

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

COLUMBIA COLLEGE CHICAGO

and

TANYA HARASYM, et al., Individuals

and

**PART-TIME FACULTY ASSOCIATION AT
COLUMBIA COLLEGE**

and

TANYA HARASYM, et al., Individuals

Case 13-CA-165872

Case 13-CB-202023

Case 13-CB-202035

Case 13-CB-165873

**RESPONDENT UNION'S EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE DECISION¹**

¹ These Exceptions have been amended to conform to the July 24, 2018 Letter of the Associate Executive Secretary requiring (1) the insertion of a table of contents and table of authorities and (2) the removal of a sentence in which Respondent incorporated by reference its briefing in case 13-RC-146452. The Letter held that incorporation by reference violates the page limits set out in the Board's Rules and Regulations. Respondent now complies with the Letter, but in no way waives its right to preserve its arguments in case 13-RC-146452 for appellate review. Rather, Respondent explicitly preserves those arguments.

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Introduction

Now comes the Respondent Union, Part-Time Faculty Association at Columbia College (P-fac), by and through its attorney, and hereby files these exceptions to the ALJ Decision (ALJD) issued on May 24, 2018 in cases 13-CB-165873, 13-CB-202023, and 13-CB-202035. Based on the exceptions set forth herein, and the argument included herein, the Decision of the ALJ should be REVERSED and the Consolidated Complaint should be DISMISSED.

Background

P-fac has been the exclusive bargaining representative of all part-time faculty at the Employer (with certain exclusions) 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 full-time staff who sometimes teach part-time (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.”); Respondent Union (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. Tr. 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. Tr. 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.

Tr. 258; see also Tr. 243-44 (Vaupel saw letter from Employer CEO Kwang-Wu Kim confirming FTST employees were excluded from the P-fac unit in 2014); Tr. 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, Tr. 196 (Vaupel associated with other FTST through their own union, US of CC); Tr.. 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. Tr. 132 (Smith testifying the College makes the decision); Tr. 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. Tr. 234, 236. And again, Vaupel could not identify any error in course assignments that was made to his—or anyone else's—detriment. Tr. 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 Tr. 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 n.10 (explaining that on March 15, 2017, the NLRB by its counsel stated that "the representation issue 'has not been fully determined by the Board.'"; see also RU Ex. 1 (Deputy Assistant General Counsel explaining that even in light of non-relitigation doctrine, the 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); Tr. 33 (P-fac attorney Persoon explaining how 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.

Exceptions

1. The ALJ's entire decision in this case, and all the instant charges against the Union, depend on the Regional Director's August 30, 2016 Dismissal of a petition for representation in case 13-RC-146452. Administrative Law Judge Decision (ALJD) at 2. The instant proceedings represent the Board's first opportunity to rule directly on the Regional Director's decision in that case. The Board should rule that, contrary to the Regional Director's decision, full-time staff are excluded from the part-time faculty bargaining unit. Therefore the Consolidated Complaint should be dismissed.

These unfair labor practice charges arise from and relate to a representation case, 13-RC-146452. ALJD at 2. The issue in that case was whether FTST at Columbia College Chicago (the

College) should be included or excluded from a pre-existing bargaining unit composed exclusively of part-time faculty. *Id.* After the revocation of an initial dismissal in 13-RC-146452, Respondent P-fac took the position that FTST employees should *not* be included in the P-fac unit, and that the petition should be dismissed.

The Regional Director dismissed the petition on August 30, 2016. But his order of dismissal found that FTST employees *were* included in the P-fac unit. GC Ex. at 13-14. This finding substantially increased the size of the bargaining unit. It pumped up the bargaining unit over the objection of the exclusive bargaining representative, and did so with no secret ballot election to protect the rights of the FTST employees who were forced into the P-fac unit. The Regional Director's decision upset the expectations of the parties, undermined labor peace, and sparked nearly two years of costly and confusing litigation.

P-fac filed a timely request for review of the Regional Director's Dismissal with the Board. However, because P-fac requested relief from the Regional Director's new determination of the unit, but did not challenge his dismissal of the petition, the Board denied the request for review. The Board's entire order stated as follows:

The Intervenor's Request for Review of the Regional Director's Decision and Order is denied. We affirm the Regional Director's action in dismissing the petition as no party has argued that the petition should not have been dismissed. See *Williams-Sonoma Direct, Inc.*, 365 NLRB No. 13 (2017).

Columbia College Chicago, 2017 NLRB LEXIS 74 (N.L.R.B. February 14, 2017). Hence these exceptions to the ALJD represent the Board's first opportunity to address the *issues* underlying the Regional Director's *action* in dismissing the petition in case 13-RC-146452.

The Board should take this opportunity to reverse the Regional Director's finding in his Dismissal that FTST employees are included in the P-fac bargaining unit. Nothing prevents the

Board from addressing this issue of representation. For one thing, as set out above, in denying P-fac's earlier request for review the Board left open the possibility that it would revisit the Regional Director's *reasoning* if not his *actions*. The Board did so expressly by affirming only the Regional Director's "action," and impliedly by citing *Williams-Sonoma*, a case wherein the Board declined to adopt the reasoning of the Regional Director although it upheld his action. As the Board held in that case:

Our denial of the request for review "constitute[s] an affirmation of the regional director's action," i.e., the dismissal of the petition. Board's Rules and Regulations, Sec. 102.67(g). In denying the Petitioner's request for review, *we do not adopt the decision of the Regional Director as the Board's own decision.*

Williams-Sonoma Direct, Inc., 365 NLRB No. 13 (2017) at n.1 (emphasis added). Furthermore—as the just-cited portion of *Williams-Sonoma* makes clear—29 C.F.R. 102.67(g) binds only a "party" to stop it from "relitigating" a case in the interest of administrative economy. It does not somehow cabin the *Board's* plenary authority to address questions of representation under Section 9 of the Act.

P-fac expressly preserves all arguments it set forth in case 13-RC-146452, including in its Request for Review in that case. (Mindful of the Board's non-relitigation doctrine, P-fac will not attempt to repeat those arguments here, but would gladly do so if the Board requests briefing on the issue—as the Board would do in granting a request for review.)

For the reasons that P-fac set forth in litigating case 13-RC-146452, including P-fac's Request for Review, the Regional Director's finding that the FTST employees are included in the P-fac bargaining unit should be reversed.

Because the inclusion of FTST in the P-fac unit is a predicate of all the alleged unfair labor practices in the instant matter, the ALJD should be overruled and the Consolidated Complaint should be dismissed in its entirety.

2. The ALJ incorrectly found that in a March 12, 2015 written submission to the Region, P-fac averred that it represented the FTST employees that P-fac now maintains are properly excluded from the bargaining unit. Administrative Law Judge Decision (ALJD) at 6, 16; CP Ex. 2. The ALJ misconstrued P-fac's written submissions. Because all of the ALJ's findings of bad faith depend to some extent on this mistaken reading of a single written submission by P-fac, ALJD at 16, all the ALJ's findings of bad faith must be reversed.

