UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

COLUMBIA COLLEGE CHICAGO	
and	**Case 13-CA-165872**
TANYA HARASYM, et al., Individuals	
and	**Case 13-CB-202023**
PART-TIME FACULTY ASSOCIATION AT COLUMBIA COLLEGE	**Case 13-CB-202035**
and	
TANYA HARASYM, et al., Individuals	**Case 13-CB-165873**

RESPONDENT UNION'S POST-TRIAL BRIEF

Introduction and Summary of the Argument

These four consolidated charges allege that the Union violated Sections 8(b)(1)(A); 8(b)(2) and 8(b)(3) of the Act. *See* Amended Complaint ¶¶ VIII(a)-(d). As charged in the Amended Complaint, the Union allegedly violated 8(b)(1)(A) by supposedly:

- Refusing to recognize FTST employees as within its unit. ¶VI(a)(i);
- Requesting that the Employer not treat FTST employees as within its unit. ¶VI(a)(ii);
- Refusing to process grievances filed by the FTST employees. ¶VI(b);
- Pursued grievances and arbitrations seeking to require the Employer to treat FTST employees as excluded from its unit. ¶¶VI(c)-(h); and
- Telling charging party Clint Vaupel that FTST employees were excluded from its unit. ¶VI(i).

Amended Complaint ¶¶VI(k); VIII(a).

Alleged violations of Section 8(b)(1(A) are handled under the standard for whether a union breached its duty of fair representation, i.e., whether its "conduct toward a unit employee is arbitrary, discriminatory, or in bad faith." *SPFPA*, 360 N.L.R.B. No. 57 (2014).

But here the Union acted solely on the basis that their contract, the undisputed past practice under that contract, and an arbitration interpreting that contract, all excluded the FTST employees from their unit. That position was also taken to protect the work assignments and seniority of the workers that were unequivocally recognized within its unit – just the type of action that is never found to be "arbitrary, discriminatory or in bad faith." Nor should the Regional Directors statements in dismissing the FTST election petition that they are "already in the unit" be controlling as that was a (wrong) contract interpretation and *not* an exercise of authority to certify a bargaining unit. *Part-Time Faculty Ass'n v. Columbia Coll. Chi*., 2017 U.S. Dist. LEXIS 185806, *19.

As charged in the Amended Complaint, the Union allegedly violated 8(b)(2) by supposedly:

- Requesting that the Employer not treat FTST employees as within its unit. ¶VI(a)(ii); and
- Refusing to process grievances filed by the FTST employees. ¶VI(b);

Amended Complaint ¶¶VI(k); VIII(b).

Alleged violations of Section 8(b)(2) are handled under the *Wright Line* standard. "Under the first step of the *Wright Line* framework, the General Counsel of the Board must show that the employee or union member's political activity was a 'motivating factor' in the employer or union's adverse action against that individual." *NLRB v. Teamsters "General" Local Union No. 200*, 723 F.3d 778, 787 (7th Cir. 2013); s*ee Wright Line*, 251 N.L.R.B. 1083, 1090-91 (NLRB 1980) (discussing motivating factor and shifting burden of proof), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). Under the second step in that analysis "the burden shifts to [the Union] to show that the same outcome would have occurred even in the absence of the protected conduct.'" *NLRB v. Teamsters "General" Local Union No. 200*, 723 F.3d 788.

But in this case, the same analysis showing that P-fac did not breach its duty of fair representation shows that it did not violate Section 8(b)(2). But applying *Wright Line* directly, the General Counsel failed at the hearing to introduce any evidence that any of the charging parties' "political activity" motivated P-fac to treat them as excluded from its unit. And under the second step, P-fac's good faith position on the meaning of its contractual recognition clause, interpreted to benefit its existing members, precludes a finding that it violated Section 8(b)(2).

