board orders that the Respondent, Columbia College Chicago, Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union by failing and refusing in a timely manner to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

[11] We cannot simply order the Respondent to restore the status quo ante, because the Respondent acted lawfully when it altered its system for scheduling courses.

[12] We recognize that, under some circumstances, the change conceivably could have resulted in lost pay, rather than a lost cancellation fee. For instance, prior to the change, the Respondent may have permitted under-enrolled courses to proceed but, after the change, declined to release "held" courses unless there was an over-enrollment. But we believe basing the monetary remedy on such a determination would be too speculative. E.g., *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900–901 (1984).

[13] To have incurred an economic loss, the part-time faculty member must have previously been assigned or have requested a third course for the spring through fall 2011 semesters and not been assigned a third course, although he would have been assigned a third course under the previous rollover system.

We leave the determination of who suffered the loss of the cancellation fee to compliance.

(b) Failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit.

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

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

(a) To the extent not already done so, furnish to the Union in a timely manner the information requested by the Union on December 15 and 20, 2010.

(b) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment, including the effects of the Respondent's decision to modify its rollover scheduling system, and, if an understanding is reached, embody the understanding in a signed agreement:

> All part-time faculty members who have completed teaching at least one semester at the College, excluding all other employees, full-time faculty, artists-in-residence, graduate students, part-time faculty members teaching only continuing education, music lessons to individual students or book and paper making classes, full-time staff members, teachers employed by the Erickson Institute, the YMCA or Adler Planetarium, and other individuals not appearing on the College's payroll, managers and confidential employees, guards, and supervisors as defined in the Act.

(c) Pay each part-time faculty member in the humanities, history, and social sciences department who, for the spring through fall 2011 semester(s), requested a third course, was not assigned a third course, and would have been assigned a third course under the former scheduling system, a $100 course-cancellation fee for each semester, with interest, as described in the remedy section of this decision.

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

(e) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(f) Within 14 days after service by the Region, post at its Chicago, Illinois facility copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 3, 2010.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 30 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the Part-time Faculty Association at Columbia College-

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Chicago-Illinois Education Association/National Education Association by failing and refusing in a timely manner to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT fail and refuse to bargain with the Union as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our unit employees in the exercise of the rights set forth above.

WE WILL furnish to the Union in a timely manner the information requested by the Union on December 15 and 20, 2010, to the extent not already done so.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment, including the effects of our decision to modify our rollover scheduling system, and, if an understanding is reached, embody the understanding in a signed agreement:

> All part-time faculty members who have completed teaching at least one semester at the College, excluding all other employees, full-time faculty, artists-in-residence, graduate students, part-time faculty members teaching only continuing education, music lessons to individual students or book and paper making classes, full-time staff members, teachers employed by the Erickson Institute, the YMCA or Adler Planetarium, and other individuals not appearing on the College's payroll, managers and confidential employees, guards, and supervisors as defined in the Act.

WE WILL pay a $100 course-cancellation fee for each semester, with interest, to each part-time faculty member in the humanities, history, and social sciences department who, for the spring through fall 2011 semester(s), requested a third course, was not assigned a third course, and would have been assigned a third course under our former rollover system for scheduling courses in that department.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

COLUMBIA COLLEGE CHICAGO

The Board's decision can be found at www.nlrb.gov/case/30–CA–018888 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

Daniel E. Murphy, Esq., for the Acting General Counsel.
Lisa A. McGarrity, Esq. (Franczek Radelet P.C.), for the Respondent.
Laurie M. Burgess, Esq. (Burgess Law Offices), for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was tried in Chicago, Illinois, from February 6 to 8, 2012. On February 1, 2011, the Part-time Faculty Association at Columbia College Chicago-Illinois Education Association/National Education Association (the Union or PFAC) Cases 30–CA–018888[1] and 13–CA–060793[2] filed the original charge involved herein. The resulting complaint alleged that Columbia College Chicago (the College or Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by, inter alia: threatening that it would no longer informally meet with the Union to discuss labor relations matters; failing to provide certain relevant information to the Union; and failing to negotiate with the Union concerning the effects of its decision to change the course scheduling procedure for part-time faculty in the history, humanities, and social sciences (HHSS) department.

On the entire record, including my observation of the demeanor of the witnesses, and after thoroughly considering the parties' briefs, I make the following

FINDINGS OF FACT

I JURISDICTION

At all material times, the College has operated an institution of higher learning, which specializes in visual, media, performing and communication arts at its Chicago, Illinois campus (the facility). Annually, in conducting its operations, it derives gross revenues in excess of $1 million and purchases and receives at the facility goods and services valued in excess of

[1] This case was formerly identified as Case 13–CA–46562.

[2] At the hearing, counsel for the Acting General Counsel moved to server and remand to the Regional Director the full complaint in Case 13–CA–60793, and paragraphs 6 and 12 of the complaint in Case 30–CA–18888, on the basis of the parties' bilateral settlement. His unopposed motion was granted.

$5000 directly from points located outside of the State of Illinois. Based upon the foregoing, it admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It further admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICE

A. Introduction

The majority of the controlling facts are undisputed. The College consists of three schools: fine and performing arts; liberal arts and sciences; and media arts. Each school, which is run by a dean,[3] houses several departments.[4] All Deans report to Dr. Louise Love, vice president for academic affairs. The College offers undergraduate and graduate studies, and uses a semester system. Most courses are held in the fall and spring semesters, which are 15 weeks long.[5] Enrollment usually ranges from 9000 to 12,000 students. (R. Exhs. 3–4).

B. Union's Representation of the Bargaining Unit

In 1998, the Union was certified as the exclusive collective-bargaining representative of the following appropriate bargaining unit (the unit):

> [A]ll part-time faculty members who have completed teaching at least one semester at [the] . . . College . . . , excluding all other employees, full-time faculty, . . . graduate students, . . . managers and confidential employees, guards, and supervisors as defined in the Act.

