

**Springfield Day Nursery a/k/a Square One and United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, Local 2322.** Cases 01-CA-062517, 01-CA-064951, 01-CA-064955, 01-CA-064961, 01-CA-074917, and 01-CA-079132

March 19, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON  
AND MCFERRAN

On March 21, 2013, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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,<sup>1</sup> and conclusions only to the extent consistent with this Decision and Order.<sup>2</sup>

The Respondent's exceptions present five unfair labor practice issues for our consideration. For the reasons stated by the judge, we affirm his finding that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Dorothy Wilson because she signed a union authorization card and sought admission to the bargaining unit. For the reasons discussed in section I below, we reverse the judge's finding that the Respondent's use of substitute employees to perform bargaining unit work constituted a unilateral change in violation of Section 8(a)(5) and (1), and that the Respondent's failure to classify certain substitute teachers as unit employees was an unlawful contract modification in violation of Section 8(a)(5) and (1) and 8(d). However, we

<sup>1</sup> 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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent did not except to the judge's findings that it violated Sec. 8(a)(1) by coercively questioning employees about communications with their union representative and Sec. 8(a)(5) and (1) by installing surveillance cameras in the Respondent's vans and by delaying in responding to the Union's information request. The Respondent also did not except to the judge's finding that deferral of the claim involving the Respondent's classification of substitute teachers and van drivers was inappropriate.

<sup>2</sup> We shall amend the judge's Conclusions of Law and Remedy and substitute a new Order and notice consistent with our findings herein and in accordance with *Durham School Services*, 360 NLRB 694 (2014).

affirm the judge's finding that the Respondent violated Section 8(a)(5) and (1) and 8(d) by failing to classify certain substitute van drivers as unit employees. Finally, as discussed in section II below, we adopt the judge's finding that the Respondent unilaterally changed its vacation and sick leave policy in violation of Section 8(a)(5) and (1).

I. THE USE OF SUBSTITUTE EMPLOYEES

A. *Background*

The Respondent provides childcare to infants, toddlers, and preschool-age children at five centers throughout the greater Springfield, Massachusetts area. It also supplies daily van transportation for children to and from the centers. Since the 1980s, the Respondent has had a collective-bargaining relationship with the Union as representative of employees engaged in both child care and transportation activities. The most recent collective-bargaining agreement of record was effective from September 30, 2009, through June 30, 2012. Article 6.2(a) of the contract defines "Regular part-time Employees" as "those persons who are employed and regularly scheduled to work for a minimum of ten (10) hours or more, but less than thirty-five (35) hours per week." Article 6.2(b) states, in pertinent part, that the Respondent "shall not be restricted in its discretion to employ . . . Substitute . . . Employees." Substitute employees are defined as "[e]mployees hired on a day-to-day basis to fill a vacancy, or to replace an Employee who is on assignment." Substitute employees are not covered by the collective-bargaining agreement.

The centers have classrooms, each of which is staffed by three employees. Between 2003 and 2009, each classroom was generally staffed with a lead teacher, teacher, and part-time teacher, all of whom were unit employees in positions requiring State certification of their qualifications. Since 2009, the Respondent has found it difficult to hire certified teachers and has increasingly used nonunit substitutes at the centers. Most of these substitute teachers regularly worked more than 10 hours per week. Since 2011, the transportation department has also relied on substitutes to fill van driver vacancies. The newly hired substitute van drivers were regularly assigned to work in excess of 10 hours per week.

By the hearing date in this case, the Union had disputed the Respondent's use of nonunit substitutes for almost a decade.<sup>3</sup> During the negotiations for the collective-bargaining agreement effective July 1, 2003, the parties

<sup>3</sup> In an email dated May 18, 2012, a union representative advised Respondent's senior management that "the issue of the use of substitutes and aides has been a conflict . . . for almost a decade."

discussed the classification of substitutes and their rights to join the bargaining unit. The Respondent maintained its position that only a certified teacher could fill a unit teacher position. In September 2003, the Union filed a grievance contending that a number of employees were misclassified as substitute nonunit employees instead of temporary unit employees because they filled vacancies, had regular long-term schedules, and should have become unit employees after 60 days. In an October 2003 letter to Respondent's counsel, the Union argued that the basis for its grievance was that the Respondent was using substitutes as a permanent staffing pattern by regularly filling vacancies with substitutes. In January 2004, the parties resolved the grievance, but the Union noted its continuing concern regarding the "long-term use of substitutes who may not be qualified as teachers." In April 2010, the parties settled another grievance relating to the classification of substitute employees.

### B. The Judge's Decision

The judge invoked two theories of violation in his analysis of the substitute employee issue. His conclusions of law and parts of his analysis indicate that he found merit in the General Counsel's complaint allegation that the Respondent's use of substitutes entailed a failure to apply the parties' contract to employees who were unit members, in violation of Section 8(a)(5) and (1) and 8(d) of the Act. However, he also found that the Respondent's failure to classify substitute employees as part-time teachers and van drivers constituted a unilateral change in violation of Section 8(a)(5) and (1). The judge reasoned that since 2009, the Respondent unilaterally changed its practice from filling the third staff position in each center classroom with a unit part-time teacher to staffing these positions with nonunit substitute teachers. He observed that the Respondent "systematically refused or failed to fill the teacher vacancies at issue" and "resorted to the de facto replacement of the third teacher with substitutes . . . ." In addition, the judge found that since November 2011, the Respondent unilaterally changed its practice from hiring unit van drivers to hiring nonunit substitute drivers.

### C. Analysis

#### 1. Unilateral change in the use and classification of substitutes

On due process grounds, we reverse the judge's unilateral change finding with regard to substitute teachers and van drivers because this independent theory of an 8(a)(5) violation was not alleged in the complaint, litigated at the hearing, or addressed in the General Counsel's posthearing brief. Instead, the record reflects a focus on Section 8(d). Paragraph 15(a) of the complaint, for example,

focuses on the Respondent's alleged failure to apply the contract to aides and van drivers. Paragraph 19 expressly alleges an 8(d) theory of the case.

The violation alleged in the complaint and litigated by the parties was that the Respondent modified the collective-bargaining agreement within the meaning of Section 8(d) by failing to apply contract terms to substitute employees who regularly worked in excess of 10 hours per week. Indeed, in his opening statement, the General Counsel stated, "this is an 8(d). It's alleged as an 8(d), which is a modification of the contract language."

The briefing in this case supports the conclusion that only an 8(d) theory was contemplated and litigated. In his posthearing brief, the General Counsel argued that the substitute teachers and van drivers were not substitutes as defined by the collective-bargaining agreement because they were regularly scheduled to work 10 hours per week or more and thus, did not work "day to day."<sup>4</sup> Likewise, the General Counsel's answering brief to the Respondent's exceptions states that the controlling issue in this case is "whether the employees at issue were, in fact, utilized as substitutes as defined in the [collective-bargaining agreement]."

As the Board has explained, "[t]he 'unilateral change' case and the 'contract modification' case are fundamentally different in terms of principle, possible defenses, and remedy." *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005), *affd. sub nom. Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007). Thus, where, as here, the General Counsel has alleged an "unlawful modification of the contract[ ] within the meaning of Section 8(d), the Board is limited to determining whether the employer has altered the terms of a contract without the consent of the other party." *Id.* The Respondent's defense at trial challenged the General Counsel's asserted contract modification theory. It focused on the General Counsel's position that the employees at issue were not substitutes as defined by the parties' contract.

We recognize that the Board may find and remedy a violation even in the absence of a specific allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated.<sup>5</sup>

<sup>4</sup> The General Counsel also argued in his posthearing brief that the Respondent "altered or abolished an essential term of the collective-bargaining agreement between the parties—the scope of the bargaining unit—without the union's consent" by failing to treat the substitute teachers as unit aides in violation of Sec. 8(a)(5) and (1) and 8(d). This is also a different theory than the unilateral change violation found by the judge.

<sup>5</sup> *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989), *enfd.* 920 F.2d 130 (2d Cir. 1990). Because we find that the matter was not

Whether a matter has been fully litigated rests in part on “whether the respondent would have altered the conduct of its case at the hearing, had a specific allegation been made.”<sup>6</sup> Those requirements have not been met here. The Respondent lacked notice that it should also adduce facts to show that its practice with respect to the utilization of substitute employees did not change after 2009. The Respondent also lacked notice that it would have to marshal a legal defense to a theory that the General Counsel did not urge before or during the hearing.<sup>7</sup>

Moreover, the evidence adduced at the hearing is insufficient to show in what respects, if any, the Respondent’s practice with regard to the use of substitutes differed materially since 2009 from what it had done before. While the evidence established that, since 2009, the Respondent relied on the use of substitutes in greater numbers, the General Counsel proffered minimal evidence as to whether this reflected an actual change in how the Respondent sought to fill vacancies. Clearly, the record does not support the judge’s finding that the Respondent systematically refused to fill teacher vacancies because, as the Respondent argues, there was no evidence that qualified employees were being denied bargaining unit positions for which they applied.

Under these circumstances, we find that the Respondent did not have fair notice of the unilateral change theory. See *Pepsi Bottling Group*, 338 NLRB 1123, 1124 (2003) (the unilateral change violation found by the judge was not alleged in the complaint or litigated at the hearing).<sup>8</sup> Accordingly, we reverse the judge’s finding.

## 2. Unlawful contract modification under Section 8(d)

The judge further found that the Respondent’s failure to provide contract benefits to substitute teachers and van drivers hired since March 21, 2011, constituted an unlawful contract modification under Section 8(d) of the Act.<sup>9</sup> The judge explained that, since 2009, the Re-

spondent was using numerous substitute teachers who were not hired on a day-to-day basis, but rather had been regularly scheduled on a weekly recurring basis. In addition, the judge reasoned that the substitute van drivers at issue worked regularly, most at least 20 hours per week and all in excess of 10 hours per week, and thus the Respondent acted in violation of clear and unambiguous contractual language by failing to apply the contract to these drivers. While we affirm the judge’s finding of a violation as to the substitute van drivers, we reverse his finding with respect to the substitute teachers on the ground that the allegation is time-barred under Section 10(b).

Section 10(b) states in pertinent part that “[n]o complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board.” The 10(b) period does not commence until the charging party has clear and unequivocal notice of the violation. *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004), *enfd. sub nom. East Bay Automotive Council v. NLRB*, 483 F.3d 628 (9th Cir. 2007). Here, the Union had clear and unequivocal notice outside the 10(b) limitations period that the Respondent was not applying the collective-bargaining agreement to substitute teachers who were not hired on a day-to-day basis. The history between the parties, including the grievances, contract negotiations, and other communications from 2003 onward, shows that the Union had the requisite notice of the Respondent’s use of substitute teachers well before March 21, 2011. The Union’s position and complaints in those earlier conflicts echo the allegations now before the Board. The record reflects that the Respondent consistently refused to apply the contract to employees who regularly worked more than 10 hours as substitute teachers.<sup>10</sup>

Further, we conclude that the Respondent’s conduct outside the 10(b) period cannot be treated as a continuing violation in this case. In *St. Barnabas Medical Center*, 343 NLRB 1125, 1127 (2004), the Board noted that when an “alleged unfair labor practice may be characterized as a contract repudiation, the unfair labor practice occurs at the moment of the repudiation, and the 10(b) period begins to run at the moment the union has clear and unequivocal notice of that act” and “all subsequent failures of the respondent to honor the terms of the agreement are deemed consequences of the initial repudiation.” In *St. Barnabas*, the Board found that the com-

fully litigated, as explained below, we need not determine whether the allegation was closely connected to the subject matter of the complaint.

<sup>6</sup> *Id.* at 335.

<sup>7</sup> See *Champion International Corp.*, 339 NLRB 672, 673 (2003) (“It is axiomatic that a respondent cannot fully and fairly litigate a matter unless it knows what the accusation is.”).

<sup>8</sup> See also *Baptist Medical Center/Health Midwest*, 338 NLRB 346, 348–349 (2002) (reversing the judge’s finding that the employer violated Sec. 8(a)(1) by ejecting two nonemployee union organizers from the outside entrances of its facility, because this violation was neither alleged in the complaint nor fully litigated at the hearing); *Sierra Bullets, LLC*, 340 NLRB 242, 242–243 (2003) (reversing the judge’s finding of a violation on a theory not advanced by the General Counsel because the employer was not given sufficient notice that the issue would be litigated so as to comport with due process requirements).

<sup>9</sup> As previously mentioned, although the judge concluded his analysis with respect to the Respondent’s use of substitute employees by finding a unilateral change violation, his conclusions of law and part of

his rationale establish that he found merit in the General Counsel’s 8(d) contract modification allegation.