As charged in the Amended Complaint, the Union allegedly violated 8(b)(3) by supposedly:

- Seeking to confirm an arbitration award. ¶¶VI(e)-(f);
- Seeking to compel arbitration of grievances subject to a *Collyer* deferral letter. ¶¶ (VI)(g)-(h):
- Telling charging party Clint Vaupel that FTST employees were excluded from its unit. ¶VI(i); and
- Determining that FTST employees are excluded from its unit "without considering whether any such individuals meet" its unit description. ¶VI(j).

Amended Complaint ¶VI(l); VIII(c).

To show a violation of Section 8(b)(3), the General Counsel must establish that P-fac refused to bargain in good faith, e.g., by demanding to bargain over non-mandatory subjects of bargaining.

But again, there is no evidence to show that P-fac violated Section 8(b)(3). It did not unilaterally change any working conditions (only the employer can do that). It did not demand to bargain to impasse over a non-mandatory subject of bargaining. What it did do was: (1) seek to compel arbitration in order to receive a contract interpretation of disputes that *the Labor Board itself* had deferred to arbitration under its *Collyer Wire* decision; (2) seek to confirm an arbitration award and its accompanying contract interpretation; and (3) clearly communicate to Clint Vaupel that because of the arbitration award, he was considered excluded from the

contractually defined unit. And there is no evidence that the Union acted in an arbitrary manner in determining FTST employees were excluded from its unit – an act that would not equate to "bad faith bargaining" even if it did happen.

Additionally, P-fac has raised affirmative matters that also preclude a finding against it.[1] *First*, the charges are time barred. *Ohio & Vicinity Regional Council of Carpenters*, 344 NLRB 366 (2005)(enforcing six-month statute of limitations for unfair labor practice charges); *NLRB v. Jerry Durham Drywall*, 974 F.2d 1000 (8th Cir. 1992)(Where there is notice of a "clear and unequivocal repudiation" of an alleged statutory obligation, "the continuing violation theory no longer applies and a party is required to file its unfair labor practice charge within six months...[.]").

Second, the premise that the Regional Director found that the FTST employees are in P-fac's unit when he dismissed the FTST election petition is false. *See* Answer to Amended Complaint ¶(V)(c).; *Part-Time Faculty Ass'n v. Columbia Coll. Chi*., 2017 U.S. Dist. LEXIS 185806, *19(holding that Regional Director was engaged in contract interpretation). Relatedly, the decision was wrong, an issue which P-fac preserves for any ultimate enforcement proceedings. P-fac will not attempt to explain all the bases for challenging the decision here, as were previously argued in 13-RC-146452 as the ALJ refused to allow any evidence on that point and refused to accept any offer of proof on that point. R. 44-46.[2]

Third, there is no evidence any FTST member lost a work assignment or was otherwise harmed as proximate result of any action by the Union. Historically the College and the College

[1] During the hearing, the General Counsel objected to the timeliness of these defenses. But as the ALJ correctly noted, any defense is timely raised if done so during the hearing. *McKeeson Drug Co.*, 257 NLRB 468 fn. 1 (1981).
[2] The Union will cite to the hearing transcript in the form "R. ___."

alone "defaulted" FTST employees into the "C Tier." That is, there was no adverse employment action that is fairly attributable to P-fac.

Finally, in the absence of a finding that P-fac brought suit to compel arbitrations in bad faith, it violates the First Amendment for the Government to pursue charges against the Union for petitioning it. *See* U.S. Const., Amend. I (protecting the right " to petition the government for a redress of grievances."); *see also BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002); *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U. S. 731, 747 (1983).

Summary of Key Facts

The Union has been the exclusive bargaining representative of all part-time faculty at the Employer (with certain exclusions including the FTST employees) since 1998. Answer to Amend. Compl. ¶ V(a). Through lawful, permissive bargaining, the Union and the College agreed to a contractually defined unit set out in Art. I of their collective bargaining agreement. GC Ex. 3, Art. I (Recognition Clause); *Hill-Rom Co. v. NLRB*, 957 F.2d 454, 457 (7th Cir. 1992)("There is no doubt that the scope of the employees' bargaining unit is a permissive subject of bargaining, regardless of whether the unit has previously been certified by the Board or voluntarily agreed upon by the parties.") That recognition clause – by its terms and by the parties' past practice of its application – excludes FTST employees. GC Ex. 3, Art. I; GC 15 (arbitration award interpreting contract and holding "the Union and the Employer excluded the FTST employees from the bargaining unit as they defined in Article I of their Agreement."); RU Ex. 5 (letter from Employer's CEO stating FTST are excluded from unit).