(GC Exh. 2.) The College has continuously recognized the Union as the unit's representative; this recognition has been embodied in successive contracts, the most recent of which expired on August 31, 2010 (the 06–10 CBA). (Id.). There are approximately 1300 employees in the unit.

C. The 06–10 CBA

Following the expiration of the 06–10 CBA, the parties have sought to negotiate a successor agreement. Although their efforts have not yet produced another contract, they have agreed to follow the 06–10 CBA, until it is supplanted by their new agreement. (Tr. 166.) Portions of the 06–10 CBA are, accordingly, relevant.

1. Management-rights clause

a. Extant management-rights clause[6]

The 06–10 CBA contained a management-rights clause, which granted the College the unilateral right to schedule the unit's teaching assignments. Specifically, article II provides:

> All the rights . . . [of the College] shall be . . . exercised in their sole discretion including . . . [t]he right to . . . . schedul[e], . . . transfer . . . any . . . course . . . [and] [t]he right to . . . assign . . . [and] appoint . . . .

(GC Exh. 2 at 2.)

b. Management rights bargaining proposal

On October 29, 2010, the College proposed to modify the current management-rights clause, and sought to add effects bargaining to the menu of waived bargaining subjects:

> All the rights . . . [of the College], including the effects or impact of their decision to exercise such rights and responsibilities, shall be . . . exercised in their sole discretion including . . . [t]he right to . . . . schedul[e], . . . transfer . . . any . . . course . . . [and] [t]he right to . . . assign . . . [and] appoint . . . .

(GC Exhs. 2, 24, 25-A, B) (emphasis added).

2. Course cancellation fee

Part-time faculty members, whose classes have been cancelled, receive a $100-cancellation fee. Article VIII provides that, "[i]f an offered and accepted course is withdrawn prior to the start of classes, without an equivalent course replacement, the unit member shall be paid . . . $100." (GC Exh. 2.)

D. The Rollover Scheduling System: the Former HHSS Scheduling System

Prior to the unilateral change at issue, the College employed a rollover scheduling system to distribute teaching assignments to part-time HHSS faculty. Dr. Lisa Brock, chair of the HHSS department from August 2003 to September 2011,[7] stated that she oversaw HHSS' operations. She explained that most HHSS courses were taught by part-time faculty. She averred that Academic Manager Tomiwa Shonekan helped schedule part-time HHSS faculty. She credibly testified that, during her tenure, HHSS used the following nine-step, rollover scheduling system to assign courses to unit faculty:

Step	Description
1	A template was created, which described a part-time professor's teaching schedule during the same semester of the prior calendar year.[8]
2	The template was then incorporated into a Faculty Teaching Availability form (the Availability form), which was disseminated to the applicable faculty member. See, e.g., (CP Exh. 1).
3	Part-time faculty members made minor changes to their Availability forms (i.e. changed class times, etc.), and resubmitted their Availability forms to the scheduler.
4	The scheduler then assembled the data from the Availability forms and created a course schedule that was electronically posted on the Online Access Student Information System (OASIS).

[3] Deans are aided by associate and assistant deans.

[4] There are 23 departments at the College. Departments are run by department chairs, who report to deans.

[5] The fall semester runs from September to December; the spring semester runs from January to May.

[6] Although a management-rights clause generally will not survive the expiration of a contract (see *Racetrack Food Services*, 353 NLRB 687 (2008)), the parties conceded at the hearing, as well as in their briefs, that this clause survived the expiration of the 06–10 CBA.

[7] Since September 2011, she has been employed as an educator at Kalamazoo College. Between September 2011 and August 2010, she was on a 1-year sabbatical from the College.

[8] For instance, HHSS used a professor's fall 2010 schedule as a template for setting up their fall 2011 schedule.

5	Students then electronically registered for the upcoming semester's courses on OASIS.
6	Courses, which attracted sufficient registrants, remained on the schedule, while courses, which failed to attract sufficient registrants, were cancelled.[9]
7	Part-time faculty members, whose courses survived the registration phase, received a letter from the Office of the Provost, which described their upcoming semester schedule and compensation.
8	Under limited circumstances, senior part-time faculty members with 51 credit hours of teaching, whose classes were cancelled, were allowed to "bump" less senior part-time faculty. (GC Exh. 2 at 8).
9	Part-time faculty members, whose courses remained cancelled, received a $100 cancellation fee. (Id.).

John Stevenson, part-time HHSS professor since 1991, and Mary Lou Carroll, part-time HHSS professor since 2005, testified that, under the rollover scheduling system, the College consistently offered students, on their behalves, three courses per semester for registration on OASIS. (GC Exhs. 3–4, 9–10.) They stated that, as a result, they typically taught three courses per semester, under the rollover scheduling system. (GC Exhs. 9–10.)

E. November 3, 2010: Modification of HHSS' Rollover Scheduling System

On November 3, 2010, Dr. Cadence Wynter, acting chair of the HHSS department, distributed this email to unit faculty, which announced the College's decision to change the rollover scheduling system in the HHSS department:[10]

> This is to inform you of schedule changes for the Spring semester 2011.
>
> Adjunct faculty members in [HHSS] . . . will be scheduled for a maximum of two classes next semester**.** Adjunct faculty members who indicated that they are available to teach a third class will only be assigned a third class . . . if student enrollment deems this necessary. . . .