The ALJ repeatedly misconstrued P-fac's legal position regarding the potential inclusion of full-time staff who sometimes teach part-time (FTST) in P-fac's bargaining unit. The ALJ treated P-fac as having switched positions: first asserting in a March 12, 2015 response to the Order to Show Cause in case 13-RC-146452 (CP Ex. 1) that it *was* the representative of the FTST, but then arguing ever since the revocation of the first dismissal of case 13-RC-146452 that it was *not* the representative of the FTST. See, e.g., ALJD at 6, 16, 18. But that is a fundamentally unsound reading of P-fac's March 12, 2015 brief.

P-fac's March 12, 2015 response to the Order to Show Cause was reproduced at CP Ex. 2, and it must be read in full to understand why the ALJ's reading of it is so wrong—indeed it appears that the ALJ read only the first three pages of the brief and then stopped. While the opening pages of P-fac's brief did recite that P-fac "is already the exclusive representative of *'all part-time faculty'* at the College" (CP Ex. 2 at 2) (emphasis in original), P-fac immediately went on to clarify that in P-fac's view *none* of the FTST qualified for membership in the bargaining

unit despite their part-time teaching duties. CP Ex. 2 at 4-9. In other words, P-fac argued that while *in theory* the FTST could be included in P-fac's bargaining unit, *in fact* none of them were.

The reason for this, P-fac stated, was the language of the CBA. The recognition clause limited the bargaining unit to "all part-time faculty members who have completed teaching at least one semester at Columbia College Chicago excluding . . . full-time staff members." CP Ex. 2 at 4-5. Because the FTST were *both* "full-time staff" *and* "part-time faculty," P-fac put forward a contract interpretation that would permit FTST to enter the P-fac unit while preserving the seniority of P-fac's then-current unit members.

To this end, P-fac argued that the tension between the CBA's inclusion of "all part-time faculty" and its exclusion of "full-time staff" meant that the only FTST covered by the unit description would be those who received courses according to the work assignment provisions of *the P-fac CBA*—and not according to the separate course assignment procedures typically used for full-time staff including FTST. See CP Ex. 2 at 4-5, 14. The result was that, while P-fac was at that time open to representing FTST as members of the P-fac the bargaining unit, FTST who wanted representation from P-fac would have to enter the P-fac bargaining unit with zero seniority—precisely because FTST employees had never had to go through the more onerous course assignment procedures that P-fac members did. See CP Ex. 2 at 6-7 (setting out how FTST employees had thus far been assigned courses through a privileged process unavailable to P-fac members).

Unsurprisingly, *no* FTST employees had been willing to give up their privileged course-assignment process in exchange for coverage under P-fac's recognition clause. CP Ex. 2 at 6 ("To P-fac's knowledge, none of the . . . 'FTST' have taken the membership steps outlined above.")

Hence P-fac's position in its March 12, 2015 was (again) that while in theory FTST *could* be included in the P-fac unit, in reality none of them *were*.

Yet contrary to any rational reading of P-fac's March 12, 2015 response to the Order to Show Cause, the ALJ found as follows: "Throughout its response to the show cause notice, PFAC repeatedly contended that it represented . . . any full-time staff who moonlighted as part-time faculty." ALJD at 6. The ALJ's findings of fact twist the meaning of P-fac's March 12, 2015 brief beyond recognition. Because the ALJ was interpreting a legal brief, her opinion as to its meaning is due no special deference.

Therefore the Board should reverse the ALJ's finding that P-fac admitted in its March 12, 2015 brief that FTST employees were included in the P-fac bargaining unit. The Board should accordingly reverse the ALJ's conclusions that P-fac violated 8(b)(1)(A), 8(b)(2), and 8(b)(3)—for all of those conclusions of law depend on her previous finding that P-fac's so-called "admission" in its March 12, 2015 brief was evidence of bad faith.

3. The ALJ incorrectly found that the FTST had an "appropriate" amount of accrued seniority in the P-fac unit as of the spring 2017 semester. ALJD at 6:31-33, citing Tr. 91. There is nothing in the record to support the ALJ's conclusion that FTST had an "appropriate" amount of accrued seniority in the P-fac unit.

There has never been a Board ruling, Regional Director decision, or agreement between Union and Employer as to when FTST started accruing seniority in the bargaining unit (assuming for the purpose of this exception, but not admitting, that the Regional Director's August 30, 2016 decision to include FTST in the unit will be upheld by the Board). Nor was the question of the "appropriate" amount of FTST seniority at issue in this litigation. Because the amount of seniority granted to FTST would diminish the seniority rights (and therefore the

contract rights) of other P-fac unit members, the issue cannot be determined without notice and an opportunity to be heard. See *Nord v. Griffin*, 86 F.2d 481 (7th Cir. 1936) (Due Process Clause prohibits the taking of contractual seniority rights without notice and an opportunity to be heard).

If, contrary to the arguments put forth by P-fac in case 13-RC-146452, the Board rules that FTST are in the P-fac unit, the proper remedy would be to order P-fac and the College to bargain in good faith over the terms of their accession. See *Federal-Mogul Corp.*, 209 NLRB 343 (1974).

4. The ALJ incorrectly found that the United States District Court "issued a judgment for the cost of the litigation" in case 17-CV-513 against P-fac. ALJD at 10, GC Ex. 41. The court only ordered P-fac to pay "costs," a legal term of art that does not include the entire cost of a litigation.

The ALJ appeared to put some stock in the fact that the district court had awarded costs against P-fac in case 17-CV-513. ALJD at 10. But in federal litigation costs are awarded to the prevailing party as a matter of course. Fed. R. Civ. P. 54(d)(1). An award of costs carries no special significance as to the merits of a litigation, unlike an award of sanctions under Fed. R. Civ. P. 11.

5. The ALJ incorrectly characterized P-fac's opposition to the Regional Director's reasoning in dismissing 13-RC-146452 as, "only an arbitrator can decide the representational issue in this case because it involves contract interpretation." ALJD at 12. The ALJ does not cite to the record for this statement, and indeed the record is totally devoid of any such statement by P-fac.

There is nothing in the record that could reasonably be construed as advancing such a legally dubious position. Indeed because the ALJ not only refused to allow P-fac to litigate appropriateness of the Regional Director's reasoning, but also refused to accept an offer of proof, there was precious little record in these ULP proceedings of P-fac's reasons for opposing the Regional Director's August 30, 2016 Dismissal in case 13-RC-146452. See Tr. 45:25-46:17. Nevertheless the Charging Parties *did* provide the ALJ a copy of P-fac's Request for Review of the Regional Director's Dismissal in case 13-RC-146452. See Ex. 8 to CPs' Reply in Support of Their Mot. in Limine. That Request for Review set out P-fac's substantive reasons for opposing the Regional Director's dismissal in great detail. As set out elsewhere in these exceptions, P-fac requests the Board to address .

6. The ALJ erred by refusing to hear evidence and argument regarding the proper scope of the unit, despite the Board previously taking the position that the ALJ would rule on the proper scope of the unit. Neither the Board nor the General Counsel should be able to take a position in this litigation that is contrary to the position taken in related case 17-CV-513 in the United States District Court for the Northern District of Illinois. See ALJD at 10-11; Order Granting CPs' Mot. in Limine; CPs' Mot. in Limine; Resp. P-fac's Opp. to CPs' Mot. in Limine; CGC Reply to CPs' Mot. in Limine.