Furthermore, everyone has known – for years – that the FTST employees were excluded from the P-fac unit. Terence Smith – the Employer's own special counsel for labor relations – testified that the first time they were treated as in the unit was August 30, 2016. R. 130. Smith

further testified that the College – and not P-fac – unilaterally defaulted the FTST employees into the lowest seniority tier and did not allow them to accrue or use any seniority from courses they taught. R. 133-34, 136.

Even the FTST employees like Clint Vaupel knew this as far back as 2013, as he testified on cross examination:

> Q: So as back in 2013, 2014 and again in 2015, the FTST knew that they were excluded from the PFAC union; correct?
>
> **A: That was our understanding.**

R. 258; *see also* R. 243-44 (Vaupel saw letter from Employer CEO Kwang-Wu Kim confirming FTST employees were excluded from the P-fac unit in 2014); R. 228 (knowledge of exclusion in 2013 and 2014).

And Vaupel testified at length of his association with the other FTST such that the ALJ should credit his statement that all the FTST, and not just him personally, understood this to be the case. *See*, R. 196 (Vaupel associated with other FTST through their own union, US of CC); R. 229-30 (details of Vaupel's association with other FTST including Tanya Harasym, Lauren Targ Emily Page and others).

Furthermore, there was no evidence that the FTST were denied courses as a result of P-fac's actions. Smith and Vaupel both testified that the Employer, not the Union, makes course assignment decisions. R. 132 (Smith testifying the College makes the decision); R. 237-38 (Vaupel testifying that a full-time faculty member makes the decision). Nor did the FTST employees have continuing employment with the College as faculty. According to Vaupel's testimony, he applied each semester. R. 234, 236. And again, Vaupel could not identify any error in course assignments that was made to his – or anyone else's – detriment. R. 238-42. In short, there was no adverse employer action for purposes of Section 8(b)(2).

After the Regional Director dismissed the FTST employees' election petition in 13-RC-146452, P-fac worked with the Employer and the Region to determine how to implement the decision, while at the same time reserving its rights by filing an appeal. *See* R. 76-78 (Smith detailing efforts to interpret dismissal). This was of particular concern to P-fac, as the law is clear that when employees are added to a unit and the existing contract was not negotiated with them in mind, the terms of their entry into the unit must be negotiated. *See, e.g., Federal-Mogul Corp.*, 209 NLRB 343 (1974). And that is what P-fac tried to do, until the Employer's unilateral actions led them to submit a grievance for arbitration over that issue, which the Employer voluntarily agreed to. GC Ex. 14 (grievance); GC Ex. 15 (arbitration award).

Of course prior to that dismissal, there was no basis in law or fact for P-fac to owe any duty of fair representation to the FTST employees, as detailed above. And as shown immediately *supra*, at no time between the dismissal order and the January 2017 arbitration award did P-fac take any concrete action denying the unit status of FTST while it tried to work out difficult legal and factual issues. It was only after a final and binding arbitration award was entered that P-fac again outright refused to recognize FTST employees as having status in its unit.

Significantly, the Labor Board itself gave comfort to P-fac's reliance on that arbitration award. First, the Labor Board indicated that the dismissal in 13-RC-146452 was not final. *See Part-Time Faculty Ass'n v. Columbia Coll. Chi*., 2017 U.S. Dist. LEXIS 185806, fn 10 (Explaining that on March 15, 2017, the Labor Board – by its counsel – stated that "the representation issue 'has not been fully determined by the Board.'"; *see also* RU Ex. 1 (Labor Board explaining that even in light of non-relitigation doctrine, the Labor Board retains authority to determine any representation issue presented to it). Second, after intervening in the suit to enforce the arbitration award, and in the course of the briefing on whether the award should be

enforced or vacated, the Labor Board told P-fac and a federal court that it "*does not take a position on the merits of the instant case*." RU Ex. 2 (emphasis supplied).