<sup>10</sup> The General Counsel, in his answering brief, states that he “does not dispute that the unlawful conduct with respect to classroom substitutes began outside the 10(b) period.”

plaint was time barred because the union had clear and unequivocal notice outside the 10(b) period that the respondent repudiated the contract by failing to apply its terms to classifications of employees who it asserted were not members of the bargaining unit. *Id.* at 1129. As in *St. Barnabas*, the Respondent's consistent refusal to apply the contract to the disputed substitute teachers outside the 10(b) period amounted to repudiation, a completed violation of the Act, and thus was not a continuing violation.<sup>11</sup>

## II. CHANGE IN VACATION AND LEAVE POLICY

The parties' collective-bargaining agreement provided that full-time and part-time employees accrue up to 12 paid leave days per year, which time "may be used for an Employee's illness or medical needs, or illness in an Employee's family, or for personal reasons." Article 26.2 also authorizes any supervisor with "a reasonable belief that an employee is misusing sick time" to request a doctor's note from the employee. Sometime after June 8, 2011,<sup>12</sup> Transportation Director Tony Buijnarowski issued an addendum to the transportation operations manual. The document, entitled, "Transportation Guidelines," included substantive provisions addressing the use of sick and vacation leave. Specifically, the guidelines provided as follows:

If you are out of work using paid time off for sick time of 3 days or more, you must have a doctor's note prior to returning to work. If a letter from a doctor is not provided, these dates will be marked on your record as unexcused absences. If excessive (three times or more) unexcused absences occur, it will result in a disciplinary action.

If you need time off for a planned appointment or vacation, it must be approved by your supervisor at least

one week in advance. This request must be submitted in writing on a Time Adjustment Form.

After a unit employee brought the guidelines to the attention of Union Representative Bruce Ballenger, Ballenger reviewed the provisions and raised his concerns over the policy changes during a September 7 meeting on another matter. Patty Guenette, the Respondent's vice president of operations, thereafter notified the van drivers at a meeting the same day that the new rule was rescinded. Rick Tremblay, the Respondent's senior human resource administrator, read aloud to the drivers the applicable leave provisions from the collective-bargaining agreement and provided the drivers with a copy of those provisions.

The judge found that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing sick leave and vacation policies for employees in the transportation department. He rejected the Respondent's argument that it effectively repudiated the unilateral change under the standards set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138, 138 (1978).

We adopt the judge's finding. Contrary to our dissenting colleague, we find that the transportation director's guidelines—that were formally incorporated into the Respondent's transportation operations manual, and which established new leave policies—constituted a material and substantial change, and were therefore unlawful. The rules not only mandated requirements contrary to the parties' negotiated agreement, but also expressly imposed discipline in the event of noncompliance with those requirements. Regardless of whether employees complied with the new policy, they were officially subject to its requirements and it had the potential to impact their willingness to use sick leave. See *Flambeau Air-mold Corp.*, 334 NLRB 165, 165–166 (2001) (unilateral change regarding sick leave was material and substantial when it required employees to decide an hour in advance whether they would be reporting for work or using sick leave, when they previously could wait until the time they departed for work; it was immaterial that the change might not have been unreasonable or that no employee was disciplined for a violation). Moreover, the policy was part of the employees' work rules (and therefore their terms and conditions of employment) potentially for as long as 3 months before the Union was made aware of it in September.<sup>13</sup>

We further agree with the judge that the Respondent failed to repudiate this unlawful unilateral change under the *Passavant* standards when it simply notified employees that the new rules were rescinded and read aloud the

<sup>11</sup> Contrary to his colleagues, Chairman Pearce agrees with the judge that the allegation that the Respondent unlawfully modified the contract by failing to classify substitute teachers as unit employees is not 10(b) barred. The Respondent bore the burden of proving that it clearly communicated its modification of the contract to the Union. See, e.g., *Logan County Airport Contractors*, 305 NLRB 854, 859 (1991). As the judge found, however, it was not until after 2009 that the Union had notice of the Respondent's possible contract modification, and it was only within the limitations period that the Union learned—through its grievances and pursuit of additional information—the magnitude of the Respondent's use of substitute teachers. In these circumstances, the Chairman finds that the Union did not have the requisite "clear and unequivocal" notice outside the 10(b) period that could bar the instant charge. See *A & L Underground*, 302 NLRB 467, 478 (1991).

On the merits, the Chairman agrees with the judge that the 8(d)(8)(a)(5) violation involving substitute teachers was established.

<sup>12</sup> The transportation guidelines state that they were updated June 8, 2011.

<sup>13</sup> The record is unclear about when the policy was announced, only that it was sometime after June 8.

applicable leave of absence provisions from the collective-bargaining agreement. The Respondent made no mention of the rescission having been made as a result of its bargaining obligation. As found by the judge, there was no admission of wrongdoing, evidence that the guidelines were removed from the Transportation Operations Manual, or even testimony that the Respondent apprised employees that it would bargain with the Union in the future over changes to terms and conditions of employment as required under the Act. As a result, the rescission failed to remedy the harm to the Union as a bargaining representative and to the employees' relationship with it.<sup>14</sup>

#### AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 4 in the judge's decision.

"4. By failing to provide contract benefits to substitute van drivers hired since March 21, 2011, who worked regularly more than 10 hours per week, the Respondent modified the parties' collective-bargaining agreement without the Union's consent, in violation of Section 8(a)(5) and (1) and 8(d) of the Act."

#### AMENDED REMEDY

We adopt the administrative law judge's remedy with the following modifications.

The judge's remedy requires the Respondent to make whole each substitute employee for every week after March 21, 2011, that he/she worked a minimum of 10 hours. The remedy for an 8(d) contract modification,

<sup>14</sup> Unlike his colleagues and the judge, Member Johnson finds that the General Counsel failed to show that the Respondent made a unilateral change in violation of Sec. 8(a)(5). Not every unilateral change in employee terms and conditions of employment constitutes a breach of the employer's bargaining obligation. The change must be a material, substantial, and significant one. *Crittenton Hospital*, 342 NLRB 686, 686 (2004). In this case, at some undefined time in the summer of 2011, the Respondent's transportation director issued a memo announcing a new leave of absence rule. Once senior management learned of the transportation director's memo, it immediately notified employees that the rule was rescinded. The General Counsel failed to adduce evidence showing how long the change was in effect and that it actually affected any employees. Accordingly, Member Johnson would dismiss this unilateral change allegation because the General Counsel failed to meet his burden of proving that the change was material, substantial, and significant. See *Crittenton Hospital*, 342 NLRB at 686 (employer's change in the dress code policy was not material, substantial, and significant where the General Counsel presented no evidence how this change affected or would affect the employees' terms and conditions of employment); *Ferguson Enterprises*, 349 NLRB 617, 618 (2007) (General Counsel failed to establish that the implementation of cell phone policy resulted in substantial and material change in drivers' working conditions where there no evidence existed as to how the drivers' jobs were affected). He therefore does not reach the issue whether, if the Respondent's conduct was unlawful, it effectively repudiated that violation.

however, "is to honor the contract." *Bath Iron Works*, 345 NLRB at 501. As discussed above, the 2009–2012 collective-bargaining agreement applied to employees who *regularly* worked more than 10 hours per week. Accordingly, we shall amend the remedy to comport with the Board's standard 8(d) make-whole remedy and require the Respondent to apply the terms of the parties' 2009–2012 collective-bargaining agreement to those substitute van drivers who regularly worked more than 10 hours per week since March 21, 2011. We shall also require the Respondent to make these substitute van drivers whole for any loss of earnings and other benefits, including seniority and other rights retroactive to their date of hire, resulting from the Respondent's unlawful failure to properly apply the collective-bargaining agreement. The make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Further, we shall order the Respondent to compensate these employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee. See *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

#### ORDER

The National Labor Relations Board orders that the Respondent, Springfield Day Nursery a/k/a Square One, Springfield, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting the United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO, Local 2322, or any other union.

(b) Implementing changes to terms and conditions of employment without first giving the Union notice and an opportunity to bargain over the changes and effects of those changes, including the effects of installing video monitors in all vans driven by van drivers, changes to vacation and leave policies, or otherwise failing or refusing to bargain collectively and in good faith with Local 2322 as the collective-bargaining representative of bargaining unit employees.

(c) Coercively questioning employees, verbally or through questionnaires, about communications with their labor representative regarding their terms and conditions of employment.

(d) Unreasonably refusing to provide information or unreasonably delaying providing information requested by the Union that is relevant and necessary for it to carry out its duties as labor representative.

(e) Failing to apply the contract's terms to all employees covered by the collective-bargaining agreement between the Respondent and the Union, including the failure to pay contract wages and benefits to all substitute van drivers who are regularly scheduled to work 10 hours per week or more.

(f) 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) On request of the Union, rescind the unilateral changes made to the employees' terms and conditions of employment concerning installing video monitors in all vans driven by van drivers and changes to its vacation and sick leave policy.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees that are not contained in the collective-bargaining agreement, notify and, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All regular full-time and regular, part-time Lead Teachers, Kindergarten Teachers, Teachers, FCC Outreach Workers, FCC Educational Coordinators, Aides, Bus Monitors, Parent Workers, Cooks, Cook's Assistants, School-Age Site Coordinators, School-Age Group Leaders, School-Age Assistant Group Leaders, Van Drivers, and Custodial and Maintenance Employees, employed by Square One and excluding all limited part-time, temporary, substitute, casual and student Employees, all executive, managerial, supervisory and confidential Employees and all other Employees.

(c) Apply the terms of the parties' 2009–2012 collective-bargaining agreement to all van drivers employed since March 21, 2011, as substitute employees, who regularly worked more than 10 hours per week, and make them whole for any loss of earnings and other benefits provided in the collective-bargaining agreement, including seniority and other rights retroactive to their date of hire, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Within 14 days from the date of this Order, offer Dorothy Wilson full reinstatement to her former job or, if

that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(e) Make Dorothy Wilson whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(f) Within 14 days from the date of this Order, remove from its files any reference to Dorothy Wilson's unlawful discharge, and within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

(g) Compensate Dorothy Wilson and the affected van drivers for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for each employee.

(h) 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 backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facility in Springfield, Massachusetts, copies of the attached notice marked "Appendix."<sup>15</sup> Copies of the notice, on forms provided by the Regional Director for Region 1, 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, the 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 du-

<sup>15</sup> 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."

plicate 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 March 21, 2011.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 1 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

#### 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 discharge or otherwise discriminate against any of you for supporting the United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, Local 2322, or any other union.

WE WILL NOT implement changes to terms and conditions of employment without first giving the Union notice and an opportunity to bargain over the changes and effects of those changes, including the effects of installing video monitors in all vans driven by van drivers, changes to vacation and leave policies, or otherwise failing or refusing to bargain collectively and in good faith with Local 2322 as the collective-bargaining representative of bargaining unit employees.

WE WILL NOT coercively question you, verbally or through questionnaires, about communications with your labor representative regarding your terms and conditions of employment.

WE WILL NOT unreasonably refuse to provide information or unreasonably delay in providing information requested by Local 2322 that is relevant and necessary for it to carry out its duties as labor representative.

WE WILL NOT fail to apply the contract's terms to all employees covered by the collective-bargaining agree-

ment between us and the Union, including not paying contract wages and benefits to all substitute van drivers who are regularly scheduled to work 10 hours per week or more.

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

WE WILL, on request of the Union, rescind the unilateral changes made to your terms and conditions of employment concerning installing video monitors in all vans driven by van drivers and changes to our vacation and sick leave policy.

WE WILL, before implementing any changes in your wages, hours, or other terms and conditions of employment that are not contained in the collective-bargaining agreement, notify and, on request, bargain with the Union as your exclusive collective-bargaining representative in the following bargaining unit:

All regular full-time and regular, part-time Lead Teachers, Kindergarten Teachers, Teachers, FCC Outreach Workers, FCC Educational Coordinators, Aides, Bus Monitors, Parent Workers, Cooks, Cook's Assistants, School-Age Site Coordinators, School-Age Group Leaders, School-Age Assistant Group Leaders, Van Drivers, and Custodial and Maintenance Employees, employed by Square One and excluding all limited part-time, temporary, substitute, casual and student Employees, all executive, managerial, supervisory and confidential Employees and all other Employees

WE WILL apply the terms of the parties' 2009-2012 collective-bargaining agreement to all van drivers employed since March 21, 2011, as substitute employees, who regularly worked more than 10 hours per week, and WE WILL make them whole for any loss of earnings and other benefits provided in the collective-bargaining agreement, including seniority and other rights retroactive to their date of hire, plus interest.

WE WILL within 14 days from the date of the Board's Order, offer Dorothy Wilson full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Dorothy Wilson whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Dorothy Wilson, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

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

SPRINGFIELD DAY NURSERY A/K/A SQUARE ONE

The Board's decision can be found at [www.nlr.gov/case/01-CA-062517](http://www.nlr.gov/case/01-CA-062517) 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.



JoAnne P. Howlett, for the General Counsel.  
Richard D. Hayes, James R. Channing, and Kate R. O'Brien,  
Esqs. (Sullivan, Hayes & Quinn, LLC), for the Respondent.

#### DECISION

##### STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was heard in Northampton and Springfield, Massachusetts, over the course of 10 days in July and September 2012. The complaint, as amended, alleges that Springfield Day Nursery a/k/a Square One (the Company): (1) violated Section 8(a)(5) of the National Labor Relations Act (the Act)<sup>1</sup> by failing to bargain in good faith with the United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, Local 2322 (the Union) by failing to respond or in delaying in responding to the Union's information requests; (2) violated Section 8(a)(5) and (d) by employing nonbargaining unit members to perform bargaining unit work;<sup>2</sup> (3) coercively questioned employees about communications with their union representative in violation of Section 8(a)(1); (4) unilaterally changed the terms and conditions of employment by placing surveillance cameras in vans and issuing guidelines that altered contractual vacation and sick leave policies in violation of Section 8(a)(5); and (5) violated Section 8(a)(3) and (1) by reducing the hours of employee Dorothy Wilson and discharging her to discourage

other employees from engaging in protected concerted activities.