(GC Exh. 5) (emphasis added).[11]

Dr. Wynter testified that she altered the rollover scheduling system, in order to remedy an ongoing over-scheduling dilemma. She asserted that, under the rollover scheduling system, the College would initially offer too many courses for student registration on OASIS, and consequently cancel several courses, due to low registration. She stated that such cancellations caused students to make undesirable, last minute schedule adjustments, and forced the College to pay unwarranted cancellation fees to the unit. She indicated that, by initially limiting part-time HHSS professors to two courses per semester, she minimized low enrollment cancellations, added third courses in accordance with demand, and controlled cancellation costs. (Tr. 438–39.)

F. Union's Initial Response

The Union reacted to the College's decision to revise the rollover scheduling system by taking these two steps. First, it filed a grievance, which alleged that the College's actions violated the 06–10 CBA. (GC Exh. 14.) Second, it requested rescission of the unilateral change and bargaining. (GC Exh. 6.)

G. November 9, 2010 Meeting

On November 9, 2010, the parties met to discuss the HHSS scheduling issue. Professor Stevenson credibly testified that, although the Union vociferously objected to the College's unilateral decision to modify the rollover scheduling system, Dr. Wynter responded that:

> She had received a directive from the Dean's office telling her that there were too many courses and too many sections being offered in the department and that she should find a way to deal with that. . . .

(Tr. 103.) Professor Carroll corroborated his account.

Dr. Wynter testified that she explained the rationale behind her actions at this meeting. She discounted, however, the degree that the rollover scheduling system was modified and said that:[12]

> It was only a change to the extent that . . . I . . . tie[d] the schedule to student enrollment, rather than offering many courses that then had to be cancelled.

(Tr. 468.)

H. December 15, 2010 Information Request

Union Representative William Silver testified that, on December 15, 2010, the Union sent the following information and bargaining request to Dr. Love (Information Request #1):

> On November 5, 2010, [the] Union . . . sent you a request to meet over the issue of a "two-class" limit that we believed was being imposed in two departments. I have been informed that no such meeting was held since that request.

[9] Dr. Brock stated that, if less than 10 students enrolled in a course, it was typically cancelled, absent special circumstances. She estimated that, out of the 300 HHSS courses offered per semester, only 10 were cancelled.

[10] The email was distributed to part-time faculty members by Shonekan, on behalf of Dr. Wynter. At the hearing, the College's objection that Shonekan's out-of-court statements were inadmissible hearsay was denied. Shonekan, who distributed hiring and scheduling emails, letters, policies and memoranda on behalf of Drs. Brock and Wynter, was, minimally, an agent. See Fed.R.Evid. 801(d)(2) (agent's admissions are not hearsay).

[11] Dr. Wynter testified that that the email was drafted to, "explain to [the part-time faculty] . . . why they were now only going to have two courses that students could register for." (Tr. 463.)

[12] In December 2010, the College distributed Adjunct Faculty Teaching Assignments forms to part-time faculty. (CP Exhs. 5–6). These forms, which were disseminated by Shonekan, memorialized the spring 2011 courses that it would have offered to students on OASIS on behalf of part-time faculty, absent altering the Rollover Scheduling System. These forms contained a handwritten note identifying "held" and "cancelled" courses.

> It has now come to our attention that widespread course reductions have been expanded to include several other departments, including Arts, Entertainment and Media Management (AEMM) and Humanities, History and Social Sciences (HHSS).
>
> The union again requests to meet to discuss these class schedule reductions. We request to bargain over the impact of these changes . . . .
>
> Please provide the union with the following relevant information:
> 1. The full extent of the class assignment changes, including:
>
> a. A list of all individuals and their department who have had their class assignments reduced, and
>
> b. For each individual, the exact number of classes that he/she is eligible to receive during the upcoming semester;
>
> 2. The number of College credit hours that has previously been taught for each of the affected faculty members.
> 3. The nature of the notification that was provided to the affected faculty staff;
> 4. The reasons for the class assignment changes; and
> 5. The efforts being made by the College to find other class(es) for affected faculty members.

The Union requests that the College refrain from implementing these changes until such time as the parties are able to meet . . . .

(GC Exh. 27.)

I. December 17, 2010 Meetings

1. Bargaining session[13]

Silver credibly testified that, at this first meeting, the Union complained about the College's modification of the rollover scheduling system. He added that the Union announced that it was unable to fully understand the change or its rationale, until the College first responded to Information Request #1. He indicated that Dr. Love reported that the College was not yet ready to bargain over this issue, and directed the Union to follow up with Marcus.[14]

Dr. Love agreed that she instructed the Union to discuss the scheduling issue with Marcus. Kelly testified that the College was unprepared to negotiate at this meeting, and tabled the effects bargaining discussions until January 13, 2011. (See R. Exh. 14.)

2. Grievance meeting[15]

Silver stated that Marcus told the Union that the College's response to Information Request #1 would be forthcoming. He added that, although she acknowledged the Union's pending grievance, she would not discuss it any further, beyond stating that it was not meritorious.

Marcus acknowledged telling the Union that she needed more time to reply to Information Request #1 as well as the grievance.[16] She said that, because the spring semester did not begin until late January, any information related to spring assignments was unavailable.

J. December 20, 2010 Information Request

On December 20, 2010, the Union requested the following additional information (Information Request #2):[17]