While the arbitration award was still in effect (i.e., final and binding, but neither confirmed nor vacated), and in light of the Labor Board's position as to that arbitration, P-fac followed the award and did not recognize FTST employees as in its unit.

Finally, overlapping with the litigation over the arbitration award, P-fac moved to compel arbitration of a number of grievances. Each of those grievances was subject to the Labor Board's *Collyer* deferral doctrine, under which it holds open an unfair labor practice charge until a related contractual dispute is resolved by arbitration. RU Ex. 3 (deferral letter); GC Ex. 21 (Complaint); GC Ex. 22 (Docket Sheet); R. 33 (Persoon explaining the markings show that the suit was to compel only the deferred charges. The ALJ can also take notice that P-fac has since dismissed this case as part of a settlement agreement with the Employer.

Argument

I. P-fac did not unlawfully refuse to acknowledge any of the charging parties as in the unit it exclusively represents.

A fundamental premise of the General Counsel's case is that in dismissing the FTST employee's election petition in 13-RC-146452, the Regional Director "issued a decision...finding...that [FTST employees] are members of the [P-fac] unit." Amended Complaint, ¶ V(c). P-fac denies that basis. Answer to Amended Complaint, ¶ V(c).

Significantly, it is clear that what the Regional Director did was dismiss an election petition. The phrasing that the General Counsel and charging parties focus on such as that, "...employees in the petitioned-for group [FTST] are already included in the P-fac unit in their capacity as part-time faculty and covered by the P-fac contract" was not an exercise of statutory

authority, but was only an interpretation of P-fac's contractual recognition clause. This was clearly established in earlier litigation with the Labor Board, represented by the General Counsel, in *Part-Time Faculty Ass'n v. Columbia Coll. Chi*., 2017 U.S. Dist. LEXIS 185806. In that case, the district court clearly and repeatedly held that the Regional Director was making a contract interpretation when he made comments regarding the unit status of the FTST employees:

> …the Director, like the arbitrator, concluded that the CBA was ambiguously silent on the subject of FTST representation and therefore relied, as did the arbitrator, on factors such as the parties' past course of dealing.

Part-Time Faculty Ass'n v. Columbia Coll. Chi., 2017 U.S. Dist. LEXIS 185806, *19.

> PFAC's premise that the arbitrator's decision rested on a foundation of contract interpretation while the Director's did not is simply fiction.

Id.

The Regional Director was *not* "certifying" a unit. He was *not* "clarifying" a unit as allowed under the Labor Board's own rules. He did *not* order an election. He was *not* interpreting the National Labor Relations Act or any agency rule in making statements regarding FTST unit status. Nor did he change a single word of the P-fac contractual recognition clause which had long excluded the FTST employees. *See, e.g.,* R. 228 (FTST knew of exclusion since 2013); RU Ex. 5, R. 48, 49 (College's CEO communicated exclusion to FTST); R. 130 (parties treated FTST as excluded until the College changed course on August 30, 2016). Even in this suit, the first amended complaint had to be filed because the General Counsel originally claimed P-fac failed to represent the FTST employees *on the basis of a different recognition clause that expressly included them* (that language was completely fabricated and has never existed).

As such, it is clear this entire exercise – from the petition for an election to these proceedings – has been designed to change a contract term governing a permissive subject of

bargaining. But the Labor Board – if it seeks to accomplish that – can only do so through a unit clarification or a resolution of a 10(k) hearing. Otherwise, it cannot dictate contract terms. *See, e.g., H. K. Porter Co. v. NLRB*, 397 U.S. 99, 102-109 (1970). But even recourse to a unit clarification would be suspect under the Labor Board's own rules, as recognized by leading Supreme Court precedent:

> As noted, the Board clarifies certificates where a certified union seeks to represent additional employees; but it will not entertain a motion to clarify a certificate where the union merely seeks additional work for employees already within its unit.