On the entire record, including my observation of the demeanor of the witnesses, and after considering briefs submitted by the General Counsel and counsel for the Company, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

The Company, a Massachusetts not-for-profit corporation, provides early childhood education and childcare services to low income and disadvantaged families in Springfield and Holyoke, Massachusetts, where it annually derives gross revenues in excess of \$250,000, and purchases and receives goods valued in excess of \$5000 directly from points outside of the Commonwealth of Massachusetts. The Company 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 and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

###### A. *The Parties*

The Company, licensed by the State of Massachusetts, provides daily services to preschool children, and before and after school childcare to approximately 1200 school-aged children throughout the greater Springfield, Massachusetts area. The Company's programs include center-based programs, home-based childcare programs, and school-age childcare programs in public school facilities.<sup>3</sup>

The Company has had a collective-bargaining relationship with the Union since the 1980s. The most recent collective-bargaining agreement (CBA) was effective from September 30, 2009, through June 30, 2012.<sup>4</sup> The CBA recognizes the Union as the exclusive representative of the following employees:

[A]ll regular full-time and regular, part-time Lead Teachers, Kindergarten Teachers, Teachers, FCC Outreach Workers, FCC Educational Coordinators, Aides, Bus Monitors, Parent Workers, Cooks, Cook's Assistants, School-Age Site Coordinators, School-Age Group Leaders, School-Age Assistant Group Leaders, Van Drivers, and Custodial and Maintenance Employees, employed by Square One and excluding all limited part-time, temporary, substitute, casual and student Employees, all executive, managerial, supervisory and confidential Employees and all other Employees.<sup>5</sup>

###### B. *The Company's Operations*

The Company provides childcare to infants, toddlers, and preschool age children at five centers. Each center has classrooms, each of which is staffed by three employees. Prior to 2002, those employees consisted of a lead teacher, teacher, and part-time teachers' aide. Lead teachers and teachers are State certified to run a classroom; teachers' aides are not required to

<sup>1</sup> 29 U.S.C. § 151-169.

<sup>2</sup> The charge relating this specific allegation, Case 01-CA-064951, was filed on September 21, 2011.

<sup>3</sup> R. Exh. 29.

<sup>4</sup> GC Exh. 5.

<sup>5</sup> GC Exh. 5 at 2-3.

have any teaching certifications, but may not be left alone with children in a classroom. In 2002, the Company upgraded the third classroom position from a part-time teachers' aide to a part-time teacher.

The Company's School Age Child Care Program (SACC) operates before school and after school, as well as during the summer recess, at seven schools: Massachusetts Career Development Institute (MCIDI), Marble Street, Brunton School, Sumner Avenue School, Lynch School, Harris School, and Trinity Church. Each SACC facility has a site coordinator and group leader; both are bargaining unit classifications. Site coordinators and group leader are required to have a minimum amount of postsecondary education, experience working with school age children, and first aid certifications.<sup>6</sup>

The Company also provides daily van transportation for 200–300 children to and from the centers and SACC facilities.<sup>7</sup> An additional van delivers meals to those facilities. Eight full-time equivalent van driver positions are assigned to eight passenger vans to cover 16 shifts (8 morning shifts, 8 afternoon shifts); drivers must be State licensed to transport children. The transportation staff includes substitute van drivers. Like substitute teachers and part-time teachers, substitute drivers are paid on a per diem basis and receive no fringe benefits.<sup>8</sup>

Program standards promulgated by the Massachusetts Department of Early Education and Care (EEC) apply to all company staff: administrators, teachers, teachers' aides, support, and custodial staff. Essentially, teachers must be certified based on qualifications derived from educational course work in childhood development, while the qualifications of teachers' aides and substitute employees are minimal.<sup>9</sup> State funding is based on the Company's progress in meeting teacher qualification standards. Teachers' aides, substitute employees, and temporary employees are not included in such calculations.<sup>10</sup>

### III. THE COMPANY'S USE OF SUBSTITUTE AND TEMPORARY EMPLOYEES

Article 6.2(a) of the CBA defines "Regular Full-time" and "Regular Part-time Employees" as follows:

Regular full-time Employees are those persons who are employed and regularly scheduled to work for a minimum of thirty-five (35) hours per week. Regular part-time Employees are those persons who are employed and regularly scheduled to work for a minimum of ten (10) hours or more, but less than thirty-five (35) hours per week.

Article 6.2(b) states, in pertinent part, that the Company "shall not be restricted in its discretion to employ Limited Part-

time, Temporary, Substitute, Casual or Student Employees." Temporary and substitute employees are defined as follows:

b. Limited Part-time. Temporary, Substitute, Casual or Student Employees: Square One shall not be restricted in its discretion to employ Limited Part-time, Temporary, Substitute, Casual or Student Employees. The terms "Temporary Employee" shall be defined as an Employee 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. Such Temporary Employees shall not be covered by this Agreement, except that a Temporary Employee hired to fill a vacancy created as the result of a voluntary or involuntary resignation, who meets the qualifications for the position specified by the Square One job description and Department of Early Education and Care ("EEC") regulations, shall become a regular Employee if employed more than sixty (60) consecutive working days, and shall receive all the benefits and seniority retroactive to the date of hire. The preceding sentence does not constitute an alternative to filing a vacant position.<sup>11</sup> "Casual and Substitute Employees" are defined as Employees hired on a day-to-day basis to fill a vacancy, or to replace an Employee who is on assignment. "Student Employees" are defined as students placed at Square One in conjunction with a student placement program. Such Limited Part-time, Temporary, Substitute, Casual and Student Employees shall not be covered by this Agreement.<sup>12</sup>

Article 36.5 provided additional context with respect to the employment of part-time teachers' aides as substitutes:

Part-time Employee Relief Hours Pay Rate: An Aide who works in excess of his/her regularly scheduled hours, substituting in positions requested by the Director, will be paid his/her normal Aide rate of pay.<sup>13</sup>

The Company has, over the last several decades, used substitute and temporary employees.<sup>14</sup> In September 2003, the Union filed a grievance alleging the misclassification of certain employees as substitute employees instead of temporary employees since they filled vacancies, had regular long-term schedules, and should have become unit employees after 60 days.<sup>15</sup> In January 2004, the Union withdrew the grievance, but noted the continuing disagreement regarding the interpretation of article 6.2(b) as applied to long-term substitutes not qualified as teachers.<sup>16</sup> On January 23, 2008, the parties resolved several grievances and unfair labor practices by agreeing to modify the

<sup>6</sup> Unlike staff at the Centers, there is no requirement that SAAC staffers be certified as teachers. (GC Exh. 59; Tr. 1074–1076, 1367–1368.)

<sup>7</sup> Although much of Anthony Bujniarowski's testimony was inconsistent and contrary to the weight of the credible evidence, see *infra*, no one else provided such information. (Tr. 1246.)

<sup>8</sup> GC Exhs. 43–44; R. Exh. 23.

<sup>9</sup> R. Exh. 58 at 23–25; GC Exh. 4 at 23–25.

<sup>10</sup> The General Counsel does not contest the propriety, from a business standpoint, of the Company's efforts to maximum State funding. (R. Exh. 59–60; Tr. 105–114.)

<sup>11</sup> In a 2003 letter, the Company asserted that "sixty (60) consecutive working days" is a period without any break or interruption. (R. Exh. 1 at 3.)

<sup>12</sup> GC Exh. 5 at 3.

<sup>13</sup> GC Exh. 4 at 27.

<sup>14</sup> The Company's long-term use of substitute employees is not disputed. (Tr. 1032–1034, 1494–1498, 1551–1552, 1605, 1610, 1794–1795.)

<sup>15</sup> R. Exh. 34.

<sup>16</sup> R. Exh. 2.

definition of regular part-time and “limited part-time” employees in the SACC departments.<sup>17</sup>

Approximately 6 years passed without any major disagreement as to the Company’s classification of employees until 2009, when the Union sent the Company an information request for documents relating to the use of substitute teachers, custodial and maintenance employees.<sup>18</sup> The Union subsequently filed a charge alleging delay, but the parties resolved the issue and the Company provided the information.<sup>19</sup> Two of those six teachers, Sandra Reyes and Carmen Santiago, as well as Thomas Gardner, a temporary custodian, became unit employees in 2009 after the Union challenged their classification by the Company as nonunit substitutes.<sup>20</sup> On April 13, 2010, the parties settled another grievance by converting two substitute teachers and a temporary custodian to unit positions.<sup>21</sup>

In the SACC program, substitute and temporary employees have generally covered brief absences of bargaining unit employees.<sup>22</sup> The SACC program director contacts substitute employees on a weekly basis to determine their availability. In cases of extended leave of unit employees, the Company posts openings for temporary employees and hires them for fixed periods of time at specific locations.<sup>23</sup>

Similarly, the Centers have utilized substitutes and temporary employees to fill in for unit members on leave or for vacancies as long as the parties have had a bargaining relationship.<sup>24</sup> Prior to 2003, the Company routinely staffed its center-based classrooms with lead teachers, teachers, and teachers’ aides. The State recognizes job classifications corresponding to each.<sup>25</sup> In 2002, the Company decided to upgrade its teachers’

aides to part-time teachers. As a result, all but one of the teachers’ aides was required to take the necessary course work to obtain teacher certification or be terminated. Several teachers’ aides complied with the Company’s mandate and were reclassified as teachers; with the exception of one aide, who was accommodated, the rest left. As a result, since 2003, the third staff position in each center classroom has been routinely filled by a part-time teacher instead of a teachers’ aide, with one exception.<sup>26</sup>

On August 29, 2002, the Union filed an amended unfair labor practice charge alleging that the Company violated Section 8(a)(5) by engaging in direct dealing, unilaterally implementing changes in the working conditions of employees, laying off 33 employees, and eliminating the job classification of teachers’ aide.<sup>27</sup> The Board declined to file a complaint relating to the 2002 charge, instead referring it to arbitration.<sup>28</sup> On May 8, 2003, an arbitrator ordered the teachers’ aide classification restored and found that the Company’s actions unilaterally imposing education requirements on teachers’ aides violated the Act and the CBA.<sup>29</sup> Following the award, by letter June 19, 2003, former teachers’ aides who upgraded to teachers or lead teachers were given the option of returning to their former classification. None, however, chose to do so.<sup>30</sup>

Notwithstanding the arbitrator’s ruling, the Company informed the Union in a letter, dated June 12, 2003, that it rejected the arbitrator’s interpretation of the CBA and did not consider it as precedent. Since then, it has not posted openings for the teachers’ aide position.<sup>31</sup>

After the ruling, the parties negotiated a successor CBA, effective July 1, 2003.<sup>32</sup> During those negotiations, the parties negotiated over the classification of substitutes and their rights to join the bargaining unit.<sup>33</sup> The Company insisted that one had to be certified as a teacher in order to move to that classification. Nevertheless, the parties agreed to modify section 6.2(b) to clarify that the hiring of temporary employees and their conversion to regular employees does “not constitute an alternative to filing a vacant position.” That change proved unsatisfactory to the Union, who continued to complain about the hiring and utilization of substitute employees.<sup>34</sup>

After the Union filed a grievance, the parties resolved it on January 30, 2004, with the Union’s acknowledging that concerns about “long-term use of substitutes who may not be qualified as teachers” was a matter, not for midterm collective bargaining but for the Labor-Management Committee.<sup>35</sup> Since

<sup>17</sup> GC Exh. 100.

<sup>18</sup> The information request was identified but not offered into evidence. (Tr. 1178–1180.) However, the subsequent settlement agreement indicates that this sequence occurred in 2009. (GC Exh. 99.)

<sup>19</sup> GC Exh. 60.

<sup>20</sup> GC Exhs. 52, 54.

<sup>21</sup> GC Exh. 54.

<sup>22</sup> The CBA provides unit employees with up to 37 paid days off per year. (GC Exh. 5 at 18–20.)

<sup>23</sup> Given the General Counsel’s withdrawal of that portion of the charge challenging the Company’s use of substitute and temporary employees in the SACC program, testimony by Gloria Chacon, a SACC employee, is irrelevant. She was hired as a substitute employee group leader at SACC in the summer of 2008, but subsequently served as a temporary group leader and temporary site coordinator for employees who went on military leave and maternity leave, respectively. When the employees returned from leave, Chacon was ultimately bumped and reclassified as a substitute employee. She subsequently applied for a regular position, but was not offered the job. The Company insists she was not offered the position because of her performance history, but there is no documentation to substantiate that claim. (Tr. 582–590, 593–599, 1375–1404, 1413–1416, 1419–1426, 1436, 1450–1451, 1454; GC Exhs. 5, 75; R. Exh. 54.)

<sup>24</sup> The Company’s contention that it typically seeks to ensure that an employee is a good “fit” for the classroom is belied by the record, which contains numerous instances of substitute and temporary employees being employed for long periods of time while vacancies existed, even though there was no documented problem with their performance. (Tr. 1472–1478, 1525–1530, 1610–1613, 1684–1689, 1691–1693, 1757, 1797–1801.)