> [1] Any and all . . . communications . . . between [HHSS] . . . and the College['s administration] . . . that . . . led to the proposed schedule change . . . .
>
> [2] College-wide enrollment data for . . . 2008, 2009, 2010, and . . . 2011 . . . .
>
> [3] Criteria employed by HHSS . . . in selecting courses to be dropped, added, changed, . . . or eliminated for Spring 2011 student registration.
>
> [4] List of hired adjunct faculty in HHSS . . . from . . . 2008 to . . . 2011.
>
> [5] List of HHSS . . . adjunct faculty by accrued credit hours as of Fall 2010 semester.
>
> [6] List of classes . . . withheld from Spring 2011 registration roster.
>
> [7] List of classes . . . added to Spring 2011 registration roster.
>
> [8] List of classes . . . substituted for other classes or sections to Spring 2011 registration roster.
>
> [9] List of classes . . . dropped from Spring 2011 registration roster.
>
> [10] List of classes . . . claimed pursuant to "bumping" privilege on Spring 2011 registration roster.
>
> [11] List of adjunct faculty who indicated their availability to teach three courses in Spring 2011 semester.
>
> [12] List of adjunct faculty who indicated their availability to teach three courses in Spring 2011 semester and who were assigned to teach less than three courses in Spring 2011 semester.
>
> [13] List of adjunct faculty who indicated their availability to teach three courses in Spring 2011 semester and who were assigned to teach three courses in Spring 2011 semester.
>
> [14] List of adjunct faculty who lost classes in any combination for Spring 2011 semester.
>
> [15] List of adjunct faculty whose teaching load increased from Fall 2010 to Spring 2011 semester.
>
> [16] Copies of adjunct faculty Availability to Teach forms for Spring 2011 semester.

[13] Dr. Love, General Counsel Annice Kelly, Associate Vice President for Budget Management John Wilkin, and others represented the College, while the Union was represented by Professor Vallera, Silver, and others.

[14] Professor Vallera corroborated Silver's testimony. See Tr. 277; GC Exh. 29.)

[15] Marcus represented the College, while Silver and Professors Vallera and Carroll represented the Union.

[16] The College subsequently denied the grievance. See GC Exhs. 30–31.)

[17] Although the request is dated November 3, 2010 (GC Exh. 15), the parties agreed that it was tendered on December 20, 2010. (Tr. 386; Jt. Exh 1; GC Exh. 1 (complaint and answer); GC Br. at 16; R. Br. at 15.)

> [17] Copies or summaries of all intra-Department . . . communications relating to the proposed schedule change . . . .
>
> [18] Copies of all curriculum-based rationale for the proposed schedule change to Spring 2011 adjunct faculty teaching assignments.

(GC Exh. 15.)

K. Release of "Held" Spring 2011 Courses

Dr. Wynter stated that, following her initial distribution of spring semester 2011 courses in November 2010, she released several "held" courses to the part-time HHSS faculty. She said that, as a result, most HHSS part-timers, who sought a third course, received one. (R. Exhs. 6–8.) She added that a few part-timers rejected the third course that was offered. (See R. Exhs. 9–11.)

L. January 13, 2011 Meeting[18]

The parties met again on January 13, 2011. (GC Exh. 32.) Silver testified that Professor Vallera reminded the College that it had not, to date, answered Information Requests #1 and #2. He stated that Kelly responded that the College would not reply, until the Union first identified which faculty members were impacted by the change. He said that Professor Vallera replied that Kelly was placing the Union in a "catch-22" situation, by requiring it to first provide the same information that was being sought. He recalled that the College then asked the Union for an effects bargaining proposal, and that the Union responded that it could not make such a proposal, until it first received the requested information. (See also GC Exh. 33-A.)

Wilkin testified that the parties discussed the scheduling changeover at this meeting. His bargaining notes reflected that the Union protested the change and compared it to a layoff. (See R. Exh. 15.) Kelly added that the College sought clarification from the Union regarding its bargaining position.

M. January 13, 2011: Partial Reply to Information Request #1

Wilkin provided a partial reply to Information Request #1, which is summarized below:

Request	Response
1(a). "A list of all individuals and their department who have had their class assignments reduced . . . ."	Information not provided.
1(b). "For each individual, the exact number of classes that he/she is eligible to receive during the upcoming semester."	Information not provided.
2. "The number of College credit hours that has previously been taught for each of the affected faculty members."	List of unit faculty members and their accumulated credit hours was provided.
3. "The nature of the notification that was provided to the affected faculty staff."	Information not provided.
4. "The reasons for the class assignment changes."	Information not provided.
5. "The efforts being made by the College to find other class(es) for affected faculty members."	Information not provided.

(GC Exh. 27; R. Exh. 5.)

N. January 21, 2011 Meeting[19]

1. Alleged threat

Silver reported that the Union raised a scenario about a high-seniority professor, who it believed should bump a low-seniority professor out of their teaching assignment under the 06-10 CBA. He indicated that the College offered to address the issue, in exchange for the Union's withdrawal of the instant unfair labor practice charge. (See GC Exh. 34.) He added that Dr. Love indicated that she would no longer address isolated grievances during bargaining, due to the flood of grievances and charges. Professor Vallera corroborated Silver's testimony.

Dr. Love credibly recollected that she made the following statement about grievances:

> I couldn't meet informally because there's [now] someone else, who was designated to meet informally, and to liaise with F-Pac about the current contract that we were working under, whereas my role was to be at the bargaining table at that point to negotiate a new contract that we were working under, whereas my role was to be at the bargaining table to negotiate a new contract. So, we were really trying to clarify ourselves be very clear to stick to our own, . . . designated policies of who does what. . . .
>
> My job had been to be liaison with F-Pac, and I would meet with them weekly or biweekly . . . talk about informal and formal grievances. All the implementation of the contract was mine. But, when Susan Marcus came that became her job.

(Tr. 347–348.) She further explained that, after Marcus began her position in the fall of 2009, she temporarily continued to meet with the Union to discuss grievances during Marcus' orientation. She added that this scenario eventually became confusing, and, as a result, she told the Union to solely meet with Marcus about grievances, in order to avoid continued confusion. She stated that this change was not retaliatory, and was solely pragmatic. Kelly corroborated her testimony.