In the U.S. District Court proceedings related to this matter, an attorney for the NLRB's Contempt, Compliance, and Special Litigation Branch (CCSLB) stated as follows in a motion hearing:

It continues to be the board's view that . . . it did not have the opportunity to pass on the conclusions that the regional director made in terms of the scope of the [P-fac] unit And so far as the board is concerned, the scope of the unit issue has been determined by the regional director, but it has not been fully determined by the board. . . . And as those cases [i.e. the

instant ULP charges] get litigated, presumably they will eventually reach the board, and the board at that time would have an opportunity to pass on the scope of the unit issue, which, of course, is what the arbitrator purported to resolve in his decision. . . . I guess I would push back on the premise that the board had an opportunity to decide this. By the time the case [13-RC-146452] reached the board, all parties agreed that the petition should be dismissed. . . . And so, therefore, the board didn't have the issues squarely before it on the unit scope issue.

Now, if the unfair labor practice case [i.e. the instant matter] proceeds, chances are the case could go to trial before an ALJ. The unit scope determination will be a predicate element of any of those four unfair labor practice charges [i.e. the instant charges]. And then the ALJ will have to pass on what the proper scope of the unit is, and that decision could eventually be appealed to the full board who would then have the issue squarely before it on what the scope of this unit is.

Ex. A to Respondent P-fac's Opp. to CPs' Motion in Limine, at 7-9. The NLRB attorney made this statement in order to secure a favorable ruling on its motions to intervene and to stay proceedings. *Id.* The NLRB obtained a benefit based on the above position it advanced because the district court granted the NLRB's motion to intervene (although it denied to motion to stay). *Id.* at 11:14-19. It is worth emphasizing that the NLRB's attorney *specifically represented to the court* that the scope of the unit would be at issue in the instant unfair labor practice proceedings, that the ALJ would have to rule on the issue, and that then the Board would finally have an opportunity to issue a final decision as to the scope of the P-fac unit.

Compare those representations with the arguments that Counsel for the General Counsel made to the ALJ in the instant matter:

[T]he Board's denial of the request for review [in case 13-RC-19791] was a final and binding determination that the Regional Director's August 30, 2016 Decision was *conclusive*, and they were members of the Unit.

CGC Brief to the ALJ at 8 (emphasis added). See also CGC Reply to CPs' Motion In Limine at 1 (arguing P-Fac must be "precluded from re-litigating the issue [of unit scope] in the instant unfair labor practice proceeding.").

Respondent P-fac argued repeatedly to the ALJ that the NLRB should not be able to take inconsistent positions to its own benefit in related litigation involving the same parties. See Respondent P-fac's Opp. to CPs' Motion In Limine at 1-2; Respondent Union's Post-Trial Brief at 7, 14. In other words, the NLRB should have been estopped from advancing one position to obtain a favorable ruling from a U.S. District Court, and then advancing the opposite position to obtain a favorable ruling from an ALJ. See *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001) (judicial estoppel serves to prevent parties—including state governments—from advancing inconsistent positions in related litigation); *United States v. Kattar*, 840 F.2d 118 at 130-31 (1st Cir. 1988) ("[T]he assertions made by the government in a formal prosecution (and, by analogy, a formal civil defense) establish the position of the United States and not merely the views of its agents who participate therein.").

The ALJ's opinion admits that the General Counsel changed positions throughout this litigation. See ALJD at 11, n.11. However, the ALJ ruled that the *Board* could not be bound by the statements that a CCSLB attorney made in district court. *Id.* Therefore, the ALJ held she was entitled to rule in favor of the General Counsel in finding that the Regional Director's unit determination in 13-RC-146452 was final and not subject to litigation before her—on the precise grounds that the NLRB, through its CCSLB attorney, had previously disavowed. See generally ALJD at 10-11.

There are multiple problems with the ALJ's analysis. First of all, the CCSLB attorney specifically represented himself to the district court as speaking *on behalf of the Board*. The NLRB can also take notice of its own internal organization and recognize that CCSLB "represents the Board *and* the General Counsel in all suits not statutorily based on Sections 10(e) and (f) of the Act." See "Contempt, Compliance and Special Litigation Branch," available at

<https://www.nlr.gov/cases-decisions/contempt-compliance-and-special-litigation-branch-briefs> (emphasis added). Hence it was simply wrong for the ALJ to conclude that a CCSLB attorney who explicitly spoke on behalf of the Board was only "representing the General Counsel" and not the Board. ALJD at 11, n.11. There was no record evidence to support that conclusion— instead the only evidence (i.e. the attorney's own statements to an Article III judge in a motion hearing) was that the attorney was speaking on behalf of, and intending to bind, the *Board*.

And while of course a single attorney cannot change the meaning of federal regulations nationwide, he can indeed bind the government as to positions it may take in particular litigation. *United States v. Yildiz*, 355 F.3d 80, 82 (2d Cir. 2004) ("the government's attorneys can bind the government with their in-court statements"). Hence the ALJ should have permitted P-fac to present evidence and argument on the proper scope of the unit.

But even if the ALJ were right, and the CCSLB attorney was representing only the General Counsel before the district court, that would not render the ALJ's decision proper. Instead it would merely present another problem: for how could the General Counsel rest its administrative prosecution of P-fac on grounds that the General Counsel had expressly and repeatedly disavowed in related litigation? In other words, even if the Board were somehow *unconstrained* by a legal position advanced by the CCSLB attorney before the district court, the General Counsel should still have been barred from arguing that the Regional Director's dismissal in 13-RC-146452 was final and indeed "conclusive." And that really amounts to the same thing, because the adjudicatory arm of the NLRB can only pass on legal theories that the General Counsel puts before it. See *NLRB v. UFCW Local 23*, 484 U.S. 112, 117-18 (1987) (Congress intended to separate prosecutorial and adjudicatory functions of the NLRB); *Soule*

Glass & Glazing Co. v. NLRB, 652 F.2d 1055, 1074 (1st Cir. 1981) (ALJ may not act as de facto prosecutor by departing from the case put forward by General Counsel).

Therefore, for the Board now to refuse to address the Regional Director's August 30, 2016 Dismissal on the merits would contradict the principles of substantive and procedural fairness called for by the Act and by the Due Process Clause.

Accordingly the Board should remand the case to the ALJ for litigation of the representational issue; alternatively, as set out in Exception 1 and in the interest of greater administrative economy, the Board should itself address the Regional Director's decision including FTST in the P-fac unit on the merits.

7. The ALJ erred by holding that the reasoning of the August 30, 2016 Regional Director's decision in case 13-RC-146452 represented the Board's final determination of the issues in that case. ALJD at 11 n.11, 15. The Board adopted only the Regional Director's action (i.e. the dismissal of the petition), not the Regional Director's reasoning (i.e. that FTST were already in the P-fac unit).