<sup>25</sup> GC Exh. 4 at 23–25; R. Exh. 58 at 23–25.

<sup>26</sup> Notwithstanding the adverse decision from the arbitrator, Guenette and Fraccero provided credible testimony that the Company’s decision was affected by the EEC Program Standards. (GC Exhs. 4, 7, 11; R. Exhs. 58–62; Tr. 1101–1103, 1168–1169.)

<sup>27</sup> GC Exh. 6.

<sup>28</sup> R. Exh. 25.

<sup>29</sup> GC Exh. 7.

<sup>30</sup> R. Exh. 63.

<sup>31</sup> R. Exh. 27.

<sup>32</sup> R. Exhs. 1, 69.

<sup>33</sup> R. Exh. 26 at 6.

<sup>34</sup> R. Exh. 1; GC Exh. 54.

<sup>35</sup> R. Exh. 2.

that time, however, the CBA has been renewed three times, but without any further changes to article 6.2.<sup>36</sup>

Until 2008, the Company was able to staff the centers almost exclusively with teachers and lead teachers.<sup>37</sup> Since that time, however, the Company has found it very difficult to meet the goal of permanently staffing each classroom with a lead teacher, teacher, and part-time teacher. However, the Company has not had difficulty finding and hiring substitute employees.<sup>38</sup>

Between 2003 and 2009, substitute employees comprised between 8.5 and 16 percent of classroom staff at the King Street facility. Since 2009, however, there has been a significant diminution of unit classroom staff, with a concomitant increase in the use of substitutes.<sup>39</sup> At both King Street and Chestnut Street, substitute employees have comprised between one-third and one-half of classroom staff.

From 2009 and 2010, the Company posted for 32 teacher or lead teacher openings. However, only six current unit teachers were hired to fill those posted teacher openings. That trend has continued. Since at least January 2011, numerous posted<sup>40</sup> part-time or full-time unit positions in the centers and transportation department have remained unfilled, despite numerous applications received. During the same time period, the Company has hired large numbers of substitute employees.<sup>41</sup>

From January 2011 through the end of June 2012,<sup>42</sup> the Company posted 61 full or part-time teacher or lead teacher positions at its various Centers. During that period, 5 applicants were hired as teachers, at least 46 were hired as substitutes, 2 were hired as temporary employees, and some positions were left unfilled.<sup>43</sup> The newly hired substitutes included several applicants already certified as teachers.<sup>44</sup> Several applicants who applied for teacher positions lacked the necessary certification, but obtained it later on. One was reclassified as a teacher in May 2012 and became a bargaining unit member,<sup>45</sup> two others subsequently received certification, but were not reclassified as teachers.<sup>46</sup> In another instance, an employee certified

as a teacher preferred the flexibility of substitute status and has never applied for a permanent part-time or full-time teaching position.<sup>47</sup>

In summary, between January 2009 and June 2012, the Company posted openings for at least 100 regular part-time or full-time unit teacher or lead teacher positions at its centers.<sup>48</sup> However, during that period, only 11 regular part-time or full-time employees were hired by the Company for its centers.<sup>49</sup> At least 3 of the 11 unit employees hired were initially hired as substitutes, and 2 of the 3 became unit employees after the Union filed a grievance asserting they were properly teachers.<sup>50</sup> During the same time period, the Company hired 49 employees to work as substitutes at its centers.<sup>51</sup> Most of these employees consistently worked more than 10 hours per week.<sup>52</sup>

In May 2012, prior to negotiations for a successor agreement, the Union requested that the Company participate in negotiations without counsel. After the Company declined the offer, Ballenger informed the Company that “the Union would be filing charges regarding the Company’s hiring and utilization of substitutes and aides.”<sup>53</sup>

#### IV. SIMILARITIES BETWEEN SUBSTITUTES AND AIDES AT THE CENTERS

Substitute teachers hired by the Company perform work similar to that contained within the teachers’ aide job description and are assigned regular schedules in excess of 10 hours per week. At King Street, substitutes have regular schedules working in excess of 20 hours per week. For the past year, each classroom has been staffed with two full-time teachers and a “halftime aid” in the vacant teacher position. The “halftime” employees frequently work in excess of 20 hours per week in order to cover teachers’ breaks or absences. They include Tiffany Rodriguez, Mara Laviera, Danielle Robinson, and Blossom Hutchins.<sup>54</sup>

At Chestnut Street, every class had at least one substitute employee and each of those employees had regular schedules of 10 hours per week or more.<sup>55</sup> At HHC, 47 “weekly substitute schedules” for the period from August 2011 through July 2012 revealed the regularity of substitute employees by containing their preprinted names.<sup>56</sup> In addition, the schedules for substitutes from January through July 2012 contain preprinted work

<sup>36</sup> R. Exhs. 26 at 1, 69 at 2–3, 70 at 2–3; GC Exh. 5.

<sup>37</sup> This finding is based on Guenette’s credible and undisputed historical account. (Tr. 1169.)

<sup>38</sup> These findings are based on the credible testimony of Guenette and Fraccero. (Tr. 52–54, 1097–1099, 1964–1966.)

<sup>39</sup> These findings are based on the attendance books. (GC Exh. 101.)

<sup>40</sup> The Company customarily posts all employment opportunities on its website. (GC Exhs. 94–95; Tr. 910–914.)

<sup>41</sup> GC Exhs. 74–75, 77(a), 82–83, 88 at 2, 94–95, 106–108, and 110.

<sup>42</sup> See summary of relevant job postings. (GC Exh. 75.)

<sup>43</sup> GC Exhs. 75, 77, 108, 110

<sup>44</sup> Applicants certified as teachers, but initially hired as substitutes included Roslyn Frazier, Kimberly Cortez, and Jasmine Colon. (GC Exhs. 74 at 003000, 003003, 77A; R. Exh. 54; Tr. 607–619, 1808–1809, 1626–1627, 1671–1672.)

<sup>45</sup> Clearly, Sanchez met the qualifications for an aide position, which was not available. (Tr. 878–879, 892–894, 896–899; GC Exh. 93.) The Company notes, however, that she was hired just after the June 1, 2011 tornado that destroyed several facilities and caused a consolidation of several programs, resulting in bargaining unit positions being reserved for displaced teachers. (Tr. 1758–1760.)

<sup>46</sup> Although not initially qualified for a teaching position when she applied in May 2011, Christine Burgos provided credible testimony, corroborated by Reid, that the Company was aware of the fact that she

received her certification in May 2012, but did not offer to reclassify her as a teacher and she left. (GC Exhs. 55, 74–76, 110; Tr. 366–369, 373–399, 404–405, 408, 1823–1824.)

<sup>47</sup> Erin Noone provided credible testimony that she prefers the flexibility of a substitute teaching position. (Tr. 1893–1894.)

<sup>48</sup> GC Exhs. 75, 94–95

<sup>49</sup> GC Exhs. 82–83.

<sup>50</sup> GC Exh. 77(a).

<sup>51</sup> This finding is based on a summary of substitute personnel records received without objection pursuant to FRE 1006. (GC Exh. 77A.)

<sup>52</sup> GC Exh. 14–26, 108.

<sup>53</sup> R. Exhs. 31–32.

<sup>54</sup> During her testimony, Price, the longtime director at King Street, readily referred to the third classroom staff members as “halftime [aides]” or “temporaries” instead of substitute employees. (Tr. 1551, 1560–1568, 1571–1579.)

<sup>55</sup> GC Exh. 78.

<sup>56</sup> GC Exh. 69 at 3798 to 3845.

hours.<sup>57</sup> At the YWCA, Center Director Dayna Griffith regularly generates a schedule for substitute employees.<sup>58</sup> Routinely, she communicates with substitute employees during their shifts and assigns them additional hours to cover gaps created by anticipated teacher absences.<sup>59</sup>

In addition to the regularity of their work schedules, substitute employees at the Centers customarily submit leave requests for time off.<sup>60</sup> In at least one instances, a substitute employee's leave request was denied because three other employees either were or would be on leave.<sup>61</sup>

#### V. THE TRANSPORTATION DEPARTMENT'S USE OF SUBSTITUTES

A similar pattern of relying on substitutes to fill vacancies also exists at the Transportation Department. Between January 2011 and June 30, 2012, the Company posted openings for eight van driver positions.<sup>62</sup> Although it received numerous applications from qualified applicants, the Company hired only two full-time drivers and one part-time driver. During that same period, the Company hired 14 substitute van drivers, including the 3 aforementioned drivers who moved into the bargaining unit classification.<sup>63</sup>

In November 2011, and without discussing it with the Union, the Company began posting job openings for substitute van drivers.<sup>64</sup> Although specified as a nonbargaining position, the job description is very similar to that of the unit driver position. The jobs were advertised for a "normal work week" of "20 hrs per week: Monday–Friday."<sup>65</sup> Despite ongoing and vacant unit positions, the Company repeatedly hired substitute van drivers to perform this work.<sup>66</sup> Maurice Chen (January 31), Richard Cruz (May 18), Melissa Hopping (June 20), Katria Rodriguez

<sup>57</sup> Ann Shea's explanation on this point was confusing and unconvincing. Moreover, I found it suspicious that she reverted to hand written entries shortly before the hearing began. (Tr. 1644–1645.)

<sup>58</sup> Given Griffith's testimony that she customarily discards her substitute schedules at the end of each week, I decline the General Counsel's application for an adverse inference. Nevertheless, Griffith's attempt to backtrack on her concession that she makes up a regular schedule was not credible. (Tr. 1539–1545.)

<sup>59</sup> This portion of Griffith's testimony was not disputed. (Tr. 1474, 1497.)

<sup>60</sup> The Company's contends that that the submission by substitutes of "Requests for Time Off" forms merely reflect statements of availability. I disagree. The form, by its terms, seeks supervisory approval which, in most instances, is reflected on many of those in the record.

<sup>61</sup> GC Exh. 63 at 4619.

<sup>62</sup> GC Exhs. 43–44.

<sup>63</sup> Buijnarowski conceded that during his tenure as transportation director, he has never filled a single posted unit position. (Tr. 1329; GC Exhs. 42, 75, 77(a), 82–83.)

<sup>64</sup> Buijnarowski's assertion that he hired van drivers as substitutes, rather than as part time or full-time unit employees as advertised, in order to enable him to observe their work ethic, is unsupported by the record and simply not credible. (Tr. 1218, 1329–1330; GC Exhs. 43, 75.)

<sup>65</sup> Hopping's credible testimony, corroborated by the applicable postings, establishes that the Company posted the openings for a 20-workweek. (Tr. 502; GC Exhs. 43–44.)

<sup>66</sup> GC Exhs. 108, 110.

(August 2),<sup>67</sup> Orlando Rivera (November 21), Dorothy Wilson (January 20, 2012), Lamont Howard (February 27, 2012), Noella Rosa (March 22, 2012), Yanira Diodonet (June 6, 2012), and Collette Ward (June 7, 2012).<sup>68</sup>

Although classified as substitute employees, the newly hired van drivers were regularly assigned to work in excess of 10 hours per week.<sup>69</sup> During this period, the Company continued to employ seven bargaining unit drivers. However, none of the new hires were classified as bargaining unit drivers.<sup>70</sup> During that period of time, only two of the drivers hired as substitutes, Hopping (November 2011) and Rivera (February 2012), were eventually classified as members of the bargaining unit when they received the applicable certification.<sup>71</sup>

#### VI. INSTALLATION OF VIDEO CAMERAS

The CBA contains two provisions setting forth the Company's authority in safety matters. Article 1.1 states, in pertinent part, that the Company may "promulgate and enforce all reasonable rules relating to operations, safety procedures, and other related matters." The health and safety provision at article 6.5 states that the Company "shall maintain appropriate safety standards and conditions to ensure safety."<sup>72</sup>

In February 2011, Guenette and Helen Shea informed van drivers that the Company was installing dual vision cameras to record passenger and driver activities inside of its vans. They explained to the drivers that the cameras were being installed because their insurance company insisted that they be installed as a condition of continued insurance coverage. This directive from the insurance company was geared toward the protection of the children, as well as the drivers. Incidents preceding the announcement included sexual assaults of children on Company vans and driving accidents. The van drivers, including union steward, Ron Sagan, were provided with additional information about the dual vision cameras on March 18. However, Union Representative Bruce Ballenger was not informed of this change and the cameras were installed in each van in or before August 2011.<sup>73</sup>

On August 8, the Company suspended van driver Nicanor Tosado for 2 days after observing from a dual vision camera recording on August 2 that he and a child passenger were not wearing seatbelts. In addition, another child was observed

<sup>67</sup> GC Exh. 79.

<sup>68</sup> GC Exhs. 62, 65, 74, 77, 77(a), 83, 108, 110.

<sup>69</sup> Buijnarowski corroborated Hopping's testimony that she had a consistent part-time schedule and was expected to report to work on a daily basis. (GC Exhs. 31, 42; Tr. 1359, 501–513, 1359.)

<sup>70</sup> GC Exh. 82.

<sup>71</sup> The Company's contention that Hopping performed "true substitute work" prior to appointment as a full-time driver is contradicted by the record, which indicates that she worked a regular schedule similar to that of bargaining unit employees in the transportation department. (Tr. 502–503; R. Exhs. 13–14.)

