

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PART-TIME FACULTY ASSOCIATION)	
AT COLUMBIA,)	
Union-Respondent,)	
)	
and)	Case 13-CB-165873
)	
TANYA HARASYM, et al, INDIVIDUALS,)	
Charging Parties,)	
)	
and)	
)	
PART-TIME FACULTY ASSOCIATION)	
AT COLUMBIA,)	
Respondent,)	
)	
and)	Case 13-CB-202023
)	
CLINT VAUPEL,)	
Charging Party,)	
)	
and)	
)	
PART-TIME FACULTY ASSOCIATION)	
AT COLUMBIA,)	
Respondent,)	
)	
and)	Case 13-CB-202035
)	
COLUMBIA COLLEGE CHICAGO,)	
Charging Party.)	

**INDIVIDUAL CHARGING PARTIES' ANSWERING BRIEF TO RESPONDENT'S
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Michael H. Slutsky
Allison, Slutsky & Kennedy, P.C.
230 West Monroe Street, Suite 2600
Chicago, Illinois 60606
312-364-9400
Slutsky@ask-attorneys.com

September 21, 2018

Table of Contents

Table of Authorities v

Introduction 1

Argument 3

 I. PFAC’s First Exception – That the Board Should Consider and Reverse the
 Determination in the Representation Case – is Without Merit 3

 A. PFAC Has Not Properly Raised the Issue of the Inclusion of FTST in its
 Bargaining Unit 3

 B. PFAC Erroneously Asserts That the Present Case is the Board’s “First
 Opportunity to Rule Directly” on the Regional Director’s Decision in
 the Representation Case 4

 C. PFAC is Precluded From Relitigating the Determination in the
 Representation Case 4

 D. In Denying Review, the Board Did Not Merely Affirm the Regional
 Director’s “Actions” 6

 E. PFAC Misconstrues the Board’s Non-Relitigation Rule 7

 F. In Any Event, PFAC Cannot Challenge the Ruling in the
 Representation Case Because it Failed to Except to the ALJ’s
 Ruling Barring Evidence on the Issue of Unit Inclusion 7

 II. PFAC’s Second Exception – That the ALJ “Misconstrued” a Brief PFAC
 Submitted to Region 13 – is Without Merit 9

 III. PFAC’s Third Exception – Regarding the ALJ’s Finding With Respect to
 FTST Having Accrued Seniority – is Without Merit 10

 IV. PFAC’s Fourth Exception – Regarding the ALJ’s Referring to the District
 Court’s Awarding Costs Against PFAC – is Without Merit 12

 V. PFAC’s Fifth Exception – That the ALJ Mischaracterized PFAC’s Opposition
 to the Regional Director’s Unit Determination – is Without Merit 12

VI.	PFAC’s Sixth Exception – That the ALJ Erred in Refusing to Hear Evidence Regarding the Scope of the Unit, Despite the Board “Taking the Position That the ALJ Would Rule on the Proper Scope of the Unit” – is Without Merit . . .	14
A.	The ALJ Did Not Commit the Errors Claimed by PFAC	15
B.	The Doctrine of Judicial Estoppel Does Not Apply	16
C.	Ellement’s Statements Failed to Take Into Account the Board’s Rules and Were Contrary to the Board’s Rules	17
D.	In Any Event, Ellement’s Statements Could Not Alter the Board’s Rules	18
VII.	PFAC’s Seventh Exception – That the ALJ Erred in Ruling That PFAC Acted Arbitrarily and in Bad Faith, Based on the Regional Director’s Unit Determination Being Final – is Without Merit	19
VIII.	PFAC’s Eighth Exception – That the ALJ Erred in Finding That PFAC Breached its Duty of Fair Representation, Because the Regional Director’s Unit Determination Was Assertedly Not Final – is Without Merit	21
A.	PFAC’s Claims of Lack of Bad Faith Fall Flat	21
B.	Whether PFAC Acted in Bad Faith is Immaterial	24
1.	Good Faith is Not a Defense	24
2.	PFAC’s Conduct Was Arbitrary and Discriminatory	24
a.	PFAC’s Conduct Was Arbitrary	25
b.	PFAC’s Conduct Was Discriminatory	26
IX.	PFAC’s Ninth Exception – That the ALJ Erred by Excluding Testimony About a Meeting With Region 13 Representatives – is Without Merit	27
X.	PFAC’s Tenth Exception – That the ALJ Erred by Holding That PFAC Violated Section 8(b)(2) and 8(b)(1)(A) of the Act – is Without Merit	29
A.	PFAC Did Not Lack Notice	29
B.	The Evidence Supported the Finding That PFAC Violated Section 8(b)(2)	30