P-fac has rested much of its good-faith defense to these ULP proceedings on the fact that the Regional Director's reasoning in his August 30, 2016 dismissal of case 13-RC-146452 did *not* represent a final Board determination of the issues. Because the issue of FTST's inclusion in the P-fac unit is still awaiting final Board resolution, P-fac has *not* refused to follow a final Board decision regarding that issue, and hence its actions that gave rise to these ULP proceedings—the filing of grievances, the lawsuits to compel or enforce arbitration (see generally ALJD at 19-21)—were *not* taken in bad faith. See *Teamsters Local Union No. 206 & Safeway Inc.*, 2017 NLRB LEXIS 535, *90-*91 (N.L.R.B. October 31, 2017) (ALJ Decision)

(refusing to find the filing of grievances unlawful where the union was attempting to preserve CBA rights in the midst of a representational issue "that need[ed] future Board resolution").

As P-fac argued in its opposition to the Charging Parties' Motion in Limine, because there has been no final Board determination of the question whether FTST are in the P-fac unit or not, P-fac *had* to continue opposing the inclusion of FTST in litigation, or else waive the issue. The same holds true grievance handling and bargaining, where failure to grieve or maintain a bargaining position can constitute acquiescence. See *Bath Iron Works*, 302 N.L.R.B. 898, 900-01 (1991) (union acquiesced by failing to bargain an issue; thereafter union could only demand bargaining if employer wished to make additional changes).

In addition, as set out more fully in Exception 6, the General Counsel should have been estopped from arguing (and the ALJ should be precluded from ruling) that the Regional Director's August 30, 2016 Dismissal represented a final Board determination of the issues. The NLRB took the opposite position in related federal district court litigation and benefitted from that position. It would be a manifest injustice to permit the General Counsel to reverse course and argue for the finality of the Dismissal in 13-RC-146452—a position the NLRB previously disavowed.

Accordingly, because the ALJ's findings of bad faith and arbitrary conduct rely in significant part on her conclusion that the August 30, 2016 Dismissal of case 13-RC-146452 represented the Board's final determination of the *issues*, and because all her findings that P-fac violated the Act rely in turn on those findings of bad faith arbitrariness, the ALJD must be reversed and the Consolidated Complaint must be dismissed in its entirety.

8. The ALJ erred in finding that P-fac breached the DFR by acting arbitrarily or in bad faith by "requesting that the College not treat the FTST as Unit employees or

afford them . . . work assignment preferences"; "refusing to process grievances . . . on the behalf of the FTST"; "maintaining grievances which attempted to compel the College to exclude the FTST from work assignments, along with its filing of a lawsuit seeking to enforce those grievances"; "filing and maintaining a lawsuit seeking to enforce the Arbitrator's award finding the FTST to be excluded from the Unit"; and "informing FTST and the College in writing that the FTST were excluded from the Unit and all matters related to bargaining" a successor CBA. ALJD at 16-17. Because the Board should reverse the Regional Director's decision placing FTST in the P-fac unit, all of these allegations should be dismissed. In the alternative, if the Board ultimately upholds the Regional Director's placement of FTST in the P-fac unit, then P-fac took the referenced actions toward FTST based on a good faith legal error, which does not support a finding of arbitrary or bad-faith action and hence is not a violation of the DFR.

As set out above in reference to Exception 1, the Board did *not* adopt the Regional Director's reasoning in his dismissal of the petition in 13-RC-146452. Rather, the Board affirmed only the Regional Director's *action* in dismissing the petition. Hence, the Regional Director's decision did not represent the Board's final determination of the "issues."

"[A] union is not liable under the duty of fair representation for mere negligence, poor judgment, ineptitude, forgetfulness or inadvertence." *Amalgamated Transit Union Div. 822, 305 NLRB 946, 949 (1991)*. Thus the ALJ had to find evidence of bad faith, arbitrary action, or discrimination.² It was not enough for the ALJ to determine that P-fac was legally mistaken in

² The ALJ states in once place that P-fac's refusal to represent the FTST was "discriminatory," ALJD at 16:36, but conducts her analysis entirely through the lens of bad faith and arbitrary actions.

concluding that the Regional Director's dismissal in case 13-RC-146452 was a non-final Board determination.

But here that is all the ALJ did. P-fac put forward multiple credible grounds for its conclusion that there was no final Board determination that the FTST were included in P-fac's unit, including as set out above (1) the extensive in-court argument made by a CCSLB attorney on behalf of the Board in case 17-CV-513, stating that the Regional Director's unit determination in case 13-RC-146452 *was not final* (Ex. A to Respondent P-fac's Opp. to CPs' Motion In Limine, at 7-9); (2) the reasoned, written arbitration award that ran contrary to the Regional Director's decision (GC Ex. 15); (3) the Board's statement in denying P-fac's request for review (see 2017 NLRB LEXIS 74) that it affirmed only that *action* of the Regional Director, and that otherwise cited *Williams-Sonoma*, 365 NLRB No. 13; and (4) the unambiguous past practice of the parties, which had excluded FTST from the P-fac unit (see CP Ex. 2 at 4-8).

At best, P-fac will be vindicated once the Board finally addresses the merits of the Regional Director's unit determination-via-dismissal in case 13-RC-146452. As set out elsewhere in these exceptions, P-fac requests the Board to review the Regional Director's decision in that case and to rule that FTST are excluded from the P-fac unit, for the reasons set out in P-fac's briefing in that related case. And because the inclusion of FTST in the P-fac unit is a predicate fact for each and every one of the Consolidated Complaint allegations against P-fac, if the Board reverses or modifies the Regional Director's dismissal in 13-RC-146452, then the Consolidated Complaint must be dismissed in its entirety.

But even at worst—if the Board adopts the Regional Director's reasoning in 13-RC-146452 in full—the facts would only support a conclusion that P-fac was *negligently* mistaken about its duties toward the FTST employees. And that too would require the dismissal of all

Consolidated Complaint allegations asserting a breach of the duty of fair representation under 8(b)(1)(A)—for reasonable but incorrect predictions as to how the Board will ultimately rule on a representational matter do *not* support a finding of arbitrary action or bad faith. See *Teamsters Local Union No. 206 & Safeway Inc.*, 2017 NLRB LEXIS 535, *83-*84 (N.L.R.B. October 31, 2017) (ALJ Decision) (finding "no bad faith" when Employer "gambled on a legal conclusion [as to unit composition] . . . with the blessing of the General Counsel" despite the fact that the Employer's "gamble" ultimately turned out to be incorrect).

In either case, the facts do not support the ALJ's findings that P-fac acted arbitrarily or in bad faith in performing the acts set forth in this exception and in the ALJD at 16-17. The decision of the ALJ must be reversed and the Consolidated Complaint must be dismissed in its entirety.

9. The ALJ erred by refusing to let P-fac introduce evidence that it acted in good faith and that the Region had not been misled by P-fac's legal briefing. Tr. 138:2-139:22. The evidence was relevant to a material fact, namely whether P-fac had taken mutually inconsistent positions in case 13-RC-146452, and whether the Region had relied on P-fac's allegedly "equivocal" statements in its first dismissal of 13-RC-146452. ALJD at 16. P-fac was prejudiced by the adverse evidentiary ruling, as the ALJ expressly based her finding of bad faith on her finding that P-fac had changed positions in this litigation, and that the Region had relied on those allegedly changing positions. ALJD at 16.