<sup>72</sup> GC Exh. 5.

<sup>73</sup> There is no doubt that Sagan, an employee serving as a union steward, was aware of the change. However, Ballenger, as the Union's designated official for notification under the CBA, never learned of the change prior to implementation. (Tr. 301–308, 534–536, 555–557, 567, 1026–1028; R. Exhs. 5, 48–49.)

sitting in a front passenger seat.<sup>74</sup> Ballenger, after filing a grievance on behalf of Tosado, learned of the dual vision cameras and submitted an information request.<sup>75</sup>

On August 30, Tosado and Ballenger met with several supervisors, including Guenette, Fraccero, Helen Shea, Buijnarowski, and Tremblay, to discuss his grievance. Ballenger pleaded for leniency and alluded to the failure of other drivers to use of seatbelts.<sup>76</sup> In response, Buijnarowski convened an emergency meeting on August 31 in the Transportation Department.<sup>77</sup> The Company reported to the drivers, including Sagan, what Ballenger told them about their deficiencies in using seatbelts. The drivers were reminded of the Company's policies, as well as applicable laws, relating to seatbelts and informed that any violation would result in disciplinary action. During the meeting, the drivers were given a sheet that reiterated much of what was communicated to them, but also inquired about each of their conversations with Ballenger, specifically, whether "you informed him that you do not wear seatbelts:"

Now that Square One has been made aware of this, we are obligated to discuss this concern with each of you to ensure that you understand the Massachusetts State Law and to ensure that you understand the importance of workplace safety for you and for the children we serve.

Please let me know if you made this statement?

If you didn't, do you recall what was said?

In the future, if we have evidence that supports that you do not wear your seatbelt; the agency may proceed with appropriate disciplinary action.<sup>78</sup>

On September 7, Ballenger demanded to bargain over both the decision and the effects of the camera installation and driver surveillance. On September 16, the Company rejected that demand, relying on the "management rights clause" in the CBA, but agreeing to meet to "explain [its] implementation of dual vision safety monitors and the effect it may have on the bargaining unit."<sup>79</sup> The parties met on October 11, but neither budged from their initial positions. By this time, the dual vision cameras had already been installed.<sup>80</sup>

Leaves of Absence Rules

The CBA provides for the accrual and use of time off. Full-time and part-time employees accrue up to 12 paid leave days

<sup>74</sup> R. Exh. 47(a) at 5.

<sup>75</sup> GC Exhs. 38-39; Tr. 144, 158.

<sup>76</sup> Ballenger asserted that Guenette wrung the information out of him after he merely pleaded for leniency toward Tosado, but his testimony strongly suggests that he did make the statement about drivers use of seatbelts and attempted to backtrack. (Tr. 158-161, 163, 547-549, 1117-1121, 1206-1207.)

<sup>77</sup> R. Exh. 36.

<sup>78</sup> R. Exh. 15.

<sup>79</sup> GC Exh. 39.

<sup>80</sup> Both parties agree that neither made a proposal at this meeting. (R. Exh. 49.)

per year, which time "may be used for an Employee's illness or medical needs, or illness in an Employee's family, or for personal reasons." Article 26.2 also authorizes any supervisor with "a reasonable belief that an employee is misusing sick time" to request a doctor's note.

The Company frequently encounters coverage issues resulting from absenteeism among its van drivers. A related problem for the transportation department is caused when drivers call out shortly before their shifts are due to start, thereby impeding the Company's ability to call in replacement drivers in time to make scheduled passenger pickups.

Sometime after June 8, 2011, Buijnarowski distributed a 1-page addendum to the Transportation Operations Manual. The document, entitled, "Transportation Guidelines," informed drivers that they needed to "contact Dispatch as soon as possible" if they were unable to work a scheduled shift or arrive late to work. It also required them to submit leave requests at least 1 week in advance and submit doctor's notes if out sick for more than 3 days.<sup>81</sup> As Ballenger had not been previously consulted about the change, he expressed his concerns in the same September 7 meeting dealing with the Tosado discipline. Guenette agreed with Ballenger and informed the van drivers the same day that the new rule was rescinded. At her request, Tremblay attended the meeting and read to the drivers the CBA provisions relating to sick and vacation leave and also provided each with a copy of those provisions.<sup>82</sup>

VIII. UNION REQUESTS FOR INFORMATION

From June 2011 to June 2012, the Union submitted approximately 29 requests for information. The Company's alleged failure to respond or timely respond to four of the requests is at issue.

A. The March 24 Request

On March 24, 2011, the Union requested seven items of information by April 7, 2011.<sup>83</sup> The facsimile transmission did not, however, arrive at its intended destination and Ballenger did not obtain written confirmation indicating that it did.<sup>84</sup>

The requested items included: wage rate and hiring information for all transportation department employees hired since November 1, 2010, who worked more than hours per week; the reasons why excluded employees were not included in the bargaining unit; timesheets for the past 6 months for any transportation employees who worked at least 5 consecutive weeks during the past 6 months and who were not classified as bar-

<sup>81</sup> R. Exh. 47(c).

<sup>82</sup> I found Guenette's testimony regarding rescission of the letter that day more credible than Ballenger's vague response as to what the Company did in response to his complaint. However, although Guenette told employees that the document was rescinded, she did not testify as to whether she also informed employees that Buijnarowski's actions were wrong. She also did not explain whether the document was removed from the transportation manual. (GC Exhs. 5, 96A; R. Exh. 47(c); Tr. 148-149, 151, 294-296, 1121-1123, 1268-1275, 1767.)

<sup>83</sup> GC Exh. 37; R. Exh. 3 at 3.

<sup>84</sup> I base this finding on Ballenger's concession that, unlike other facsimile transmissions, he was unable to produce a confirmation that this facsimile copy was successfully transmitted. (GC 37 at 260-261, 270.)

gaining unit employees; a list of all new or reopened sites where bargaining unit work would be performed, including names of employees assigned to them and contact information; and an explanation for the Company's position as to why the recently advertised director/lead teacher position, FCC outreach worker/ FCC educational coordinator/parent worker and family services coordinator positions were excluded from the bargaining unit. In or around May 2011, Ballenger asked Guenette about the request. Guenette acknowledged that she was working on a response to an information request, but she was not referring to the same request.<sup>85</sup>

On June 1, 2011, a tornado ravaged portions of Springfield,<sup>86</sup> including the Company's administrative facility and the Main Street Center. The administrative building, which housed all of the Company's personnel records, was demolished shortly thereafter. As a result, Guenette and other managerial, administrative, and human resource staff, were preoccupied with the relocation of administrative offices and the Main Street facility to various locations, as well as other disaster and recovery-related operations. These included reconstruction of the Company's personnel records.<sup>87</sup>

Notwithstanding this unfortunate turn of events, on June 2, Ballenger resubmitted the May 24 request to Guenette, noting that the Union had not received a response.<sup>88</sup> A few days later, when Guenette was eventually able to access her email account, she received the "renewed" request. Guenette immediately contacted Union President Ron Patenaude and asked for forbearance regarding information requests. Patenaude told Guenette that he would speak with Ballenger. She also spoke with Ballenger, explained the situation and he responded by requesting that she let him know if any employee needed assistance.<sup>89</sup>

Guenette emailed Ballenger on July 29 and, referring to the destruction of the Company's administrative facilities, explained that she was consulting with counsel and would respond to the March 24 request "in the near future." On November 30, the Company provided the Union with a response to its June 2 resubmission of the March 24 information request.<sup>90</sup>

#### B. The July 7 Request

On July 7, 2011, Ballenger sent the Company an information request spurred by the layoff of Thomas Garner, a custodial employee. The request sought, in pertinent part, hiring dates and assigned locations for all custodial and maintenance employees. Guenette responded to the request on July 29, alluding to the administrative obstacles posed by the June 1 tornado and,

in pertinent part, provided the requested information by listing only the information relating to Garner, who had been terminated.<sup>91</sup>

On July 14, the Company hired Shaun Guenette, Patricia Guenette's son, as a substitute employee. He was assigned to an unspecified position to perform work at "all locations."<sup>92</sup> Soon thereafter, Sagan learned from Tommie Johnson, the King Street Director, that Shaun Guenette was performing work similar to that previously done by Garner. He passed that information along to Ballenger.<sup>93</sup>

#### C. The December 14 and 23 Requests

On December 14, 2011, the Union requested timesheets and attendance records and entire personnel files for all nonmanagerial employees who were not part of the bargaining unit.<sup>94</sup> On December 23, the Union requested time and attendance records for kitchen employees, as well as personnel files and "staff records."<sup>95</sup>

The Company responded to both requests simultaneously by providing the majority of the information requested on January 12, 2012, including timesheets and attendance records.<sup>96</sup> In the cover letter, the Company agreed to provide the information on a regular basis, but suggested providing it quarterly, given the voluminous nature of the records. The cover letter also addressed the Union's request for entire personnel files of non-bargaining unit members, objecting to the request as overly broad, unduly burdensome, not relevant and asserting that the files contained confidential and private employee information. The Company's counsel also asked Ballenger to clarify what he meant by "staff records." The Company's counsel suggested that the Union narrow the scope of its request and identify specific documents that it needed, along with an explanation as to why each particular document was needed.<sup>97</sup>

The Union responded on February 6, 2012. Rather than narrowing its request or explain the relevance of each document, the Union provided a detailed list of documents that could be contained within a personnel file. The list included: "all evaluations, discipline records, change of status forms, hiring documents, explanation of wages, hours and benefits, job descriptions, site assignment, bargaining unit status, etc." Moreover, the Union insisted that the Company provide the personnel files of three employees as "samples."<sup>98</sup>

#### IX. DOROTHY WILSON'S TERMINATION

Dorothy Wilson was employed as a substitute van driver from January 20 to April 10, 2012. She applied for a regular

<sup>85</sup> I found Ballenger's testimony credible regarding his conversation with Guenette but, given the lack of a fax receipt, I also found it likely that she thought he was referring to another request. (Tr. 136.)

<sup>86</sup> R. Exh. 55.

<sup>87</sup> The General Counsel did not dispute the extent to which Guenette, Tremblay, Carter, and others were overwhelmed by the disaster. (Tr. 1127-1141; R. Exh. 51.)

<sup>88</sup> R. Exh. 3; GC Exh. 36.

<sup>89</sup> Guenette's testimony about her conversation with Patenaude was not disputed, although she did not state that either Patenaude and Ballenger actually agreed to a reprieve. (Tr. 1143-1144.)

<sup>90</sup> GC Exh. 42.

<sup>91</sup> GC Exh. 36; R. Exh. 42.

<sup>92</sup> GC Exhs. 46, 77, 77A, and 108 at 3244, 3277.

<sup>93</sup> GC Exhs. 74 at 3021 and 77A; Tr. 539-542.

<sup>94</sup> Complaint, Exh. C.

<sup>95</sup> Complaint, Exh. D.

<sup>96</sup> R. Exh. 44.

<sup>97</sup> The Company asserts that the information requested was related to the subject of a pending unfair labor practice charge (Case 01-CA-064951) alleging "the employer has altered the scope of the bargaining unit by employing non-bargaining unit members to do bargaining unit work" and, thus, it was under no obligation to provide the Union with such information.

<sup>98</sup> GC Exh. 48.

full-time driver position in December but, unbeknownst to her,<sup>99</sup> was hired as a substitute driver.<sup>100</sup> During her employment, there were no postings or openings for a full-time or part-time driver position. Until March 26, Wilson consistently worked morning and afternoon shifts several days per week in excess of 10 hours per week.<sup>101</sup>

Wilson received orientation and van driver training in accordance with Company protocols, and was made aware of her job description and operational and safety responsibilities. Buijnarowski, the transportation director, also observed Wilson drive and spoke to her on numerous occasions about several safety issues.<sup>102</sup> During Wilson's 3 months of employment, the Company received several complaints regarding her performance. The incidents included parent complaints in February that Wilson failed to ensure that a child was buckled into her seat, failed to properly buckle in another child, and yelled at two other children.<sup>103</sup>

On March 12, 2012, the Union submitted a copy of Wilson's union dues authorization card to the Company's accountant. The accountant delivered the authorization card to the Company's staff accountant. On March 21, the accountant delivered the card to Tremblay. On the same day, Tremblay informed Guenette that the authorization card had been received. She immediately contacted the Company's attorney. The attorney drafted a response, which Tremblay incorporated into a letter to the Union on March 27, 2012. Essentially, Tremblay's letter informed the Union that Wilson did not meet the criteria for bargaining unit membership since she was a substitute employee and, thus, excluded under section 6.2 of the CBA.<sup>104</sup>

Meanwhile, Buijnarowski also learned that Wilson signed an authorization card on or before March 21.<sup>105</sup> On that day, after some form of communication from Guenette, Tremblay, or someone on their behalf,<sup>106</sup> Buijnarowski emailed Tremblay

<sup>99</sup> I credited Wilson's testimony that she noticed her pay rate, but not the substitute classification, listed on the company personnel form. (Tr. 676–678; R. Exhs. 22–23.)

<sup>100</sup> Notwithstanding Wilson's lack of qualifications at the time of application, there is no evidence to suggest that, even if she had possessed the necessary qualifications, she would have been hired into a permanent position. (GC Exh. 61; R. Exh. 19; Tr. 644–649.)