Given that Silver and Professor Vallera testified that Dr. Love announced that she would no longer address grievances during bargaining as retaliation against the Union's flood of grievances and charges, and Dr. Love and Kelly stated that Dr. Love solely directed the Union to address grievances with Marcus in order to avoid the confusion associated with multiple forums, I must make a credibility resolution. For several reasons, I credit Dr. Love and Kelly on this close issue. First, they provided clearer accounts; their testimonies were detailed and their recollections were somewhat stronger. Second, their ac-

[18] The College was represented by Kelly and Dr. Love; the Union was represented by Professor Vallera and Silver.

[19] The College was represented by Kelly and Dr. Love; the Union was represented by Professor Vallera and Silver.

counts were plausible. It's abundantly reasonable that the College wanted to limit negotiations to bargaining, in light of the fact that the parties' negotiations have effectively dragged on indefinitely. It's equally likely that Dr. Love would have openly relegated grievance handling duties to Marcus, once she became fully oriented, in order to concentrate on other competing obligations, and permit Marcus to take a more consistent approach on behalf of the College concerning all step-1 grievances.

2. Discussion regarding the alteration of the rollover scheduling system

Wilkin stated that the College was available to conduct effects bargaining at this meeting, but, the Union was unwilling to do so. (See also R. Exhs. 15, 22.) He added that the Union subsequently failed to schedule additional effects bargaining sessions. Kelly indicated that the Union never requested subsequent bargaining sessions, and that the College never refused to continue to meet with them regarding this matter.

O. February 21, 2011 Reply to Information Request #2

On February 21, 2011, the College replied to Information Request #2. (See Jt. Exh. 1.) Silver said that the Union remained unsatisfied with their response, which he classified as untimely and insufficient. The College's response is summarized below:

Request	Response
1. "[C]ommunications . . . between [HHSS] . . . and the College['s] [administration] . . . that . . . led to the proposed schedule change . . . ."	"No [responsive] documents . . . ."
2. "College-wide enrollment data for . . . 2008, 2009, 2010, . . . 2011."	"Hard copies . . . attached."
3. "Criteria employed by HHSS . . . in selecting courses to be dropped, added, changed . . . or eliminated for Spring 2011 student registration."	"No [responsive] documents . . . ."
4. "List of hired adjunct faculty in HHSS . . . from [2008 to 2011] . . . ."	"Attached"
5. "List of HHSS . . . adjunct faculty by accrued credit hours as of Fall 2010 semester."	"Attached"
6. "List of classes . . . withheld from Spring 2011 registration roster."	"No [responsive] documents . . . ."
7. "List of classes . . . added to Spring 2011 registration roster."	"No [responsive] documents . . . ."
8. "List of classes . . . substituted . . . [in] Spring 2011."	"None"
9. "List of classes . . . dropped from Spring 2011 registration roster."	"None"
10. "List of classes . . . claimed pursuant to 'bumping' privilege on Spring 2011 registration roster."	"None"
11. "List of adjunct faculty who indicated their availability to teach three courses in Spring 2011 semester."	"Availability forms attached."
12. "List of adjunct faculty . . . . availab[le] to teach three courses in Spring 2011 . . . [and] were assigned to teach less than three courses."	"Availability forms . . . and . . . part-time faculty list is attached."
13. "List of adjunct faculty . . . availab[le] to teach three courses in Spring 2011 . . . [and] who were assigned to teach three courses."	"Availability forms . . . and . . . part-time faculty list is attached."
14. "List of adjunct faculty who lost classes in . . . Spring 2011."	"[N]o category of 'lost' courses."
15. "List of adjunct faculty whose teaching load increased from Fall 2010 to Spring 2011 semester."	"Fall 2010 and Spring 2011 . . . faculty list is attached."
[16] 16. "[A]djunct faculty Availability to Teach forms for Spring 2011."	"Attached"
17. "Copies or summaries of all intra-Department . . . communications relating to the proposed schedule change . . . ."	"No documents responsive to this request"
[18] 18. "Copies of all curriculum-based rationale for the proposed schedule change to Spring 2011 adjunct faculty teaching assignments."	"No documents responsive to this request"

(GC Exh. 15; Jt. Exh. 1.)

Professor Vallera testified that, before the hearing, in response to a subpoena request, the Union received various Adjunct Faculty teaching assignment forms dated December 2010 and January 2011, which described classes that were requested, held, canceled and assigned in HHSS during the spring 2011 semester. (See CP Exhs. 4–6.) She averred that these documents would have been responsive to Information Request #2, but, were never supplied.

Marcus testified that she helped prepare the College's reply to Information Request #2. She stated that, on January 20, 2011, she advised the Union that the College was still compiling its reply. (See R. Exh. 13.) She added that it took 2 months for the College to respond to Information Request #2 because, at the time, the Union had tendered multiple competing information requests. She asserted that some of these requests were lengthy. She said that the timeliness of the College's reply was further impacted by the Shonekan's discharge, who would have ordinarily aided the College's response. She averred that she turned over all responsive documents in the College's possession.[20] (Tr. 400.) She stated that the Union never told her that the College's reply was inadequate. She added that the Union's request was vague.

Dr. Wynter testified that she helped Marcus assemble the College's response. She stated that Shonekan left HHSS' records in disarray, and that she did her best to compile a reply.

[20] She stated that she did not have CP Exhs. 4–5 in her possession. She stated that she was not previously aware that such "Adjunct Faculty teaching assignment forms with handwriting on them existed." (Tr. 403.)

She added that she never withheld any records from the Union.[21] Dr. Love asserted that, in response to the information requests, she provided all existing documents; she added that there were simply no responsive documents in certain cases.

III. ANALYSIS

A. The 8(a)(1) Threat[22]

Dr. Love's comments did not violate Section 8(a)(1). The complaint alleged that, on January 21, 2011, Dr. Love engaged in the following unlawful conduct:

> [T]hreatened that she would no longer meet informally with Union representatives to discuss individual matters because the charges and grievances that the Union had been filing, and that she was now going to follow the formal procedures for dealing with such individual matters.