The ALJ concluded that P-fac had shown bad faith by successfully moving for dismissal of the petition in 13-RC-146452, and then moving for dismissal again (purportedly on a different ground) after the Region revoked the initial dismissal of the petition. See ALJD at 16. As set out in the argument in support of Exception 2, P-fac's position was *never* that FTST were actually

included in the P-fac bargaining unit, but rather that they *would have been* included in the bargaining unit if (1) the College had assigned them courses according to the procedure set forth in the P-fac contract instead of through a separate process that favored FTST employees over the rest of the part-time faculty *and* (2) the relevant FTST employees had then met the other neutral, universally applicable prerequisites for inclusion in the unit. See CP Ex. 2 at 4 (setting out that certain unmet prerequisites prevented FTST from being in the bargaining unit at that time).

At the ALJ hearing P-fac sensed that the Charging Parties and General Counsel were attempting to paint a false picture in which P-fac had misled the Region about its intentions in order to win the first dismissal of 13-RC-146452. So P-fac attempted to introduce evidence regarding communications between P-fac and the Region, and regarding the Region's understanding of P-fac's position, which would show that P-fac had been forthcoming about its position and that the Region had not been misled. Specifically, P-fac attempted to introduce testimony about the contents of a meeting between the College, P-fac, and Region 13 leadership that had occurred in the summer of 2015—after the Region's first dismissal of the petition, and before that dismissal was revoked. Tr. 137:8-138:18. Counsel for the General Counsel objected on the grounds that statements at the meeting were hearsay, and the ALJ sustained the objection. Tr. 138:19-139:8. P-fac's counsel explained that the evidence was necessary to undercut the Charging Parties' contention that P-fac "took one position in an administrative proceeding . . . and then benefitted from that only to later in time take a different position. So I am trying to establish an evidentiary basis that would refute that line of argument." Tr. 139:15-20. P-fac's counsel then went on to argue, "I want to establish that the Region was aware of [P-fac's] position." Tr. 140:11-12. The ALJ still prohibited the evidence from being introduced, stating, "And that's not relevant to me." Tr. 140:13-14.

Despite prohibiting P-fac from introducing evidence regarding the Region's understanding of P-fac's position, the ALJ found the Region had been misled by P-fac—and then used that finding to support the ultimate conclusion that P-fac had acted arbitrarily or in bad faith. As the ALJ wrote, "*The Region had relied upon PFAC's own insistence that it was the sole representative of all part-time faculty employed by the college in administratively dismissing the petition. . . . I find that PFAC had no valid 'good faith' belief that it did not represent the FTST.*" ALJD at 16 (emphasis added).

Had P-fac been permitted to introduce evidence regarding its communications with the Region and regarding what the Region understood, the evidence would have shown that P-fac did *not* switch positions as to whether FTST were *actually* in the bargaining unit in the time period up through the Region's second dismissal of 13-RC-146452 on August 30, 2016. The evidence would have shown that P-fac had in fact made it clear to the Region that, whatever the theoretical future possibility of FTST entering the P-fac unit may have been, there were *purely contractual* prerequisites to representation that had not yet been met. Cf. CP Ex. 2 at 4 (making this point to the Region in writing). The evidence would have also shown that the Region was well aware that this was P-fac's position, and that other factors—not "PFAC's equivocal statements," ALJD at 16—caused the Region to ultimately revoke the dismissal in 13-RC-146452.

Accordingly the ALJ improperly prejudiced P-fac by preventing it from introducing evidence that was relevant to determining one of the crucial issues of this litigation: whether P-fac acted in good faith or bad faith. Because all the Consolidated Complaint allegations rely on P-fac's purported bad faith, the Consolidated Complaint should be dismissed in its entirety; in the alternative the matter should be remanded for a new hearing.

10. The ALJ erred by holding that P-fac violated Section 8(b)(2) and 8(b)(1)(A) of the Act. ALJD at 17-19. P-fac had no notice of the factual basis of this charge, and the ALJ based its finding of an 8(b)(2) violation on P-fac's refusal to process FTST grievances—a non-action that cannot possibly "cause or attempt to cause an employer to discriminate." In addition, the Board should rule that FTST are excluded from the unit.

P-fac had no notice of the factual basis of the 8(b)(2) allegations against it, and therefore the 8(b)(2) allegations must be dismissed. In fact, not even the ALJ knew what complaint allegations the General Counsel asserted gave rise to a violation of 8(b)(2):

General Counsel's brief does not specifically analyze the 8(b)(2) allegation outside of its discussion of alleged violations of Section 8(b)(3) of the Act. I further note that [the] consolidated complaint paragraph . . . alleging 8(b)(3) violations relies upon different conduct . . . than that of the 8(b)(2) allegations. Thus, it is unclear as to which analysis General Counsel is asserting establishes the Section 8(b)(2) allegation.

ALJD at 18 n.15. Despite the fact that the ALJ admitted that *she herself could not tell* exactly what P-fac had been accused of when it came to the 8(b)(2) allegations, she departed from the Consolidated Complaint and the General Counsel's argument and created her own legal theory of an 8(b)(2) violation out of whole cloth. That was error. See *UFCW Locals*, 329 NLRB 730 (1999) (proper to dismiss 8(b)(2) allegations where General Counsel failed to present arguments in post-trial briefing that addressed 8(b)(2) distinctly from 8(b)(1)(A)); *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1074 (1st Cir. 1981) (ALJ may not act as de facto prosecutor by finding violations that the General Counsel did not argue).

In addition, even if it was proper for the ALJ to supply the General Counsel's missing factual and legal theory of an 8(b)(2) violation, the facts the ALJ relied upon do not support a finding that 8(b)(2) was violated. First of all, the ALJ held that it violated 8(b)(2) for P-fac to refuse to process the grievances of FTST employees. ALJD at 18:5-7. While a refusal to process

a grievance may give rise to an 8(b)(1)(A) violation (although it does not in this case, for the reasons set out elsewhere in these exceptions), the ALJ does not explain how this *non-action* by P-fac could possibly "cause or attempt to cause" the College to discriminate. See Section 8(b)(2) of the Act. And indeed there could be no such explanation—refusing to process a grievance simply permits an employer to do as it sees fit, free of any pressure from the union. In this case, the College decided on its own accord not to treat FTST as within the unit prior to August 30, 2016. See Tr. 130:14-132:14 (College witness testifying that the College, not P-fac, decided to treat FTST as outside the bargaining unit until August 30, 2016).