<sup>101</sup> Buijnarowski regularly scheduled Wilson to work two shifts on days that she did not have classes. (Tr. 649–650, 664–665, 1327–1328.)

<sup>102</sup> It was not disputed that Buijnarowski routinely evaluated and/or monitored drivers by either riding along or following them. (Tr. 669–673, 676–677, 1256–1257.)

<sup>103</sup> Wilson corroborated Buijnarowski's testimony about his conversations with her about the incidents. (Tr. 687.) However, he did not document any of those instances as disciplinary actions. (R. Exh. 17; Tr. 661–662, 1284–1286, 1301–1303, 1335–1338, 1709–1712.)

<sup>104</sup> Although the accountant did not testify, Tremblay confirmed receipt of the card and the sequence of events that followed. (GC Exhs. 85, 87; Tr. 828–834.)

<sup>105</sup> Wilson provided credible and unrefuted testimony that Lewis Denson, the transportation dispatcher, informed her "soon" after she signed the authorization card that Buijnarowski mentioned to him that Wilson signed an authorization card. (Tr. 651–654.)

<sup>106</sup> The weight of the credible evidence dispels Buijnarowski's testimony that he was the only supervisor involved in the decision to terminate Wilson. Given the background, events and role of company

with the message that "[w]e are going to need to terminate [Wilson] as soon as we get the new drivers trained."<sup>107</sup> The message was not preceded by any counseling, warning, or other form of communication to Wilson regarding her performance.<sup>108</sup> Moreover, there was no further explanation or documentation as to the basis for Wilson's discharge. Prior to that day, Buijnarowski had never even so much as hinted to Wilson that she was in danger of losing her job.<sup>109</sup>

After March 26, 2012, the Company limited Wilson's work to the morning shift and began to closely monitor her performance.<sup>110</sup> After receiving a complaint from a school principal on April 5 that Wilson dropped off a child off on the wrong side of the street and the schoolbus' flashing lights were not on at the time, Buijnarowski mentioned the incident to Wilson. She explained that she watched as the child crossed the street.<sup>111</sup> The next day, April 6, Buijnarowski rode along with Wilson. During that ride, he observed that she failed to turn on the bus lights when unloading a passenger. He did not, however, share his observations with her.<sup>112</sup>

The failure of the Company's van drivers to turn on flashing lights when dropping off passengers was not an uncommon occurrence. Although this safety requirement was often

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officials in personnel matters and labor relations, it is a virtual certainty that Guenette made the decision to terminate Wilson. (Tr. 67, 714–715.)

<sup>107</sup> As previously explained, Buijnarowski's denial of any prior knowledge that Wilson signed an authorization card on March 21 was not credible. Given the Company's human resources structure and progressive disciplinary process, he clearly did not have the final authority in terminate an employee. (GC Exh. 86; Tr. 825–828, 1284–1285, 1301–1302.) Moreover, given the Company's demonstrated commitment to maintain high safety standards in the care of their very young clients, it is preposterous to believe that he would determine that Wilson's safety deficiencies warranted termination, yet allow her to continue transporting very young passengers for another 3 weeks. (Tr. 1284.)

<sup>108</sup> Buijnarowski's explanation for the sudden decision to terminate Wilson—that "he was concerned for the safety of the children"—rang hollow (Tr. 1284), since she, like her colleagues, was never warned or otherwise disciplined for common safety violations like failing to put on flashing lights when dropping off passengers. (Tr. 661, 832–833, 1459; R. Exh. 50(d–g).)

<sup>109</sup> Buijnarowski's denial that he knew about Wilson signing the authorization card was not credible. First, his March 21 email was unaccompanied by an explanation as to the reason for the termination or documentation supporting the action. Second, he admitted that her monitored her performance prior to April 6, 2012, but never documented any problems. (Tr. 1302, 1337, 1352–1355.)

<sup>110</sup> Aside from Wilson's perception that Buijnarowski's attitude toward her changed, there is no evidence that Wilson inquired about the loss of her afternoon shift. (Tr. 655–656; R. Exhs. 18, 52.)

<sup>111</sup> Buijnarowski confirmed that Wilson provided an explanation but, again, took no action on that day either. (Tr. 1338–1339.)

<sup>112</sup> The fact that Buijnarowski continued to monitor Wilson's performance, without documenting his observations or speaking to her about his concerns, strongly suggests that the Company sought to augment the rationale for her discharge. (Tr. 832–833, 1301–1303, 1337, 1343; R. Exhs. 17, 50(a).) He also concluded that "there's times" when drivers do not turn off their lights. However, rather than issue discipline, Buijnarowski's preferred approach was to bring up the issue at safety meetings. (Tr. 1334.)

brought up at safety meetings, Buijnarowski never disciplined any of the drivers for violating only that rule. No employee, other than Tosado, who also committed several other infractions, was previously disciplined for not properly buckling a passenger's safety belt.

Wilson continued working until April 11, 2012. After completing her shift that day, she was summoned to a meeting with Buijnarowski and Tremblay, where the latter handed her a termination letter.<sup>113</sup> The letter cited the February complaints about failing to buckle in a child and yelling at another child, as well as the April 5 school principal's complaint and Buijnarowski's April 6 observations from his ride along. The letter concluded that "the three complaints and additional observations of serious vehicle infractions are unacceptable, children's safety and handling children in an appropriate manner is our first priority. Effective Tuesday, April 10, 2012, your employment is terminated. Your final paycheck and unemployment paperwork is included."

Wilson was the first and only driver terminated during Buijnarowski's tenure as transportation director. Given the history of similar past safety violations by other drivers, coupled with Guenette's concern about a shortage of drivers, it was peculiar that a lesser form of discipline was not imposed.<sup>114</sup>

#### Legal Analysis

##### I. UNILATERAL CHANGES

###### A. Installation of Safety Monitors

The General Counsel asserts that the Company's installation of surveillance cameras violated Section 8(a)(5) because it was a unilateral change in the way supervisors investigated employee performance and potentially affected the continued employment of monitored employees. The Company disagrees, relying on the management-rights provision of the CBA to support its contention that (1) it is entitled to observe and monitor employee performance, and (2) the installation of cameras did not result in a significant change in that term and condition of employment.

An employer violates Section 8(a)(5) by making unilateral changes to represented employees regarding their terms and conditions and employment. *NLRB v. Katz*, 369 U.S. 736, 743–747 (1962). Terms and conditions of employment are those considered "plainly germane to the working environment and not among those managerial decisions which lie at the core of entrepreneurial control." *Ford Motor v. NLRB*, 441 U.S. 488, 498 (1979).

In this case, the Company is entitled pursuant to articles 1.1 and 6.5 of the CBA to promulgate and enforce safety rules, procedures, standards, and conditions. The Company routinely

conducts supervision through ride along and other observations of drivers. The cameras, which are an automated version of functions already in place do assist in this supervisory function and serve to facilitate the safety of the children, as well as the drivers. In that sense, the Company believes that the surveillance monitors involve the "core purpose" of its business and thus, fall outside the presumption that the change was a mandatory subject of bargaining. *Peerless Publications*, 283 NLRB 334, 335 (1987), on remand *Newspaper Guild Local 10 (Peerless Publications) v. NLRB*, 636 F.2d 550, 562–563 (D.C. Cir. 1980). Moreover, the Company contends that, although it already installed the cameras, it agreed to bargain over the effects of its decision to install them. The parties met, but their positions remained steadfast and no proposals were exchanged. Under the circumstances, the Company contends that it did not fail to negotiate over the issue.

Insurance considerations aside, one can hardly question the propriety of the Company's actions, given the prior incidents, in seeking to protect the children by deploying surveillance cameras on its vans. However, the core purpose doctrine is limited to rules and policies, not unilateral action in advance thereof. Moreover, the presence of the cameras created new circumstances under which employees are exposed to surveillance by the Company and possible discipline based its recorded information. Such a result is evident from the Tosado discipline, which was a direct—not indirect as the Company suggests—result from information obtained from his van's surveillance camera. Thus, the imposition of such new circumstances warranting discipline constituted a mandatory subject of bargaining. *Pepsi-Cola Bottling Co. of Fayetteville, Inc.*, 330 NLRB 900, 904 (2000). The fact that the Company agreed to discuss the effects of its decision after already installing the cameras was insufficient to avoid a 8(a)(5) violation. *Rose Fence, Inc.*, 359 NLRB 225, 232 (2012) (as in the case of decisional bargaining, effects bargaining also requires an employer to provide notice of a change *before* it occurs).

Lastly, the Company's attempt to distinguish the visible installation of the monitors from the installation of hidden surveillance cameras, which have traditionally constituted a mandatory subject of bargaining, is also unavailing. *Anheuser-Busch*, 342 NLRB 560 (2004); *Colgate-Palmolive Co.*, 323 NLRB 515 (1997). The Board does not draw such a distinction and considers the installation of visible surveillance cameras as an unlawful unilateral change. *Nortech*, 336 NLRB 554, 568 (2001); *Genesee Family Restaurant*, 322 NLRB 219, 225 (1996).<sup>115</sup>

<sup>113</sup> Wilson's version of the meeting was credible and undisputed. (Tr. 657–658.)

<sup>114</sup> The selected "supervisory logs" relied upon as documentary support for terminating Wilson hardly constitute reliable business records created at or around the events recorded therein. Buijnarowski's handwritten entries skipped around chronologically, covering specific dates in February, March, and April and numerous entries were modified or supplemented well after they occurred. (Tr. 835, 1344–1346, 1459–1462; GC Exh. 103; R. Exh. 50(e)–(g).)

<sup>115</sup> The Company's brief did not assert that the surveillance charge was untimely pursuant to Sec. 10(b). In any event, such a defense would not apply here, since the statutory period did not begin to run until the Union received notice in August 2011, not when employees were told months earlier about the change. See *Brimar Corp.*, 334 NLRB 1035 fn. 1 (2001) (simply because a shop steward is among employees told of a change does not impute notice to the union under the contract).

### B. Changes to Vacation and Sick Leave Policy

The General Counsel alleges that the Company violated Section 8(a)(5) and (1) by unilaterally changing sick leave and vacation policies for employees in the Transportation Department. The Company contends that the new guideline issued by the director of Transportation was outside the scope of his authority, was promptly disavowed by senior management and never implemented. The General Counsel disputes that assertion, insisting that the Company failed to produce any evidence that a verbal rescission, much less a written one, was issued to employees.

Section 8(a)(5) obligates the parties to a collective-bargaining agreement to bargain over wages, hours, and conditions of employment, and Section 8(d) prohibits the unilateral modification of an agreement. When determining whether there is a violation of the Act under these sections, the Board considers the “totality of the circumstances.” *Saginaw Control & Engineering, Inc.*, 339 NLRB 541 (2003).

The Company does not dispute that Buijnarowski’s written memorandum constituted a unilateral change to a term of employment-employee leave policy. It insists, however, that Guenette and Tremblay rescinded the unilateral change by meeting with the van drivers on the same day that they learned of Buijnarowski’s action.

In order to relieve itself of liability by repudiating unlawful conduct, the “repudiation must be timely, unambiguous, specific in nature to the coercive conduct, and free from proscribed illegal conduct.” It must also “give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights.” *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). Here, Guenette and Tremblay met with drivers, notified them that Buijnarowski’s guideline was rescinded, and simply read aloud the applicable leave provisions from the contract. There was no testimony or other evidence indicating that employees were told that Buijnarowski’s action was wrong and that his unilaterally issued transportation guidelines were removed from the employee manual.

Under the circumstances, the Company violated Section 8(a)(5) and (1) of the Act. See *Fresh & Easy Neighborhood Market, Inc.*, 356 NLRB 588, 588 fn. 2 (2011) (repudiation insufficient where it failed to unambiguously inform employee that supervisor had been wrong and employees were free to discuss union matters during worktime); *Intermet Stevensville*, 350 NLRB 1349, 1350 fn. 6 (2007) (no effective repudiation where employer did not admit wrongdoing and simply informed employees that it was clarifying its policy).

### II. THE SEATBELT QUESTIONNAIRE

The General Counsel alleges that the Company unlawfully interrogated van drivers on August 31, 2011, in violation of Section 8(a)(1) by meeting with them and distributing a questionnaire inquiring as to whether they wore seatbelts while driving. The Company denies that the questionnaire’s distribution and collection was coercive and contends it was merely intended to remind employees of the Company’s existing seatbelt policies and applicable laws.

In determining whether or not an interrogation violated Section 8(a)(1), the Board examines whether under all the circumstances the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. *Rossmore House*, 269 NLRB 1176, 1177 (1984), *enfd.* 760 F.2d 1006 (9th Cir. 1985). On the other hand, an employer will not be found liable when it uses a survey for a legitimate business reason, and the survey is not designed for, nor does it have the effect of, eroding the union’s position as the employees’ exclusive bargaining agent. *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000); *Logemann Bros. Co.*, 298 NLRB 1018, 1019–1020 (1990).