Carey v. Westinghouse Electric Corp., 375 U.S. 261, 268-69 (1964).

Here, P-fac (the "certified union") did *not* seek to represent additional employees (FTST). Of course, the election petition was an effort by the FTST's *own union* (US of CC) to "seek[] additional work employees already within its unit" (the FTST). Therefore, resort to a unit clarification would have been suspect, which explains the motivation for the Regional Director to attempt to accomplish a unit clarification through a contract interpretation under the guise of resolving an election petition. But that does not legitimize the out-of-place statements regarding unit placement of FTST employees.

Additionally, even if the Regional Director did broadly place FTST employees in the P-fac unit, there was no determination of who those employees were, and what the terms of their ascension into the unit would be. But those negotiations are required, as was noted in *Federal Mogul*, which involved the addition to a unit a group of employees who had been treated as excluded from the unit before a representation election placed them in the unit.

> We do not perceive either legal or practical justification for permitting either party to escape its normal bargaining obligation upon the theory that this newly added group must somehow be automatically bound to terms of a contract which, by its very terms, excluded them. Such a determination would appear to be at

> odds with the Supreme Court's holding in *H. K. Porter Co., Inc.* v. *N.L.R.B.* In *H. K. Porter,* the Supreme Court noted that "while the Board does have power . . . to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement." ***Were the Board to require unilateral application of the existing contract to the setup men we would, in effect, be compelling both parties to agree to specific contractual provisions in clear violation of the H. K. Porter doctrine.*** We understand the teaching of that case to be that we have no statutory authority here to force on these employees and their Union, as well as the Employer, contractual responsibilities which neither party has ever had the opportunity to negotiate.

Federal Mogul, 209 NLRB 344 (emphasis supplied).

As part of the process mandated by *Federal Mogul*, the Union would have sought to negotiate seniority, and ensure that no persons were excluded from the unit on the basis that they were supervisors. This is in fact what led to the grievance the General Counsel now faults P-fac for winning and enforcing. GC Ex. 14 (Grievance)("By unilaterally adjusting and assigning seniority...of employees including so-called 'FTST,' and certain others including deans, former deans, [and other persons], the College [has breached the contract]."). *See also Part-Time Faculty Ass'n v. Columbia Coll. Chi*., 2017 U.S. Dist. LEXIS 185806, footnote 8 ("The parties disagree, for example, about whether the Director's Decision and Order requires treatment of FTST as new additions to the unit or grants them status (and therefore seniority) as members since the date the CBA came into effect. This was a central issue presented by PFAC's grievance....]").

As the Regional Director did not act within the scope of the National Labor Relations Act, as applied through the Labor Board's own rules, to place the FTST employees in the P-fac unit when he dismissed the FTST election petition, the ALJ should not find that P-fac violated the act on any basis that turns on FTST unit inclusion.

II. P-fac did not violate its duty of fair representation.

Notably, no one has ever determined what date the FTST employees such as Clint Vaupel allegedly entered the P-fac unit under the dismissal order in their election petition. *See Part-Time Faculty Ass'n v. Columbia Coll. Chi*., 2017 U.S. Dist. LEXIS 185806, *17 ("The Board's primary jurisdiction does not preclude arbitration of contractual grievances, and it can be assumed for purposes of this discussion that *PFAC had every right to file a grievance and pursue arbitration concerning CCC's application of seniority and other work assignment rules* to the members of PFAC. *PFAC's grievance and arbitration briefs appropriately presented the arbitration as involving work assignment, not representational, issues*...[.]")(emphasis supplied). The Labor Board is party to this ruling.