As for the ALJ's alternate theory that P-fac violated 8(b)(2) by sending the College a single email on May 11, 2015 disputing the College's seniority list, it too lacks merit.³ The email in question simply states that P-fac does not agree with the College's position that *every* FTST employee was now in the bargaining unit. As P-fac wrote, "The facts unique to each of those persons [on the proposed seniority list] must be dealt with in the first instance between P-fac and Columbia." GC Ex. 7. This was entirely consistent with P-fac's prior submissions to the Regional Director in case 13-RC-146452, where P-fac argued that *as a matter of contract*, new unit members could only enter the unit and begin to accrue seniority according to a certain universally applicable process. CP Ex. 2 at 4. In other words, P-fac's May 11, 2015 letter to the College simply staked out a bargaining position that each FTST employee's particular teaching history would have to be reviewed before P-fac would agree on the seniority tier for which that

³ Significantly, the ALJ did *not* find that P-fac violated 8(b)(2) by maintaining a grievance over unit seniority or by filing suit to enforce the arbitration award resulting from that grievance. Rather the ALJ based her finding of an 8(b)(2) violation entirely on the May 11, 2015 email and then by P-fac's declining to file grievances. ALJD at 18-19.

particular employee qualified.⁴ The letter shows a good-faith effort to engage in collective bargaining, not an unlawful attempt to "cause or attempt to cause an employer to discriminate." Section 8(b)(2). As P-fac has argued repeatedly (e.g., Resp. Union's Post-Trial Br. at 7) 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). That was the entire purpose of the May 11, 2015 email. (It is separately worth noting that the letter shows P-fac's good faith effort to work out a thorny question of seniority, and hence the letter cannot possibly support a finding that P-fac violated 8(b)(1)(A).)

Finally, as set out elsewhere in these exceptions, the Board should for the first time address the reasoning of the Regional Director's August 30, 2016 Dismissal, and should reverse the Regional Director's conclusion that FTST are included in the P-fac unit.

For all of the above reasons, the ALJD was in error, and the Consolidated Complaint's 8(b)(2) allegations must be dismissed.

11. The ALJ erred by holding that P-fac's federal lawsuit seeking to enforce an arbitration award was "preempted." ALJD at 19-20, GC Exs. 17-18. Preemption doctrines do not apply to federal lawsuits arising from federal rights of action.

P-fac's lawsuit was filed in federal court under 29 U.S.C. § 185—not in state court under state law. GC Exs. 17-18. Hence the ALJ's reasoning that the lawsuit was "preempted" by the

⁴ It should be emphasized that this email fell in the time period between the Region's initial dismissal of the petition in 13-RC-146452 and its subsequent revocation of that dismissal. It was thus in the time period before P-fac received assurances from Board attorneys that the Regional Director's ultimate August 30, 2016 Dismissal was not a final Board determination, before the Board denied review of that Dismissal on the basis that it upheld the Regional Director's "action" without expressing an opinion on his reasoning, and before the arbitral award that ran contrary to the Regional Director's contract interpretation as set forth in the August 30, 2016 Dismissal.

NLRA, as well as the ALJ's citation to preemption precedents like *Ashford TRS Nickel*, 366 NLRB No. 6 (2018) are totally inapposite. The NLRB's preemption cases cited at ALJD 19-20 involve *Garmon* preemption, a doctrine that applies only to *state* laws and rights of action. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959) ("due regard for the federal enactment requires that state jurisdiction must yield"). But Federal lawsuits to compel arbitration in the labor context cannot be "preempted" because the Labor-Management Relations Act, 29 U.S.C. § 185, gives the federal courts concurrent jurisdiction with the NLRB over federal lawsuits involving labor contracts. The Board should therefore modify the ALJD to exclude any application of preemption doctrines to P-fac's federal lawsuits.

12. The ALJ erred by concluding that P-fac's lawsuit to enforce an arbitration award had an "illegal objective" and thus lacked First Amendment protection. ALJD 19-21; GC Exs. 15, 17. P-fac did not have an "illegal objective" but was merely protecting its rights in an area—the proper scope of the P-fac unit—where the Board has not yet issued a final decision. In addition the Board's interpretation of the Bill Johnson's dictum, purporting to deny lawsuits the protection of the First Amendment without any inquiry into whether they were a "sham" and brought in bad faith, is contrary to the First Amendment and should be abandoned.

The ALJD held that P-fac's lawsuits in U.S. District Court cases 17-CV-513 and 17-CV-4203 were unprotected by the First Amendment because they had an "illegal objective" under footnote 5 of *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983). ALJD at 20-21. This was improper.

First of all, neither lawsuit had an "illegal objective" because, as set out in reference to Exceptions 1, the Regional Director's Dismissal of 13-RC-146452 did not represent the Board's

final determination of the issues. Alternatively, the General Counsel should have been estopped from arguing that the Dismissal was final and "conclusive" because the NLRB had taken a contrary position in the very litigation that the ALJ now purports to enjoin—see Exception 6. In either case, the lack of a final Board determination distinguishes P-fac's lawsuits from the cases relied upon by the ALJ—such as *Brooks Brothers*, 365 NLRB No. 61 (2017) and *Duane Reade, Inc.*, 342 NLRB 1010 (2004)—all of which involved a final Board determination. (Notably, although *Brooks Brothers* involved a denial of review, it did not involve a *Williams Sonoma* denial of review as this case did. Cf. *Marywood Univ.*, 2017 NLRB LEXIS 221 at n.1 (N.L.R.B. May 5, 2017) (another *Williams-Sonoma* denial-of-review case, holding that "in denying the Petitioner's request for review on this issue, we do not adopt the rationale of the Acting Regional Director")). Because there is not yet a final Board determination of the central question underlying this litigation—whether FTST are in the P-fac unit or not—P-fac's lawsuits seeking to keep FTST out of the unit lack an "illegal objective." Therefore typical First Amendment and Petitions Clause precedents apply.

As for the litigation in U.S. District Court case 17-CV-4203, P-fac moved to compel arbitration of the relevant grievances *because they were subject to a Collyer deferral letter requiring their arbitration*. See RU Ex. 3 at 2, v. and 5, xi.h. (Regional Director stating that he is "deferring . . . to the grievance/arbitration process" grievances challenging course assignments to FTST employees). It makes a mockery of the rule of law for a Region to require a party to pursue a matter through grievance and arbitration; then administratively prosecute the party for doing so; and then arguing that the party's efforts to pursue arbitration had an "illegal objective" and thus lacked the protection of the First Amendment. Indeed the actions of the Region in reference to case 17-CV-4203 are so outside the realm of reasonableness that they lack any substantial

justification within the meaning of 28 U.S.C. § 2412. Again, typical First Amendment and Petitions Clause precedents apply to P-fac's district court lawsuit 17-CV-4203.

On that score the First Amendment stands as a vibrant protection of the right to petition the government. U.S. Const. Amend. I. Filing a lawsuit is protected by the Petition Clause. *Bill Johnson's Rests. v. NLRB*, 461 U.S. 731 (1983) (NLRB cannot enjoin the prosecution of a well-founded lawsuit, but may enjoin baseless suits brought with a retaliatory motive). And even an unsuccessful lawsuit—so long as it is not objectively a “sham”—is protected petitioning of the government. *BE&K Constr. Co. v. NLRB*, 536 U.S. 546 (2002).

To be sure, these two suits brought by P-fac were not/are not “sham” litigation. They are not intended to impose litigation costs on the College. P-fac sincerely sought—and continues to seek—the enforcement of a lawfully obtained arbitration award the College consented to. And once the arbitrator offered his interpretation, it became the parties’ agreement. *E. Assoc. Coal Corp. v. Mine Workers*, 531 U.S. 57, 62 (2000). Thus, for the 17-CV-513 case, P-fac is doing nothing more than attempting to enforce its contract with the College. And the later suit—already settled with the College—sought only to compel arbitration of claims *subject to the Board’s own Collyer deferral letter*. That suit honestly sought to resolve grievances through arbitration in good faith. It was not a “sham” to achieve some other thing such as a delay or the imposition of litigation costs on a better-capitalized opponent.