An employer may exercise a limited privilege to interrogate employees regarding protective activity in the “investigation of facts concerning issues raised.” *Johmy’s Poultry Co.*, 146 NLRB 770, 774 (1964), *enfd.* denied on other grounds 344 F.2d 617 (8th Cir. 1965). Understandably, upon learning from Ballenger that employees might not be using seat belts, the Company had a legitimate safety concern to address the employees about what he told them and remind employees about applicable laws and company rules. The company was also entitled to have employees acknowledge verbally or in writing that they were aware of Company rules regarding seatbelts and warn them of disciplinary consequences for failing to comply. *Pan American Grain Co.*, 343 NLRB 318, 332 (2004), *enf.* denied on other grounds 448 F.3d 465 (1st Cir. 2006).

In this case, however, the Company overreached. The two-page form stated that Ballenger “verified that you informed him that you do not wear seatbelts” and then asks “if you made this statement.” While there was nothing confidential about Ballenger’s remarks to the Company about employee practices, it was conveyed during his representation of an employee who was being disciplined. The Company then used that information in an attempt to wring information from its employees as to their discussions with Ballenger. This type of communication with employees crossed the line into coercive conduct that conveyed the message that employee communications with their union representative are not protected from disclosure. Under the circumstances, the Company’s inquiry in its questionnaire as to what employees told Ballenger did not serve a legitimate business concern and constituted unlawful interrogation in violation of Section 8(a)(1).

### III. USE OF SUBSTITUTE EMPLOYEES TO PERFORM BARGAINING UNIT WORK

#### A. The Company’s Use of Substitutes Employees

The General Counsel alleges that the Company violated Sections 8(a)(5) and 8(d) by using numerous substitute employees that were “employed and regularly scheduled to work for a minimum of ten (10) hours or more, but less than thirty-five (35) hours per week,” without classifying them as members of the bargaining unit. The alleged date of the violation is March 21, 2011, which is 6 months prior to the filing of a charge. The Company concedes that it engaged in an appreciable use of substitute employees, but contends that, consistent with its interpretation of the CBA, each was “hired on a day to day basis to fill a vacancy” and, thus, did not qualify for bargaining unit membership. Entry into the bargaining unit, it asserts, can

only be attained when an individual is hired into a vacant position and committed to a fixed, regular schedule, and assignment.

Section 8(a)(5) of the Act obligates an employer to bargain collectively with its employees' labor representative in good faith with respect to wages and other terms and conditions of employment. *San Juan Teachers Assn.*, 355 NLRB 172, 175, (2010), citing *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Section 8(d) defines the obligation to "bargain collectively" as their mutual obligation to meet . . . and confer in good faith regarding such terms and conditions. An employer violates Section 8(d) of the Act when it makes an unlawful midterm change to a term and condition of employment during the term of a CBA. The most common example is where an employer eliminates an entire classification of employees embodied in the CBA. Where it does so without notice to the union and or authority under its management rights, the action constitutes a unilateral change and, thus, an independent violation of Section 8(a)(5) and (1). See *Embarq Corp.*, 358 NLRB 1192, 1192 (2012); *Mt. Sinai Hospital*, 331 NLRB 895, 895 fn. 2 (2000), *enfd.* 8 Fed. Appx. 111 (2d Cir. 2001).

Notwithstanding the Company's "unrestricted discretion" at section 6.2(b) of the CBA to employ substitute employees, the controlling question is whether the employees at issue were, in fact, utilized as substitutes as defined in the CBA. There is no question that the Company hired the employees at issue as substitute employees. However, article 6.2(b) defines substitute employees as those "hired on a day-to-day basis to fill a vacancy, or to replace an Employee who is on assignment." Contrary to the Company's interpretation, "day to day" means that the work is scheduled from one day to the next, not on a recurring weekly basis. See article 36.5 of the CBA, which provided pay rates for teachers aides who served in substitute positions.

The overwhelming evidence establishes that the employees at issue were not hired on a "day-to-day basis." The credible testimony of longtime Center Director Gail Price, as well as other employees, voluminous personnel, and time records, all support the conclusion that substitute employees have been regularly scheduled on a weekly recurring basis since 2009. Moreover, the same evidence illustrates that the positions of teachers' aide and substitute are functionally equivalent to the extent that neither is qualified to serve as a teacher. Indeed, Price conceded that she considered her substitute employees as "part-time aides."

Regarding the Company's waiver defense, it is undisputed that the Company has long used substitute classroom staff and van drivers. However, the facts do not demonstrate contractual authority or a past practice that "unequivocally and specifically" reveal a mutual intention to permit use of substitutes to an extent equivalent with the role of permanent part-time teachers aides or drivers. See *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007); *Bath Iron Works*, 302 NLRB 898, 900-901 (1991) (no waiver unless evidence shows subject was consciously explored in bargaining or union intentionally relinquished right to bargain); *Roll & Hold Warehouse & Distribution Corp.*, 325 NLRB 41, 42 (1997) (mere failure to invoke bargaining rights over particular changes in the past does not

represent a waiver of such rights over other changes in the future).

First, the language in article 6.2, the management-rights clause, does not entitle the Company to unilaterally misclassify employees or create new classifications. See *Miami Systems Corp.*, 320 NLRB 71, 74 (1995). Second, none of the events that transpired in 2003 serve as the basis for a waiver. The Union's withdrawal of a proposal to convert long-term substitutes to bargaining unit status preceded 6 years where such employees were utilized, on an as-needed basis, to fill the third classroom staff position, but not nearly as much as they were after 2009.

The Board's recent decision in *Ampersand Publishing, LLC*, 358 NLRB 1415, 1419 (2012), is directly on point. In that case, the employer hired nonbargaining unit members to perform bargaining unit work without providing the union with notice and an opportunity to bargain. Past practice revealed that the employer hired a nonemployee freelance reporter and employees from outside employment referral agencies as recently as 3 years earlier. The Board, citing *Caterpillar, Inc.*, 355 NLRB 521, 522 (2010), *enfd. mem.* 2011 WL 2555757 (D.C. Cir. 2011), quoting *Sunoco, Inc.*, 349 NLRB 240, 244 (2007), noted that "a past-practice defense" is one that occurs "with such regularity and frequency that employees could reasonably expect the 'practice' to continue or [recur] on a regular and consistent basis." In concluding that the employer's failure to bargain with the union over the change violated Section 8(a)(5), the Board found that the company's asserted past practice did not occur with sufficient regularity and frequency as to constitute a waiver by the union.

In this case, the Company began using substitute employees to perform bargaining unit work with increased regularity and frequency since 2009, or approximately 2 years before it rejected Wilson's attempt to join the bargaining unit. However, contrary to the clear nonbargaining unit status of the freelance employee in *Ampersand Publishing*, the misclassification of substitute employees was not immediately apparent until a certain amount of time lapsed and a pattern became evident. The record supports the General's Counsel's contention that the Company systematically refused or failed to fill the teacher vacancies at issue: the overwhelming number of unfilled vacancies—89 out of 100—between 2009 and 2012; and evidence that qualified applicants applied for available teacher positions, but were not hired. While the Company was entitled to hire part-time teachers instead of teachers' aides—both bargaining unit positions—as the third classroom staff persons, it resorted to the de facto replacement of the third teacher with substitutes who functioned with the equivalence of teachers' aides, but did not receive the contract benefits.

As was the case with Wilson, the substitute drivers at issue worked regularly, most at least 20 hours per week and all in excess of 10 hours per week. They formed part of a regularly planned weekly schedule that the Company utilized in attempting to have a driver assigned to each of the 16 daily shifts. Indeed, prior to November 2011, the Company posted the positions as part-time or full-time openings, not for substitute driver positions.

Under the circumstances, the Company's failure to classify substitute employees hired since March 21, 2011, as part-time teachers and van drivers, and who regularly worked in excess of 10 hours per week, constituted a unilateral change in violation of Section 8(a)(5).

#### B. Applicability of Time Limitations

Section 10(b),<sup>116</sup> the Act's 6 months limitations period, begins to run only when a party has clear and unequivocal notice of a violation. *Leach Corp.*, 312 NLRB 990, 991 (1993), enf. 54 F.3d 802 (D.C. Cir. 1995). In the case of a continuing violation, Section 10(b) would bar remedial relief for conduct occurring more than 6 months before a charge is filed, but permit relief for conduct within the 10(b) period. *MV Public Transportation, Inc.*, 356 NLRB 867, 885 (2011).

The Company premises its 10(b) defense on the fact that its use of substitutes has not changed since 2003.<sup>117</sup> It relies on *St. Barnabas Medical Center*, 343 NLRB 1125, 1129–1130 (2004), where the Board found that employer's refusal to apply the contract to bargaining unit aspirants constituted repudiation and could not be treated as a continuing violation. In that case, the Board distinguished the situation where a party refuses to apply one or more of its terms without entirely repudiating the agreement versus situations where each discrete breach is a continuing violation. The Company concedes, however, that the instant case is distinguishable since the classification of substitute employees is specifically excluded from the bargaining unit.

The fact that the Company has successfully avoided hiring any new teachers' aides since 2003 is not an overt repudiation of the CBA. The Company does not contest the continued inclusion of teachers' aides—albeit one employee—in the bargaining unit and the Union has not challenged the Company's hiring of part-time teachers as the third classroom staffer since 2003. Contrary to the Company's assertion, however, the Union can only be assessed with notice of the Company's divergent practices involving substitutes at some point after the evidentiary trend began in 2009. Prior to that time, the Union was on notice that new teachers' aides had not been hired since 2003 and had been effectively replaced by a third teacher in each classroom. It was not until 2009, however, when the Company began to fall short of its program objective of staffing each classroom with a third qualified teacher. See *MV Public Transportation*, supra at 1 fn. 2 (limitations period begins to run when union first learns of a potential violation). That year, the Union sought information, filed a grievance, and achieved a remedy. It was only through the course of pursuing additional information, and ultimately new charges over the Company's practices in the transportation department, that the scope of the issue concerning substitute classroom staff and van drivers became evident. Applying applicable precedent to the instant facts, 10(b) limits any remedy to the 6-month period prior to

the filing of charge in Case 01–CA–064951 on September 21, 2011. Accordingly, every substitute classroom teacher and van driver hired since March 21, 2011, who has regularly worked 10 hours per week or more is entitled to a remedy.

#### C. Appropriateness of Deferral to Arbitration

The Company contends that, at most, the Board should defer consideration of this claim to the grievance and arbitration process set forth in the CBA pursuant to the principles of *Collyer Insulated Wire Co.*, 192 NLRB 837(1971), and *United Technologies Corp.*, 268 NLRB 557 (1984). It emphasizes that the record is best depicted as a history of cooperation between the parties, as evidenced by three successive collective-bargaining agreements, and devoid of meaningful antiunion animus.

The Board has “considerable discretion to defer to the arbitration process when doing so will serve the fundamental aims of the Act.” *Certainfeed Corp.*, 2013 WL 772784, quoting *Wonder Bread*, 343 NLRB 55, 55 (2004). It has found deferral appropriate in instances where: (1) the dispute arose within the confines of a long and productive bargaining relationship; (2) there is no claim of employer animosity to the employees' exercise of protected statutory rights; (3) the CBA's arbitration provision envisions a broad range of disputes; (4) the arbitration clause clearly encompasses the dispute at issue; (5) the employer indicates a willingness to utilize arbitration to resolve the dispute; and (6) the dispute is eminently well suited to such resolution. *Id.*; *United Technologies Corp.*, 268 NLRB at 558. See also *San Juan Bautista Medical Center*, 356 NLRB 736 (2011).

Some, but not all, of the applicable factors are present in this case. The parties have a long collective-bargaining history and, for the most part, have worked out most of their disagreements through collective bargaining or the grievance procedure. Moreover, the CBA does cover a broad range of disputes and there is scant evidence of union animus during much of the collective-bargaining history. Most recently, however, the Company has exhibited unlawful conduct in several respects. First, it discriminatorily discharged Wilson when she sought admission to the bargaining unit as a substitute employee. Secondly, the Company coercively questioned unit employees by compelling them to respond to a survey that sought to elicit communications with their labor representative. Thirdly, the Company has not indicated a willingness to engage in arbitration, including waiving time limitations or other objections. Fourth, this case includes charges alleging the failure to timely respond to information requests. In such instances, where a case involves issues of statutory policy other than interpretation of the contract, the Board will not defer to an arbitrator. *Advanced Architectural Metals, Inc.*, 347 NLRB 1279 (2006); *Marion Power Shovel*, 230 NLRB 576, 577578 (1977).

As to the last factor, there are several reasons why the history between the parties on the classification issue involving substitute employees is not one eminently well suited for arbitration. First, deferral to arbitration is not appropriate when contract provisions involved in a dispute are clear, unambiguous and do not present problems requiring the special competence of an arbitrator. *University Moving & Storage, Inc.*, 350 NLRB 6, 25 (2007). Here, there is no ambiguity as to how the CBA

<sup>116</sup> 29 U.S.C. § 160(b).

<sup>117</sup> The Company's witnesses testified about the consistency of the 2.5 FTE compositions of its classrooms. Since FTE makes no distinction between substitute hours, aide hours, or teacher hours, the fact that the FTE for staffing has remained constant proves nothing.

defines substitute employees, but rather, an evidentiary quagmire as to the deployment of employees hired as substitute teachers and van drivers over the past several years. Second, an arbitrator's interpretation of the CBA to determine the obvious—that the Company is entitled to hire substitute employees—would not resolve the issue arising from their subsequent misclassification. *Servomation Corp.*, 271 NLRB 1112 (1984) (deferral inappropriate where respondent's contractual rights would not “necessarily resolve the merits of the unfair labor practice alleged in the complaint.”)