C.	The ALJ Did Not Err in Finding That PFAC Violated Section 8(b)(2) in Part by Disputing FTST’s Inclusion on a College’s List of Employees Eligible for Part-Time Teaching Assignments	32
XI.	PFAC’s Eleventh Exception – That Federal Lawsuits Are Not Subject to the Exemption for Baseless Claims Under <i>Bill Johnson’s</i> – is Without Merit . . .	33
XII.	PFAC’s Twelfth Exception – That the ALJ Erred by Ruling That PFAC’s Lawsuit to Enforce an Arbitration Award had an Illegal Objective – is Without Merit	34
A.	PFAC’s Attempt to Distinguish the Cases the ALJ Relied on Utterly Fails	35
B.	PFAC’s Suits had an Illegal Objective	35
C.	PFAC’s Reference to a Concurring Opinion and the Noerr-Pennington Doctrine are Unavailing	36
D.	That the Region Deferred Certain Charges is not a Defense	36
XIII.	PFAC’s Thirteenth Exception – That the ALJ Erred in Holding That PFAC Breached its DFR by not Representing FTST’s Interests in Successor Bargaining – is Without Merit	37
XIV.	PFAC’s Fourteenth Exception – That One of the Charges Was Untimely – is Without Merit	39
A.	PFAC Fails to Distinguish the Cases Cited by the ALJ	39
B.	PFAC’s Contention That FTST Knew That They Were Excluded From PFAC’s Unit is Unsupported by the Evidence	44
C.	PFAC’s Exception Ignores the Substantial and Undisputed Evidence That PFAC Failed to Unequivocally Inform FTST Until Less Than Two Months Before the Charge Was Filed That They Were Excluded From PFAC’s Unit	47
XV.	The Individual Charging Parties Do Not Take a Position Regarding PFAC’s Fifteenth Exception – That the ALJ Erred by Including an Award of Attorneys’ Fees in Favor of the College	48
XVI.	PFAC’s Sixteenth Exception – That Purports to Preserve its Argument for Future Compliance Proceeding That There Was No Economic Harm – Does Not Constitute a Cognizable Exception	49

Conclusion	49
Certificate of Service	50

Table of Authorities

Cases

Addington v. US Airline Pilots Ass'n,
606 F.3d 1174 (9th Cir. 2010) 38

Air Line Pilots Ass'n, Intern. v. O'Neill,
499 U.S. 65 (1991) 24, 26, 37

Allied Mechanical Services, Inc.,
357 NLRB 1223 (2011), review granted on other grds,
734 F.3d 486 (6th Cir. 2013) 34