The concurrence by Justice Scalia in *BE&K* is particularly instructive on the role of the First Amendment—and indeed it strongly counsels that the Board should abandon its overbroad reading of footnote 5 to *Bill Johnson's*. Perhaps the strongest invocation of the Petition Clause is expressed in the *Noerr-Pennington* doctrine, which holds generally that a party is immunized from liability from conducting prior litigation unless it is a “sham.” And while that doctrine arose

in the anti-trust setting, it is heavily discussed in *BE&K*, including in Justice Scalia's concurrence:

Although the Court scrupulously avoids deciding the question (which is not presented in this case), I agree with JUSTICE BREYER that the implication of our decision today is that, in a future appropriate case, we will construe the National Labor Relations Act (NLRA) in the same way we have already construed the Sherman Act: to prohibit only lawsuits that are *both* objectively baseless *and* subjectively intended to abuse process. See *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60-61, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993).

BE&K, 536 U.S. at 537. The line of judicial thought represented by Justice Scalia's *BE&K* concurrence is not fading—far from it. For example, the United States District Court for the Southern District of New York admirably catalogued the strict application of *Noerr* and its protection of all but sham litigation in *Mosdos Chofetz Chaim, Inc., v. Vill. of Wesley Hills*, 701 F. Supp. 2d 568 (S.D.N.Y. 2010). Nor does the trend of First Amendment protections in labor law appear likely to retreat. For the foregoing reasons, the ALJ erred and acted in violation of the First Amendment in awarding extraordinary remedies against P-fac for bringing and maintaining non-frivolous litigation in federal court.

13. The ALJ erred in holding that P-fac breached the duty of fair representation by telling FTST employee Clint Vaupel that P-fac would not represent the interests of FTST in successor contract negotiations. ALJD at 21; GC Ex. 39. The alleged breach of the duty of fair representation was not yet ripe.

Breaches of 8(b)(1)(A) premised on a breach of the duty of fair representation in contract negotiations are not ripe until a final contract is complete. "[T]he *final product* of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far

outside a wide range of reasonableness, that it is wholly irrational or arbitrary." *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65 (1991) (internal citation and quotation marks omitted) (emphasis added). See also *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174 (9th Cir. 2010) (holding that alleged DFR violation based on ongoing negotiations was not ripe because policy being negotiated had not yet been put in place). At this point, negotiations are ongoing, and neither a settlement nor a final Board or Court of Appeals decision bringing FTST into the unit—which would necessitate P-fac negotiating contract terms on behalf of the FTST employees—are impossibilities. Hence unless and until there are actual agreed contract provisions that arbitrarily treat FTST employees differently from the more economically vulnerable employees who form the great majority of P-fac's bargaining unit, any alleged breach of the duty of fair representation based on P-fac's negotiating position must be dismissed as unripe.

14. The ALJ erred by ruling that charge 13-CB-165873 was not time-barred under § 10(b) of the Act. See ALJD at 21-23; Resp. Union's Post-Trial Br. at 17-18.

The ALJ cited *International Ass'n of Machinists v. NLRB*, 362 U.S. 411 (1960), to distinguish *Durham Drywall*.⁵ But in *IAM v. NLRB*, the Supreme Court actually *reversed* the Court of Appeals and the NLRB by finding that a ULP complaint was time-barred as the enforcement of a contract that unlawfully imposed a union security could only be sued on for the six months following the making of the agreement. In other words, once the lawful contract was formed, its continued enforcement was not a continuing violation.

Similarly, and to use the language of *IAM*, the charges brought by the FTST employees that P-fac violated 8(b)(1)(A) and 8(b)(2) as set forth in paragraphs VI(a)(i), VI(a)(ii), VI(b), VI(c)-(h), VI(i), VI(k) and VIII(a), are “inescapably grounded” in P-fac’s exclusion of the FTST

⁵ The ALJ captioned the case as *Bryan Manufacturing Co.*

employees from its unit in its contract (the exclusion being accomplished with the College). *IAM*, 362 U.S. at 421-22. The Supreme Court continued its analysis in *rejecting* the attempt to invoke the “continuing violation” theory:

The applicability of these principles cannot be avoided here by invoking the doctrine of continuing violation. It may be conceded that the continued enforcement, as well as the execution, of this collective bargaining agreement constitutes an unfair labor practice, and that these are two logically separate violations, independent in the sense that they can be described in discrete terms. Nevertheless, the vice in the enforcement of this agreement is manifestly not independent of the legality of its execution, as would be the case, for example, with an agreement invalid on its face or with one validly executed, but unlawfully administered.

Id. at 423.

The ALJ’s other cases do nothing to distinguish *IAM* or *Durham Drywall*. First, *IBT Local 509* was a hiring hall case. Apart from that hiring hall context, the union in *Local 509* was violating the law in the *manner* in which it ran its hall. As the Board stated:

...the Respondent operated an exclusive hiring hall that excluded nonmembers such as Coghill. The operation of such a hiring hall violates the Act. See Morrison-Knudsen, 291 NLRB 250, 259 (1988) (union that operates an exclusive hiring hall is obligated to refer individuals without regard to their union membership or lack thereof).

IBT Local 509, 357 NLRB 1668 (2011). And unlike in this case and in *IAM*, the Union in *Local 509* also took the post-contract execution act of closing its referral list. The record is further unclear as to how proximate the filing of the charge was to the employee’s attempt to transfer into the Union in *Local 509* and hence his actual knowledge of the illegal hiring hall.

And in *Register Guard*, 351 NLRB 1110 (2007), the “continuing violation” at issue was the maintenance of a work place rule regulating the display of union insignia. It did not relate to a contract term as in this case where P-fac and Columbia College did not have a “policy” or

“rule” that excluded the FTST from the P-fac unit – their contractual recognition clause excluded the FTST.

Control Services, 305 NLRB 435 (1991) is likewise distinguishable on the basis that the “rules” that were being enforced were “presumptively illegal.” But here again, P-fac is not enforcing a “rule.” Its contract with the College itself – upon execution – excluded the FTST.

And the exclusion of the FTST is not “presumptively illegal” as unit scope is a lawful subject of bargaining. *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.

Furthermore, it is lawful to exclude FTST employees from a unit of adjunct faculty.

Marist College, 03-RC-127374 (August 23, 2016)(excluding 33 FTST employees from faculty union).

Finally, *Arvin Industries*, 285 NLRB 753 (1987), again involved an illegal contract term providing superseniority, that could only be justified on a post-contract showing of business necessity. As the Board majority stated:

For superseniority based on union office, unlike natural seniority, which typically rests on the date of employee hire or transfer, is bestowed by a contractual fiat that accords a preference for retaining or securing a given job on the basis of union office alone. Contractual superseniority based on union office inherently encourages union support by means of discrimination, and it can be saved from illegality only if the contracting parties can establish that the favored union position imposes on its holder duties that are related to grievance processing or on-the-job contract administration so that the preference may serve the interest of all unit employees.