(GC Exh. 1.) An employer violates Section 8(a)(1), when it engages in conduct that reasonably tends to interfere with employees' Section 7 rights. *American Freightways Co.*, 124 NLRB 146 (1959). Such unlawful conduct includes threatening the stricter enforcement of company rules, in response to grievance-filing. See *Schrock Cabinet Co*., 339 NLRB 182, 185 (2003).

Dr. Love stated that she would no longer address isolated grievances during bargaining, as a consequence of Marcus' new role and the need for greater consistency in the College's grievance handling. She did not threaten to abandon the grievance process or retaliate against the Union; she only allocated this key function to another employee.[23] Such commentary was lawful.

B. The 8(a)(5) Allegations

1. Information request allegations[24]

The College violated Section 8(a)(5), when it failed to adequately respond to Information Requests #1 and #2. An employer must provide requested information to a union representing its employees, whenever there is a probability that such information is necessary and relevant to its representational duties. See *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). This duty encompasses the obligation to provide relevant bargaining and grievance processing materials. See *Postal Service*, 337 NLRB 820, 822 (2002). The standard for relevancy is a "liberal discovery-type standard," and the sought-after evidence need only have a bearing upon the disputed issue. See *Pfizer, Inc.*, 268 NLRB 916 (1984). Concerning information connected grievance-handling, the Board has held that:

> The Union is entitled to the information in order to determine whether it should exercise its representative function in the pending matter, that is, whether the information will warrant further processing of the grievance or bargaining about the disputed mater.

Ohio Power Co., 216 NLRB 987, 991 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976).

Information, which concerns unit terms and conditions of employment, is "so intrinsic to the core of the employer-employee relationship" that it is presumptively relevant. *York International Corp.*, 290 NLRB 438 (1988). When material is presumptively relevant, the burden shifts to the company to establish a lack of relevance. *Newspaper Guild Local 95 (San Diego) v. NLRB*, 548 F. 2d 863, 867 (9th Cir. 1977).

In addition to an employer's duty to provide necessary and relevant information, "an unreasonable delay in furnishing such information is as much a violation of the Act as a refusal to furnish the information at all." *Postal Service*, 332 NLRB 635, 640 (2000). "Absent evidence justifying an employer's delay in furnishing a union with relevant information, such a delay will constitute a violation . . . inasmuch '[a]s the Union was entitled to the information at the time it made its initial request, [and] it was [the employer's] duty to furnish it as promptly as possible.'" *Woodland Clinic*, 331 NLRB 735, 737 (2000), quoting *Pennco*, *Inc.*, 212 NLRB 677, 678 (1974). The Board evaluates the reasonableness of a delay in supplying information, on the basis of "the complexity and extent of the information sought, its availability and the difficulty in retrieving the information." *Samaritan Medical Center*, 319 NLRB 392, 398 (1995). The Board has consequently found multi-month delays in providing information unreasonable.[25] Additionally, an employer cannot justify delays in supplying information on the basis of other, unrelated, information requests. See *DaimlerChrysler Corp.*, 344 NLRB 1324, 1330 (2005). Finally, where an information request is vague, the onus to request clarification rests with the employer. See *Keauhou Beach Hotel*, 298 NLRB 702, 702 (1990).

Concerning Information Request #1, the College wholly failed to respond to various components of this request. As noted, it responded as follows:

Request	Response
1(a). "A list of all individuals and their department who have had their class assignments reduced . . . ."	Information not provided.
1(b). "For each individual, the exact number of classes that he/she is eligible to receive during the upcoming semester."	Information not provided.
2. "The number of College credit hours that has previously been taught for each of the affected faculty members."	List of unit faculty members and their accumulated credit hours was provided.
3. "The nature of the notifica-	Information not pro-

[21] She denied previously seeing CP Exhs. 4–5, or telling Shonekan to add notations to such documents.

[22] This allegation is listed under pars. 10 and 11 of the complaint.

[23] Given that negotiations have not yielded a new contract, Dr. Love's deletion of a distraction from the bargaining table was, arguably, beneficial.

[24] These allegations are listed under pars. 7, 8, and 13 of the complaint.

[25] See *Pan American Grain Co.*, 343 NLRB 318 (2004), enfd. in relevant part 432 F.3d 69 (1st Cir. 2005) (3-month delay was unreasonable); *Bundy Corp.*, 292 NLRB 671 (1989) (2.5-month delay); *Woodland Clinic*, supra, 331 NLRB at 737 (7-week delay).

tion that was provided to the affected faculty staff."	vided.
4. "The reasons for the class assignment changes."	Information not provided.
5. "The efforts being made by the College to find other class(es) for affected faculty members."	Information not provided.

Items 1(a) and (b), 3, 4, and 5,[26] which were not provided, sought "presumptively relevant" unit information. This information would have allowed the Union to gauge whether the College had modified its course assignment system outside of HHSS, which would have allowed it to gauge whether additional unfair labor practice charges or grievances were merited. Such information could have also aided its ongoing negotiation of a successor agreement, and could have, upon review, prompted it to propose an alternative scheduling methodology. The College, therefore, violated the Act by failing to comprehensively reply to Information Request #1.

Concerning Information Request #2, even assuming arguendo that the College fully answered this request,[27] it violated the Act by responding in an untimely manner. The College, which received this request on December 20, 2010, did not respond until February 21, 2011, which was 2 months later. This 2-month delay was unreasonable, given that the Union's request was neither overly complex nor voluminous, and the information was readily available. See *Woodland Clinic,* supra. Moreover, the College cannot justify its delayed response by asserting that its delay was triggered by competing information requests. See *DaimlerChrysler Corp.*, supra. Lastly, to the extent that the College deemed this request vague, which it was not, the onus nevertheless rested on the College to seek prompt clarification, which it neglected to do. See *Keauhou Beach Hotel*, supra. The College, as a result, violated the Act by unreasonably delaying its response to Information Request #2.