Allied Trades Council (Duane Reade, Inc.),
342 NLRB 1010 (2004) 34

Amalgamated Transit Union Div. 822,
305 NLRB 946 (1991) 25

Approved Electric Corp.,
356 NLRB 238 (2010) 8, 38, 46

Arts Way Vessels, Inc.,
355 NLRB 1142 (2010) 41

Arvin Industries,
285 NLRB 753 (1987) 43

Ashland Oil, Inc. v. FTC,
548 F.2d 977 (D.C. Cir. 1976) 19

Barton Brands, Ltd. v. NLRB,
529 F.2d 793 (7th Cir. 1976) 24

Bath Iron Works,
302 NLRB 898 (1991) 21

BE & K Const. Co. v. NLRB,
536 U.S. 516 (2002) 36

Bernal, Inc.,
206 NLRB 72 (1973) 46

Bill Johnson's Restaurants, Inc. v. NLRB,
461 U.S. 731 (1983) 33, 34, 35, 36

<i>Bodine v. Warden of Joseph Harp Correction Center,</i> 217 Fed. Appx. 811 (10th Cir. 2007)	8
<i>Brooks Brothers,</i> 365 NLRB No. 61	34, 35, 36
<i>Burlington Truck Lines, Inc. v. U.S.,</i> 371 U.S. 156 (1962)	18
<i>Cabrillo Lanes,</i> 202 NLRB 921 (1973)	43
<i>Carey v. Westinghouse Electric Corp.,</i> 375 U.S. 261 (1964).	21, 22
<i>Columbia College,</i> 346 NLRB 726 (2006)	44
<i>Control Services,</i> 305 NLRB 435 (1991), enf'd, 961 F.2d 1568 (3d Cir. 1992)	42
<i>Davis Cnty. Solid Waste Mgmt. v. EPA,</i> 108 F.3d 1454 (D.C. Cir.1997)	19
<i>Dayton Newspapers,</i> 339 NLRB 650 (2003), enf'd in part & denied in part on other grounds, 402 F.3d 651 (6th Cir. 2005)	8, 38, 47
<i>Eureka Pipe Line Co.,</i> 115 NLRB 13 (1956)	43
<i>Federal-Mogul Corp.,</i> 209 NLRB 343 (1974)	12
<i>Filippo v. Northern Indiana Public Service Corp., Inc.,</i> 141 F.3d 744 (7th Cir. 1998)	25
<i>Ford Motor Co. v. Huffman,</i> 345 U.S. 330 (1953)	25, 30
<i>Gaetano & Associates,</i> 344 NLRB 531 (2005), enf'd, 183 Fed. Appx. 17 (2d Cir. 2006)	4, 8, 49
<i>Golden West Broadcasters-KTLA,</i> 220 NLRB 937 (1975)	5, 23

<i>Grinnell Fire Protection Systems Co.</i> , 328 NLRB 585 (1999), review denied & enf'd, 236 F.3d 187 (4th Cir. 2000), cert. denied, 534 U.S. 818 (2001)	34
<i>Harvey Mfg.</i> , 309 NLRB 465 (1992)	18
<i>Harvey Russell</i> , 145 NLRB 1486 (1964)	43
<i>Hill-Rom Co. v. NLRB</i> , 957 F.2d 454 (7th Cir. 1992)	42, 43
<i>Hoctor v. U.S. Dept. of Agriculture</i> , 82 F.3d 165 (7th Cir.1996)	19
<i>Holsum De Puerto Rico, Inc.</i> , 344 NLRB 694 (2005), enf'd, 456 F.3d 265 (1st Cir. 2006)	4, 8, 49
<i>Ichikoh Mfg., Inc.</i> , 312 NLRB 1022 (1993), enf'd, 41 F.3d 1507 (6th Cir. 1994)	8, 49
<i>Independent Metal Workers, Locals 1 & 2 (Hughes Tool Co.)</i> , 147 NLRB 1573 (1964)	31, 32
<i>International Brotherhood of Teamsters, Local 509 (Touchstone Television Productions, LLC d/b/a ABC Studios)</i> , 357 NLRB 1668 (2011), review denied & enf'd, 803 F.3d 1 (D. C. Cir. 2015)	41
<i>International Brotherhood of Teamsters, Local 727 (Global Experience Specialists, Inc.)</i> , 360 NLRB 65 (2013)	24
<i>Ivaldi v. NLRB</i> , 48 F.3d 444 (9th Cir. 1995)	19
<i>Kelley v. NLRB</i> , 79 F.3d 1238 (1st Cir. 1996)	19
<i>Jewish Federation Council of Greater Los Angeles</i> , 306 NLRB 507 (1992)	37
<i>Lafayette Park Hotel</i> , 326 NLRB 824 (1998)	42
<i>Local 340, New York New Jersey Regional Joint Board (Brooks Brothers)</i> , 365 NLRB No. 61 (2017)	34