Thus, in the terms of *Bryan Mfg.*, the allegation that a superseniority clause has been unlawfully maintained is not “inescapably grounded on” events outside the 10(b) period,

even if the clause was originally executed more than 6 months prior to the filing of the unfair labor practice charge. Indeed, this would be so whether we deemed an overinclusive superseniority clause to be invalid on its face or invalid only on the General Counsel's showing, by extrinsic evidence, that the clause applied to persons lacking steward-like functions.

Arvin Industries at 756. In other words, and unlike the immediate effect of the P-fac recognition clause, the illegal superseniority provision was not self-executing. It only went into effect later (in addition to being illegal).

And here, the record is clear that the FTST employees were excluded from the P-fac unit far in advance of the six-month statute of limitations. And it is also clear that – similar to the facts in *IAM* – they were excluded by the contractual negotiation P-fac's recognition clause, which set forth the unit description.

P-fac and Columbia College agreed by contract as to the definition of the P-fac unit. GC Ex. 3, Art. I; *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 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). And the agreement containing the recognition clause was executed and went into effect more than six-months prior to any of the consolidated charges. GC Ex. 3. As such, this case is four-square with *IAM* as the alleged “illegal act” was caused by the *execution*, not *enforcement* of the contract. Therefore,

precedent demands the same outcome as in *IAM* – dismissal on the basis that the charge is untimely.

Furthermore, as exhaustively proven at hearing, the FTST knew of this exclusion. 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.

Tr. 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). For these reasons, it is futile for the ALJ to argue that P-fac was other than unequivocal in its stance that FTST were excluded from its unit.

The ALJ erred when she found that “PFAC’s actions, within the 6-month period, constitute unfair labor practices *without any reliance upon actions that it may have taken during the years preceding the allegations at issue in this matter.*” ALJD at 22. The reason that P-fac excluded the FTST from the unit is because that is what their contract provides, i.e., in executing that contract with Columbia College, P-fac and the College excluded the FTST from the P-fac unit. P-fac did not come up with some later-in-time and questionable contract interpretation and in doing so engage in a separate and distinct act of “unlawfully administer[ing]” its contract. *IAM* at 422.

This is why P-fac argued that the FTST had “acquiesced” to their exclusion – the act of excluding them was: (1) clearly and unequivocally known to them, (2) a *fait accompli* as of the execution of the contract and (3) acquiesced to for more than six months. And while the ALJ takes issue with P-fac’s characterization of the legal principle in *Durham Drywall*, there is no

practical distinction between an employer clearly and unequivocally repudiating a contract as in *Durham Drywall* and a Union and Employer contractually agreeing to a unit scope that excludes certain employees from the Union's scope of exclusive representation as in this case.

Put another way, the ALJ was wrong to frame the issue of the 10(b) defense as whether conduct outside the statute of limitations was necessary to prove the ULP. As she stated at page 22 of her Decision: "I find PFAC's actions, within the 6-month period, constitute unfair labor practices *without any reliance upon actions it may have taken during the years preceding the allegations at issue in this matter.*" (emphasis supplied). But that misses the point of the affirmative defense, which is that because the alleged ULP (in this case treating FTST as excluded from the P-fac unit) is the wrong, the charging parties had to complain of that wrong within six months of becoming aware of it. They did not. And therefore, they are barred from complaining about it now. Not only as a matter of law, but a supreme matter of fairness.

P-fac, Columbia College, and even the FTST operated for *years* in reliance on the fact that the FTST were not in the P-fac unit. They never appeared on a unit eligibility list. R. 130. They never accrued seniority. R. 133-34, 136. They never paid dues. R. 228. And apart from this common sense, even Board precedent reflects the policy of not disturbing established bargaining terms unless they are illegal. As stated in *Harvey Russell*, 145 NLRB 1486 (1964):

In order to facilitate collective bargaining or the speedy disposition of questions concerning representation, the Board has long accepted the agreement of the parties concerning the contractual or appropriate unit. Parties are given broad latitude in the reaching of such agreements and the Board will not disturb them unless it can be shown that the exclusion or inclusion of certain employees contravenes the Act or established Board policy.

The Board now – for the first time – has the opportunity to right this wrong and to restore the right of collective bargaining partners to rely on their own agreements, free from the

intervention of third parties who want to force their way in to that bargaining relationship for their own purposes and in doing so disrupt a finely balanced arrangement. The past three years of labor relations at Columbia College Chicago are proof of the deleterious impact of encouraging such conduct by persons like the FTST and in the end it is the workers and industrial efficiency that will suffer.

For the foregoing reasons, the Board should find the claims discussed above time-barred.

15. The ALJ erred by including an award of attorney's fees in the Remedy section. ALJD at 25. Attorney's fees are an extraordinary remedy and are not warranted here.

The standard rule is that “extraordinary remedies” including an award of attorney’s fees, are not supported absent outrageous conduct. See, e.g., *Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995) (Board will not order reimbursement of expenses for “nonmeritorious defense,” but only where defense is “so insubstantial as to be patently frivolous”), cited in *Columbia College Chicago v. NLRB*, 847 F.3d 547 (7th Cir. 2016); see also *Tiidee Products, Inc.* 194 NLRB 1234 (1972). In response to non-frivolous litigation like that conducted by P-fac in federal district court, the use of traditional remedies such as a “cease and desist” order should be used.

Significantly, P-fac settled the later suit to compel arbitration (17-CV-4203) *without requiring the College to arbitrate any claim related to FTST employees*. See Tr. 36-37. And the earlier suit to enforce an arbitration award (17-CV-0513) remains pending in the Seventh Circuit (Case No. 17-3492), i.e., it is not yet *res judicata*. These two facts, ignored by the ALJ, are materially relevant because they show P-fac does not have “a proclivity to violate the Act *once its actions have been adjudicated unlawful*.” *Eastern Maine Medical Center*, 253 NLRB 224,

228 (1980) (emphasis supplied). There is no evidence—and the ALJ failed to even attempt to make predicate factual findings or offer any analysis—that the traditional “bargaining” remedies including a cease and desist order are inadequate in this case, or that the College’s litigation expenses—including its own motion to vacate—are akin to “damages” it suffered.

Unlike the typical case supporting extraordinary remedies, the employer was not required to engage in a “useless” expenditure of funds, e.g., as when a Union is forced to spend time and money bargaining with an employer who is bargaining in bad faith. Such instances involve sham bargaining, not legitimately directed at securing a contract. This standard is remarkably similar to that in P-fac’s First Amendment defense, as set out above in reference to Exception 12.

Accordingly, the ALJ's order that P-fac should pay any of Columbia College's attorney's fees or costs of litigation (beyond what the district court has already properly ordered under the Federal Rules of Civil Procedure) should be vacated.

16. P-fac preserves its argument for any future compliance proceeding that there was no economic harm to the FTST. ALJD at 23.

As set forth in its post-trial brief, Resp. Union's Post-Trial Br. at 15, there was no evidence in the record that any charging party suffered any economic harm as a result of P-fac's actions.

Conclusion

For the foregoing reasons, the Decision of the ALJ should be REVERSED and the Consolidated Complaint in this matter should be DISMISSED.

Respectfully submitted,

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Certificate of Service

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