Lastly, and most tellingly, the related issue involving the Company's elimination of teachers' aides went to arbitration in 2003. After receiving an adverse decision requiring reinstatement of teachers' aides, the Company rejected the arbitrator's interpretations of the CBA and refrained from posting any further openings for that unit position. Instead, the Company resorted to the hiring of part-time teachers and, approximately 6 years later, began to use substitutes to fill part-time teacher vacancies on a regular basis in excess of 10 hours per week. There is no reason to expect that the Company, 10 years later, would accept an arbitrator's ruling resolving the unfair labor practice charges and interpretation of the CBA with respect to the classification and utilization of substitutes. *Jos. Schlitz Brewing Co.*, 175 NLRB 141, 142 (1969). Under the circumstances, deferral is inappropriate.

#### IV. INFORMATION REQUESTS

The General Counsel alleges that the Company unreasonably delayed on four occasions in providing information requested under the CBA. The Company denies the allegations, insisting that it provided all of the information to which the Union was entitled in as timely a fashion as circumstances reasonably allowed.

It is well established that information pertaining to employees in the bargaining unit is presumptively relevant. *Disneyland Park*, 350 NLRB 1256, 1257 (2007). When information pertains to nonbargaining unit matters, the burden to show relevance is “not exceptionally heavy.” *Alcan Rolled Products*, 358 NLRB 37, 40 (2012). See also, *National Grid USA Service Co.*, 348 NLRB 1235, 1242 (2006). An employer is required to furnish grievance related information to the union so the latter can determine whether to pursue the grievance to arbitration, *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).

##### A. The March 24 and July 7 Requests

The March 24 and July 7 information requests dealt with application of the CBA to van drivers and custodial support staff, as well as a potential grievance by a laid-off custodial employee, and were not disputed to be relevant.

The Union's March 24 information request, however, was never received by the Company. The request was sent on June 2, 2011, but due to the destruction of the Company's administrative facilities, Guenette was not able to access her emails and read the request until a few days later. Facing massive recovery and operational obstacles, however, Guenette contacted Patenaude, the Union Local's president, who appears to have acquiesced to the Company's request for more time. Guenette could have elaborated more about that conversation.

On the other hand, Patenaude, who was present during part of the trial, was not called to dispute her testimony; nor did Balenger testify to the contrary.

The Union's July 7 information request was responded to on July 29, approximately 3 weeks or 16 business days later with one name on it—the name of the laid-off custodian. During this period of time, the Company still lacked an administrative facility and its human resources operations were overwhelmed.

Under the circumstances, the Company did not unreasonably delay in responding to the Union's July 7 information request. The Union insists that the Company's response was incomplete or lacked good faith because it omitted information about Shaun Guenette, who an employee observed performing tasks previously handled by Garner, the laid-off custodian. That may be true. The fact is, however, that the Company responded to the information request, which led to the Union communicating with the Company about work being performed by Shaun Guenette, and Garner was reinstated.

Information responsive to the March 24 request, however, was not provided to the Union until November 30, nearly 6 months later. In determining whether an employer has unlawfully delayed responding to an information request, the Board requires a good-faith effort under all of the circumstances, which includes the complexity and extent of information sought, its availability and the difficulty in retrieving it. *West Penn Power Co.*, 339 NLRB 585, 587 (2003), *enfd.* in pertinent part 349 F.3d 233 (4th Cir. 2005).

While there is no doubt that the Company was overwhelmed during the weeks that followed the July 7 request, the months that followed present a different picture. The Company did not reach out for additional time to respond, essentially ignoring the nature of its collective-bargaining relationship with the Union and going about other essential business. There is no doubt that it was a challenging period for the Company. However, record is devoid of evidence that the requested information was so complex and voluminous or that the Company was so tied up with other essential business that it could not have carved out time to respond to the information request. Under the circumstances, the Company unreasonably delayed in responding to the June 2 information request in violation of Section 8(a)(5).

##### B. The December 14 and 23 Requests

The Company responded to two information requests, dated December 14 and 23, 2011, on January 12, 2012. The information included attendance and time records, but was accompanied by a request for clarification regarding staff records and an explanation as to the relevancy of each request. The Union responded on February 6 by identifying specific personnel records and requesting production of the entire personnel files of three individuals. The Company contends that the Union's boilerplate response did not narrow the otherwise burdensome request, but contends that the requested documents were sought in order to determine whether employees were misclassified. It also notes that this request, one of 10 submitted by the Union in January and February 2012, amounts to harassment.

The Company is obligated “to provide information that is needed by the bargaining representative for the proper perfor-

mance of its duties.” *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–443 (1967). However, the duty to furnish requested information is not defined in terms of a per se rule, but rather, a reasonable good-faith effort to respond to the request as promptly as circumstances allow. *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993); *E. I. Du Pont & Co.*, 291 NLRB 759 fn. 1 (1988). Information pertaining to employees within the bargaining unit is “presumptively relevant,” but information regarding employees outside the bargaining unit is not. *Acme*, 385 U.S. at 435-436; *Postal Service*, 332 NLRB 635 (2000). In the case of nonbargaining unit members, the Union has the burden of proof of demonstrating why it is entitled to the requested information. *Honda of Hayward*, 314 NLRB 443, 455 (1994).

I agree with the Company that, under the circumstances, it was unreasonable for the Union to simply wait a mere two weeks before filing a charge, especially since the Company was cooperating and attempting to provide relevant information. See *Albertson’s Inc.*, 351 NLRB 254, 254–256 (2007) (2-month delay in responding to union’s request for information not unreasonable). Moreover, the information requested related directly to charge in Case 01–CA–064951 filed on September 21, 2011. As such, the request was in the nature of pretrial discovery, which is not authorized under Board rules. *Saginaw Control & Engineering, Inc.*, 339 NLRB 541, 544 (2003).

The personnel files of nonbargaining unit employees include documents that are not relevant to the Union’s role as bargaining representative. I agree with the Company that the only relevant documents are those that can be used to determine if a substitute or temporary employee has met the criteria listed in section 6.2(b) of the CBA to become a bargaining unit member. In balancing the needs of the Union with the confidentiality interests of nonbargaining unit members, I fail to see how documents such as evaluations, disciplinary records, and medical records relate to the subject of whether a substitute employee meets the criteria for inclusion in the bargaining unit. *Alcan*, supra at 12–14; *Detroit Newspaper Agency*, 317 NLRB 1071, 1073 (1995). Redacted forms containing wages and benefits information, as well as site assignments, on the other hand, are relevant to the classification issues that the parties were discussing during that period.

Under the circumstances, the Company satisfied its duty to provide the information requested. See *Day Automotive Group*, 348 NLRB 1257, 1263 (2006) (employer did not violate Section 8(a)(5) where it provided the union with the requested information and the union did not renew the information request or identify topics about which it needed more information).

#### V. WILSON’S TERMINATION

The General Counsel alleges that the Company violated Section 8(a)(3) by reducing Dorothy Wilson’s work hours and subsequently terminating her because she sought, as a substitute, to be classified into the bargaining unit. The Company denies that allegation, insisting that Wilson was discharged because of a pattern of continuing violations of company policies and laws, and the resulting concern for the safety of the children she transported. The Company contends that, as a

substitute employee, Wilson was not subject to the CBA or progressive discipline, was advised several times about performance related issues and reminded of applicable regulations. The Company also denies that Wilson’s supervisor, as the one who allegedly spurred the adverse action, was aware of her bargaining unit status.

In order to establish that Wilson was discriminatorily discharged, the General Counsel needed to prove, by preponderance of the evidence, that protected conduct was a motivating factor in the Company’s decision. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The elements of an 8(a)(3) violation are established by demonstrating that the employee engaged in protected concerted activity, the company knew of the activity and harbored animus against the protected activity. *United Rentals*, 350 NLRB 951 (2007). If the evidence produced by the employer is found to be pretextual, that ends the inquiry. *Golden State Foods Corp.*, 340 NLRB 382 (2003); *Frank Black Mechanical Services*, 271 NLRB 1302 (1984); *Limestone Apparel Corp.*, 225 NLRB 722 (1981), enfd. mem. 705 F.2d 799 (6th Cir. 1982). If not, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same adverse action in the absence of the protected activity. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004). Absent a showing of antiunion motivation, an employer may discharge an employee for good reason, a bad reason, or no reason at all without violating the Act. *Clothing Workers v. NLRB (AMF, Inc.)*, 564 F.2d 434, 440 (D.C. Cir. 1977).

Relevant evidence includes the timing of the employer’s action, pretextual motives, inconsistent treatment of employees and shifting explanations provided by the employer. *Flour Daniel, Inc.*, 311 NLRB 498 (1993); *Best Plumbing Supply*, 310 NLRB 143 (1993). Inferences of animus and discriminatory motivation may be warranted where there is evidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the alleged discriminatee was fired and disparate treatment of the discharged employees. *Banta Catalog Group*, 342 NLRB 1311 (2004); *Nortech Waste*, 336 NLRB 554 (2001); *Bourne Manor Extended Health Care Facility*, 332 NLRB 72 (2000); *L.S.F. Transportation, Inc.*, 330 NLRB 1054 (2000).

With respect to union animus, there is scant evidence of the Company disciplining employees for engaging in protected concerted conduct. However, the timing of the adverse action strongly indicates circumstantial evidence of antiunion animus. *Adco Electric*, 307 NLRB 1113, 1123 (1992); *NLRB v. Future Ambuelle, Inc.*, 903 F.2d 140, 143–144 (2d Cir. 1990). Wilson engaged in protected concerted conduct by submitting a union authorization card to the Company. The Company, however, considered her a substitute employee who was not eligible for membership in the bargaining unit. The suspicious circumstances that followed, including the timing, inconsistent explanations by Buijnarowski and lack of documentation for the alleged circumstances leading to the decision to terminate, strongly suggest that Guenette was not pleased by Wilson’s effort to gain admission to the bargaining unit.

The Company's decision to terminate Wilson is suspicious from the outset based on the timing—the same day that Guenette learned of Wilson's attempt to join the Union. It is notable that, with contention increasing between the parties over the eligibility of substitute employees to join the Union, Wilson is the only substitute to make such an individual request in 2011. Equally as troublesome is the assertion that Buijnarowski made the decision to terminate Wilson without documentary evidence and without discussing it with Guenette and/or Tremblay. The record lacks credible evidence as to how the decision to terminate Wilson fell within the Company's progressive disciplinary process. Lastly, Buijnarowski's wildly inconsistent testimony and backdated reports of his discussions with and observations of Wilson, coupled with an additional 3-week observation period—after the decision to terminate Wilson—smacks of an attempt to generate additional evidence to justify her termination.

There is no doubt that Wilson committed several safety infractions prior to March 21 and that her supervisor, Buijnarowski, spoke to her about several of those incidents. However, the Company had a disciplinary process in place that required documentation of counseling and warnings.<sup>118</sup> Buijnarowski never counseled, much less warned, Wilson about her performance prior to March 21. By that day, all three key supervisors—Guenette, Tremblay, and Buijnarowski—knew of Wilson's request to be classified as a bargaining unit employee. Under the circumstances, the Company discharged Wilson for discriminatory reasons in violation of Section 8(a)(3) and (1).

Given the finding that Wilson's discharge was motivated by discriminatory reasons, the General Counsel's additional theory as to the elimination of her afternoon shift work becomes superfluous. Regardless of how the Company planned to deploy newly hired substitute drivers Noella Rosa and Lamont. Howard, the fact is that Wilson's afternoon shift disappeared after Buijnarowski recommended her discharge on March 21.

#### CONCLUSIONS OF LAW

1. By installing surveillance cameras in Company vans and changing vacation and sick leave policy without giving the Union notice and an opportunity to bargain, the Company engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.

2. By compelling employees to disclose in a questionnaire their communications with their labor representative regarding their compliance with the Company's seatbelt policy, the Company engaged in unlawful interrogation in violation of Section 8(a)(1) of the Act.

3. By unreasonably delaying in providing information in response to the Union's requests of June 2 until November 30, 2011, the Company failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining rep-

<sup>118</sup> There is absence of credible evidence to support the Company's contention that its progressive disciplinary policy did not apply to substitute and temporary employees.

resentative 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.

4. By 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 regularly more than 10 hours per week, the Company 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.

5. By discharging Dorothy Wilson on April 10, 2012, because she signed a union authorization card and sought admission to the bargaining unit, the Company engaged in an unfair labor practice in violation of Section 8(a)(3) and (1).

6. The aforementioned unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act.

#### REMEDY

Having found that the Company has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Company, having discriminatorily discharged Dorothy Wilson, must offer her reinstatement and make her whole for any loss of earnings and other benefits. Moreover, the Company, having failed to apply the contract's provisions to classroom staff and van drivers hired since March 21, 2011, as substitute employees who regularly worked more than 10 hours per week, must make said employees whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

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

The Company shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Company shall also compensate Wilson and the affected classroom staff and van drivers for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB 518 (2012).

[Recommended Order omitted from publication.]