<i>Local Lodge No. 1424 International Association of Machinists (Bryan Mfg) v. NLRB</i> , 362 U.S. 411 (1960)	40, 41
<i>Local Union No. 12, United Rubber, Cork Linoleum & Plastic Workers v. NLRB</i> , 368 F.2d 12 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967))	32
<i>Local Union No. 1010, United Furniture Worker (Leggett & Platt, Inc.)</i> , 261 NLRB 524 (1982)	32
<i>Marist College</i> , Case 03-RC-127374, 2016 WL 4473156 (2016)	43
<i>Martel Const.</i> , 311 NLRB 921 (1993), enf'd, 35 F.3d 571 (9th Cir.1994)	19
<i>Maryland v. Wilson</i> , 519 U.S. 408 (1997)	36
<i>McLeod v. Arrow Marine Transport, Inc.</i> , 258 F.3d 608 (7th Cir. 2001)	25
<i>Minteq International, Inc.</i> , 364 NLRB No. 63 (2016), review denied, 855 F.3d 329 (D.C. Cir. 2017)	41
<i>Miranda Fuel Co.</i> , 140 NLRB 181 (1962)	31, 32
<i>New Hampshire v. Maine</i> , 532 U.S. 742 (2001)	16
<i>Newman v. Corner Inv. Co., LLC</i> , 2012 WL 2072773 (D. Nev. 2012), aff'd, 570 Fed. Appx. 684 (9th Cir. 2014)	27
<i>NLRB v. Jerry Durham Drywall</i> , 974 F.2d 1000 (8th Cir.1992)	39
<i>NLRB v. R.L. Sweet Lumber Co.</i> , 515 F.2d 785 (10th Cir. 1975), cert. denied, 423 U.S. 986 (1975)	45
<i>Nord v. Griffin</i> , 86 F.2d 481 (7th Cir. 1936)	11
<i>O'Rourke v. City of Providence</i> , 235 F.3d 713 (1st Cir. 2001)	29

<i>Part-Time Faculty Association at Columbia College Chicago v. Columbia College Chicago</i> , 892 F.3d 860 (7th Cir. 2018)	22
<i>PCC Structural, Inc.</i> , 365 NLRB No. 160 (2017)	43
<i>Petrochem Insulation, Inc.</i> , 330 NLRB 47 (1999), review denied & enf'd, 240 F.3d 26 (D.C. Cir. 2001), cert. denied, 534 U.S. 992 (2001)	34
<i>Pratt & Whitney</i> , 327 NLRB 1213 (1999)	43
<i>Register Guard</i> , 351 NLRB 1110 (2007)	41, 42
<i>Roadway Express, Inc.</i> , 355 NLRB 197 (2010), enf'd, 427 Fed. Appx. 838, 842 (4th Cir. 2011)	24
<i>Rubber Workers, Local 12 (Business League of Gadsden)</i> , 150 NLRB 312 (1964), enf'd, 368 F.2d 12 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967)	32
<i>Rupcich v. United Food and Commercial Workers International Union</i> , 2016 WL 4376512 (7th Cir. 2016)	25
<i>Scerba v. Allied Pilots Ass'n</i> , 2013 WL 6481583 (S.D.N.Y. 2013), aff'd, 589 Fed. Appx. 554 (2d Cir. 2014), cert. denied, 135 S. Ct. 2313 (2015)	38, 39
<i>Sheet Metal Workers International Association Local #18 (Everbrite, LLC)</i> , 359 NLRB 1095 (2013)	37
<i>Smith Steel Workers v. A.O. Smith Corp.</i> , 420 F.2d 1 (7th Cir. 1969)	22
<i>Sorenson Communications, LLC v. Federal Communications Commission</i> , 2018 WL 3542638 (D.C. Cir. 2018)	45
<i>Soule Glass & Glazing Co. v. NLRB</i> , 652 F.2d 1055 (1st Cir. 1981)	30
<i>Southside Med. Ctr., Inc.</i> , 356 NLRB 295 (2010)	4, 8, 49