2. Effects bargaining allegation[28]

The College violated Section 8(a)(5) of the Act, when it failed to bargain with the Union concerning the effects of its decision to modify the rollover scheduling system in HHSS. Section 8(a)(5) provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees." 29 U.S.C. § 158(a)(5). Section 8(d) explains that "to bargain collectively" is to "meet and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder." Id. at § 158(d).

An employer's bargaining obligation includes a duty to bargain about the effects on unit employees of management decisions, which are not subject to bargaining obligations. See *First National Maintenance Corp. v. NLRB,* 452 U.S. 666, 681–682 (1981); *Champion International Corp.,* 339 NLRB 672 (2003). As a general matter, an employer must bargain over the effects on unit employees of decisions involving nonmandatory subjects, whenever these effects cause "material, substantial, and significant" changes to unit working conditions. *Bohemian Club*, 351 NLRB 1065, 1066–1067 (2007). Effects bargaining "must be conducted in a meaningful manner and at a meaningful time." *First National Maintenance,* supra, 452 U.S. at 682.

Although the College's decision to modify the rollover scheduling system in HHSS was admittedly not a mandatory bargaining topic,[29] the effects of this decision remained a mandatory bargaining subject. The College, consequently, violated Section 8(a)(5), when it unilaterally modified the rollover scheduling system in HHSS, without bargaining with the Union over the associated unit effects. The College's decision had the following "material, substantial, and significant" consequences on unit HHSS employees: (1) HHSS faculty, who had taught three courses in the prior year's semester, lost their opportunity to have these three courses offered to students for registration on OASIS;[30] (2) HHSS faculty, who were popular with students, lost the opportunity to have their third course offered to a student body that would have likely rewarded their status with strong registration results;[31] (3) HHSS faculty, who were creative or aggressive in marketing their courses to students, lost their opportunity to enhance their ability to secure a third course via such means;[32] and (4) HHSS faculty, who had previously taught a third course, lost their opportunity to receive a $100-cancellation stipend, in the event that their third course

[26] In its brief, the College avers that the Union could have derived a response to items 1(a) and (b) by comparing and contrasting previously submitted documents. Even assuming arguendo that this proffered subtraction exercise, which is neither obvious nor previously communicated, fulfilled the College's duty to respond to items 1(a) and (b), it nevertheless violated the Act by failing to provide items 3–5.

[27] There is an obvious dispute over whether the College fully responded to Information Request #2. See, e.g. (CP Exhs. 4–6 and related testimony). The Order, which directs the College to supply all requested information to the extent that it has not already done so, should, therefore, be construed by the College as requiring it to engage in a revised and thorough search of all of its records, in order to verify that it has fully complied with both requests.

[28] This allegation is listed under pars. 9 and 13 of the complaint.

[29] The College's decision to modify the rollover scheduling system was not alleged to be a mandatory subject of bargaining in the complaint, inasmuch as the Union waived the right to bargain over such decisions in the management-rights clause of the 06–10 CBA. (See GC Exh. 2.)

[30] HHSS faculty consequently lost substantial control; they went from having a greater assurance that all three of their prior year's courses would be offered to students on OASIS to having only two courses initially offered for registration, and then being subject to the administration's unbridled discretion concerning whether they might receive a third course at a later date. This additional uncertainty likely increased stress, and potentially precluded some faculty members from committing to teach additional courses at other institutions, out of fear that they might eventually be assigned a third course that would conflict with other teaching commitments.

[31] Popular professors, whose courses were in high demand, lost what would have been an almost-guaranteed third course, and were relegated to the same status as part-time faculty, who lacked a significant student following.

[32] Professors, who were adept at advertising and otherwise maximizing demand for their courses, lost this opportunity. They were, as a result, relegated to the same status as faculty, who neglected such efforts.

was cancelled due to low enrollment. These consequences collectively added up to a "material, substantial and significant" change to the unit's terms and conditions of employment, and thus, prompted a bargaining obligation. See, e.g., *Bohemian Club*, supra at 1066–1067 (even relatively minor adjustments such as adding minimal duties or work time trigger a bargaining obligation); *Verizon New York, Inc.*, 339 NLRB 30 (2003).

Although the Union promptly requested effects bargaining over the College's unilateral decision to modify the rollover scheduling system (see, e.g., GC Exhs. 6, 27), bargaining never occurred in a "meaningful manner." First, the College's ongoing failure to fulfill the Union's information requests precluded meaningful bargaining. See *Miami Rivet of Puerto Rico,* 318 NLRB 769, 772 (1995) ("Union is not required to begin bargaining at a time when relevant information is being unlawfully withheld."); *Southern Mail, Inc.,* 345 NLRB 644, 647–648 (2005); *Clemson Bros.,* 290 NLRB 944, 944 fn. 5 (1988). Second, the College's piecemeal discussions with the Union regarding this issue were nonsubstantive, and fell far afield of good-faith bargaining. The College, as a result, failed to fulfill its effects bargaining obligation.