Nor did the record establish that P-fac arbitrarily ignored a meritorious grievance or dealt with a grievance in a perfunctory manner. There was probably no issue that P-fac dealt with in more detail over the last four years than the unit status of FTST employees. At each stage, it came to the determination that those employees were *not* in its unit. This determination was consistent with past practice – the College had always treated them as excluded, they never paid dues, and they were always "defaulted" to the lowest seniority tier. GC Ex. 3, Art. I; GC 15 (arbitration award interpreting contract and holding "the Union and the Employer excluded the FTST employees from the bargaining unit as they defined in Article I of their Agreement."); RU Ex. 5 (letter from Employer's CEO stating FTST are excluded from unit). And as charging party Clint Vaupel testified, the FTST knew in 2013, 2014, and 2015 that they were excluded from the P-fac unit:

> Q: So as back in 2013, 2014 and again in 2015, the FTST knew that they were excluded from the PFAC union; correct?
>
> **A: That was our understanding.**

R. 258; *see also* R. 243-44 (Vaupel saw letter from Employer CEO Kwang-Wu Kim confirming FTST employees were excluded from the P-fac unit in 2014); R. 228 (knowledge of exclusion in 2013 and 2014).

Furthermore, as shown by the one arbitration on this issue, it was reasonable to expect any arbitration that sought to interpret the recognition clause to include the FTST employees would fail.[3] As such, *at least until the dismissal of the representation petition*, there was no "meritorious" grievance.

Then, as explained above, during the period between the dismissal and the issuance of the arbitration award, P-fac took no overt acts to treat FTST as excluded from its unit, and in fact sought to bargain over the terms of their entry into the unit including their seniority as required by *Federal Mogul*, applying the binding Supreme Court precedent of *H.K. Porter*. *See* GC x. 14 (grievance) and *Part-Time Faculty Ass'n v. Columbia Coll. Chi*., 2017 U.S. Dist. LEXIS 185806 (describing permissible scope of grievance to determine entry into unit).

Then, after the award was issued P-fac justifiably relied on a final and binding labor arbitration that the Employer voluntarily submitted to. And it has already been held that P-fac did not seek to undermine the Regional Director's dismissal order by seeking arbitration:

> And here, it is pellucid that PFAC neither intended nor believe that it was submitting a representation issue to the arbitrator to resolve. Indeed, PFAC expressly disavowed any intention to challenge the NLRB's representation ruling in the arbitration in its arbitration briefing:
>
> > The Union is *not* using this arbitration as a collateral challenge to the Labor Board's ruling. It presented that challenge directly to the Board itself via a Petition for Review and awaits a ruling. So

[3] While that arbitration was vacated, it was not vacated on the basis that the contract interpretation of the recognition clause was incorrect.

> long as the current Decision and Order remains in effect (although not 'final') the Union will comply with it and fairly represent the FTST.

> As CCC accurately points out, PFAC's grievance claims are cast in terms focusing on the required method for making seniority determinations, not on determinations about who is eligible for representation by the bargaining unit. This can be seen most clearly in the third paragraph of the grievance, where PFAC refers expressly to the Director's order in noting that the FTST had not paid union dues and so were not entitled to seniority. This paragraph, expressly acknowledging the import of the Director's ruling that FTST are within the bargaining unit, plainly focuses not on any challenge to that ruling but on the concrete issues of how to implement that ruling in making seniority determinations. It reflects that PFAC might well have a legitimate grievance if CCC was assigning work on the basis of its own unilateral determinations about seniority within the bargaining unit; the court takes no position on that question other than to note that is entirely different than a "challenge to the Labor Board's ruling."

Part-Time Faculty Ass'n v. Columbia Coll. Chi., 2017 U.S. Dist. LEXIS 185806, *29-30.[4]

As noted above, when given the opportunity to make clear to P-fac that this lawsuit was against the National Labor Relations Act by supporting the Employer's motion to vacate, the Labor Board took no position on the merits. That act provided P-fac the comfort to proceed with the case, and the Labor Board cannot now change its tune.

As to the allegation that P-fac violated the Act by not including Mr. Vaupel in its contract negotiations, refusing him a seat on the bargaining team does not in-itself violate the Act. And there is literally zero evidence that P-fac has negotiated or tried to negotiate any term of its new contract that would violate its duty of fair representation.

[4] P-fac is appealing the district court's decision to vacate the arbitration on a number of grounds, but the ALJ can take note of the proceedings as they currently stand. By highlighting this, P-fac is not waiving any of the issues it has raised in that appeal.

To summarize: before the dismissal of the election petition, P-fac was within its rights to deny the FTST were in its unit. Between the dismissal and the arbitration award, P-fac took no acts to deny FTST unit inclusion. After the arbitration award, P-fac was justified in treating the FTST as excluded from its unit. To hold otherwise would be to ignore the high standard for a breach of the duty of fair representation, particularly where the denial of unit status to FTST worked to benefit the historic bargaining unit and promote the value of seniority and work jurisdiction.

III. No evidence was presented that any charging party suffered any harm as a proximate result of P-fac's actions.

At the hearing, not a single piece of evidence – no exhibit and no testimony – showed that any charging party or any FTST employee suffered a loss of any work – or any loss at all that was fairly attributable to any action by P-fac.[5] *See, e.g.,* R. 238-42 (Vaupel unable to identify errors in course assignments that harmed any FTST employee). As such, there was no adverse action and can be no violation of Section 8(b)(2).

IV. P-fac did not seek to "attempt to cause" the Employer to discriminate against FTST employees in order to encourage or discourage union membership.

This dispute has nothing to do with the charging employees' membership in P-fac. Instead, the only reason P-fac has ever relied on is that the FTST employees are not in its *unit*. It is critical to not conflate inclusion in the *unit* with inclusion in the *union.* Section 8(b)(2) addresses *union* membership, and actions that by discrimination would tend to encourage or discourage membership in a Union, in this case membership in P-fac.

[5] In fact, it appears that the FTST employees were freeloading off the terms of employment negotiated by P-fac without ever having contributed their fair share while flying under the radar and receiving unilateral assignments of courses from the College under the terms of the P-fac contract.

P-fac sought to enforce the undisputed contractual past practice of excluding FTST employees from the *unit*. It sought to enforce its own interpretation of its collective bargaining agreement -- that is why it repeatedly filed grievances, every semester, challenging course assignments that it believed violated its work preservation rights.

P-fac did so on the basis of a rational classification -- unit status. It did not do so on the basis of a classification that was irrelevant, invidious or unfair. And no evidence was adduced at trial to suggest that P-fac acted on any motive other than that FTST were excluded from its unit by virtue of practice (e.g., the 2015 letter from the College's CEO, Kwang-Wu Kim) and its contractual recognition clause. There is no evidence that by maintaining that FTST employees were not in its unit it was trying to "send a message" to employees that they must curry P-fac's favor to avoid mistreatment by the College. The only "message" sent was that P-fac will zealously advocate for the contractual rights of its members -- but such encouragement by providing good member services is insulated from liability: "[T]he union is a service agency that probably encourages membership whenever it does its job well. But...the only encouragement or discouragement of union membership banned by the Act is that which is "accomplished by discrimination." *Teamsters Local 357v. NLRB*, 365 U.S. 667, 675-76 (1961).

Once again, unions are given a wide range of reasonableness in representing their members as a whole. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). And just as an employer's business judgment is deferred to in the absence of discriminatory intent, so too is a union's "business judgment" deferred to in the course of administering its contract and making bargaining decisions – decisions that benefit the unit as a whole. In fact, the FTST employees – through their own union – sought to negotiate their entry into the P-fac unit on the basis that they would teach not more than one class a semester and have seniority limited. RU Ex. 3.

V. The charging parties acquiesced to their exclusion from the P-fac unit and the Complaint is untimely.

The FTST knew since 2013 that they were excluded from the P-fac unit. Clint Vaupel was clear on this point:

> Q: So as back in 2013, 2014 and again in 2015, the FTST knew that they were excluded from the PFAC union; correct?
>
> **A: That was our understanding.**

R. 258; *see also* R. 243-44 (Vaupel saw letter from Employer CEO Kwang-Wu Kim confirming FTST employees were excluded from the P-fac unit in 2014); R. 228 (knowledge of exclusion in 2013 and 2014).