he College's contention that the Union waived its right to engage in effects bargaining is meritless. In order to establish the waiver of a statutory right to bargain over changes in terms and conditions of employment, the party asserting waiver must establish that the right has been clearly and unmistakably relinquished. See, e.g., *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1981); *Provena St. Joseph Medical Center*, 350 NLRB 808, 811–812 (2007). Waivers may be found in the express language of the collective-bargaining agreement, or can be inferred from bargaining history, past practice, or a combination thereof. *Johnson-Bateman Co.*, 295 NLRB 180, 185 (1989). The Board requires, however, that a matter was consciously explored during bargaining, and that a union unmistakably waived its interest. Id. For several reasons, the College's waiver argument is unreasonable. First, the management-rights clause in the 06–10 CBA does not expressly classify effects bargaining as a waived bargaining subject. See, e.g., *Allison Corp.*, 330 NLRB 1363, 1365 (2000) (holding that a similarly worded management-rights clause, which expressly waived decisional bargaining, did not also waive effects bargaining). Second, the College's bargaining activity demonstrates that the Union did not waive its effects bargaining rights under the management-rights clause. As noted, on October 29, 2010, the College proposed to add "the effects or impact of their decision to exercise such rights and responsibilities" to the list of waived bargaining subjects in the management-rights clause. (See GC Exhs. 2, 24, 25-A, B.) If an effects bargaining waiver had already existed in the 06–10 CBA, the College would have not proffered a redundant bargaining proposal. The College's proposal on this matter deeply undercuts its waiver contention. Lastly, the College failed to demonstrate that an effects bargaining waiver was explored during past negotiations and consciously waived by the Union.

CONCLUSIONS OF LAW[33]

1. The College is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. The Union is, and, at all material times, was the exclusive bargaining representative for the following appropriate unit:

> All part-time faculty members who have completed teaching at least one semester at the College, excluding all other employees, full-time faculty, artists-in-residence, graduate students, part-time faculty members teaching only continuing education, music lessons to individual students or book and paper making classes, full-time staff members, teachers employed by the Erickson Institute, the YMCA or Adler Planetarium, and other individuals not appearing on the College's payroll, managers and confidential employees, guards, and supervisors as defined in the Act.

4. The College violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide information, and unreasonably delaying its provision of other information, requested by the Union, which was relevant to its representational duties.

5. The College violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain in good faith with the Union over the effects of its decision to modify its procedure for scheduling unit HHSS teaching assignments.

6. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. The College has not otherwise violated the Act.

REMEDY

Having found that the College has engaged in certain unfair labor practices, it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

To the extent that it has not already done so, the College shall provide the Union with the information requested in its December 15 and 20, 2010 requests. To remedy the College's unlawful failure to bargain in good faith with the Union over the effects of its decision to modify the rollover scheduling system for its part-time HHSS faculty, it shall be ordered to bargain with the Union, upon request, about the effects of its decision. As a result of its unlawful conduct, however, unit employees have been denied an opportunity to bargain through their collective-bargaining representative at a time when a measure of balanced bargaining power existed. See *Rochester Gas & Electric Corp.*, 355 NLRB 507 (2010). Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union; a bargaining order alone,

[33] The Union's request for the imposition of sanctions under *Bannon Mills*, 146 NLRB 611 (1964), which was based upon the College's reported failure to comply with certain subpoena requests covering the information and effects bargaining allegations, is denied. (See Jt. Exhs. 2–3 (admitted at posthearing teleconference) and oral hearing motion). Simply put, the Union, which has successfully established the information and effects bargaining violations, has not been prejudiced by the College's alleged inaction. *Bannon Mills* sanctions are, thus, not warranted.

therefore, cannot serve as an adequate remedy for the unfair labor practices committed.[34]

Accordingly, it is necessary, in order to ensure that meaningful bargaining occurs and to effectuate the policies of the Act, to accompany this bargaining order with a limited backpay requirement designed both to make whole HHSS unit employees for losses suffered as a result of the violation, and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the College. The College shall, as a result, pay the monetary value of a three-credit course to HHSS unit employees,[35] in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified in *Melody Toyota*, 325 NLRB 846 (1998).[36] See *Rochester Gas & Electric Corp.*, supra.

Thus, the College shall pay its HHSS unit employees the value of a three-credit course at their normal rate, when last in the College's employ from 5 days after the date of the Board's decision and order, until the occurrence of the earliest of the following conditions: (1) the date the College bargains to agreement with the Union on those subjects pertaining to the effects of its decision to modify the rollover scheduling system for its unit employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of the Board's decision and order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith.

The sum paid to each HHSS employee shall not exceed the monetary value of a 3-credit course from November 3, 2010 (i.e., the date the rollover scheduling system in HHSS was modified) until the date on which the College shall have offered to bargain in good faith. However, in no event shall the sum paid to any employee be less than the monetary value of a 3-credit course to that employee for a 2-week period.[37] Backpay amounts shall be based on earnings which HHSS unit employees would normally have received for a 3-credit course during the applicable period, less any net interim earnings, and shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682, 683 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest computed as set forth in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

The College shall distribute appropriate remedial notices electronically via email, intranet, internet, or other appropriate electronic means to unit employees at the facility, in addition to the traditional physical posting of paper notices. See *J Picini Flooring*, 356 NLRB 11 (2010).

[Recommended Order omitted from publication.]

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[34] See *Rochester Gas & Electric Corp.*, supra at 508–510 (holding that, although a *Transmarine* remedy is "typically granted when an employer fails to bargain over the effects of closing a facility or otherwise removing work from the bargaining unit," it is also appropriate where an employer refused to bargain over the effects of its nonbargainable, managerial decision to discontinue an established workplace practice).

[35] The compensation for a 3-credit course can be derived from the 06-10 CBA. (See GC Exh. 2 at 13.)

[36] Counsel for the Acting General Counsel's request that a *Transmarine* remedy be imposed for **each** semester that the College subjected HHSS unit employees to the new scheduling system is denied. This request, which minimally cover three semesters, i.e., spring 2011, fall 2011, and spring 2012 semesters, seeks a treble *Transmarine* remedy for a single bargaining violation. Treble *Transmarine* damages were not pled in the complaint, which only seeks a single, traditional *Transmarine* remedy, and would be tantamount to the imposition of punitive damages.

[37] The 2-week value of a 3-credit course, which runs 15 weeks, can be found by multiplying the total value of a 3-credit course by 2/15.