Vaupel testified that through his ongoing association with other FTST, including through their own union (US of CC) that they all were knowledgeable about the issues with P-fac. *See also* CP Ex. 4 (detailing June 11, 2015, mailing from 55 FTST employees). On this record, the the ALJ should credit that all the FTST, and not just Vaupel personally, were aware of their exclusion. *See*, R. 196 (Vaupel associated with other FTST through their own union, US of CC); R. 229-30 (details of Vaupel's association with other FTST including Tanya Harasym, Lauren Targ Emily Page and others).

But under Section 10(b), all unfair labor practice charges must be filed within six months of the charging party becoming award of the violation (or from when they ought to have been aware). *Ohio & Vicinity Regional Council of Carpenters*, 344 NLRB 366 (2005)(enforcing six-month statute of limitations for unfair labor practice charges). And while the General Counsel will undoubtedly argue that this is a "continuing violation" and excepted from the 10(b) statute of limitations, where there is "clear and unequivocal repudiation" of an alleged statutory obligation, "the continuing violation theory no longer applies and a party is required to file its unfair labor practice charge within six months...[.]"). *NLRB v. Jerry Durham Drywall,* 974 F.2d

1000 (8th Cir. 1992). This record presents such a "clear and unequivocal repudiation" of the FTST's unit status dating to 2013. This is highlighted by the letter from the College's CEO in 2014. And to hold otherwise would work a real evil on labor relations by not only upsetting the foundation of all collective bargaining expectations, but even worse by holding a small, independent union financially liable for hewing to its established unit.

VI. The prosecution of the complaint violates the First Amendment.

There is no evidence that P-fac brought either federal lawsuit in bad faith. But that is what is required. *See* U.S. Const., Amend. I (protecting the right " to petition the government for a redress of grievances."); *see also BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002); *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U. S. 731, 747 (1983).

Here, P-fac sued to enforce an arbitration award. The Labor Board was a party, and it did not oppose enforcing the Award. That cannot be "bad faith."

Here also, P-fac sued to compel arbitration of claims *the Labor Board actually deferred to arbitration*. That cannot be bad faith.

Because neither of the suits were shown to have been brought in bad faith, the First Amendment and controlling Supreme Court precedent stand as a bar to prosecuting P-fac for bringing and maintaining them.

VII. P-fac did not bargain in bad faith.

It is unclear from the charging documents or the record, how exactly the General Counsel believes P-fac bargained in bad faith. There is no evidence that P-fac sought to bargain to impasse over a non-mandatory subject of bargaining. There is no evidence (nor could it plausibly be possible) that P-fac unilaterally changed a mandatory subject of bargaining without bargaining to impasse.

Most likely, the General Counsel thinks that by seeking to enforce an arbitration award that interpreted a permissive subject of bargaining, P-fac was in essence unilaterally changing that term. But that position would be a gross misunderstanding of what labor arbitration is. A labor arbitrator does nothing other than *interpret* a contract. They *interpret what the parties themselves agreed to.* An arbitration does not "change" a contract. An arbitration does not "change" any term of a contract. It simply tells the parties what they agreed to.

For that reason, nothing based on an arbitration award, a suit to compel arbitration, or a suit to enforce arbitration, can plausibly be suggested to be "bad faith bargaining."

Conclusion

Everyone has known since 2013 that the FTST employees were not in the P-fac Unit. Their own union tried to negotiate their entry for the sole purpose of stealing work from down-trodden adjunct faculty. The administrative process since then has been a farce, with one desired outcome. These claims are time-barred by years and the Labor Board should not radically upset labor relations in this way, or prosecute a Union for trying to arbitrate claims the Board itself deferred to arbitration. For all the reasons in this brief and as explored at trial, there can be no basis for finding P-fac violated the Act.

Respectfully submitted,

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Certificate of Service

The undersigned attorney hereby certifies that he caused copies of the foregoing brief to be served on the persons listed below by email on the date shown:

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