<i>SSA Pacific, Inc.</i> , 366 NLRB No. 51 (2018)	30
<i>Stormont-Vail Healthcare, Inc.</i> , 340 NLRB 1205 (2003)	43
<i>Teamsters, Chauffeurs, Warehousemen & Helpers, Local 631</i> , 340 NLRB 881 (2003)	24
<i>Teamsters Local Union No. 206</i> , Case Nos. 19–CB–168283, 19–CB–178098 & 19–CB–192630 (October 31, 2017) (exceptions pending with Board)	20, 23
<i>Teamsters Local 776 (Rite Aid Corp.)</i> 305 NLRB 832 (1991), enf’d, 973 F.2d 230, 234 (3d Cir. 1992), cert. denied, 507 U.S. 959 (1993)	34
<i>Teamsters Local 952 (Pepsi Cola Bottling Co.)</i> , 305 NLRB 268 (1991)	34
<i>The Mirage Casino-Hotel</i> , 364 NLRB No. 1 (2016)	5, 23
<i>Tramont Mfg., LLC</i> , 365 NLRB No. 59 (2017), review granted in part & denied in part, 890 F.3d 1114 (D.C. Cir. 2018)	4, 8, 49
<i>United Food and Commercial Workers Locals 951, 7 and 1036 (Meijer, Inc.)</i> , 329 NLRB 730 (1999)	30
<i>United States. v. Salerno</i> , 937 F.2d 797 (2d Cir. 1991)	15
<i>United States v. Yildiz</i> , 355 F.3d 80 (2d Cir. 2004)	15
<i>United States v. Zizzo</i> , 120 F.3d 1338 (7th Cir.1997)	15
<i>United States Postal Service</i> , 362 NLRB No. 103 (2015)	31
<i>Vaca v. Sipes</i> , 386 U.S.171 (1967)	24

<i>Venetian Casino Resort, LLC</i> , 366 NLRB No. 14 (2018)	36
<i>West Texas Utilities Co.</i> , 85 NLRB 1396 (1949), enf'd, 184 F.2d 233 (D.C. Cir. 1950), cert. denied, 341 U.S. 939 (1951)	18
<i>Westrum Electric</i> , 365 NLRB No. 151 (2017)	48
<i>White Elec. Constr. Co.</i> , 345 NLRB 1095 (2005)	8, 49
<i>Williams-Sonoma Direct, Inc.</i> , 365 NLRB No. 13 (2017)	6, 22
<i>Wilmina Shipping AS v. United States Dep't of Homeland Sec.</i> , 75 F. Supp. 3d 163 (D.D.C. 2014)	19
<i>Wolf Creek Nuclear Operating Corp.</i> , 365 NLRB No. 55 (2017)	5, 6, 7, 18, 23
<i>Yellow Freight System, Inc. v. Automobile Mechanics Local 701 Intern. Ass'n of Machinists</i> , 684 F.2d 526 (7th Cir. 1982)	5, 22, 23

Statutes

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157	33
Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1)	34
Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3)	29, 31
Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(A)	2, 32, 36
Section (b)(2) of the National Labor Relations Act, 29 U.S.C. § 158(b)(2)	2, 29, 30, 31, 32
Section 8(b)(3) of the National Labor Relations Act, 29 U.S.C. § 158 (b)(3)	2, 32

Section 9 of the National Labor Relations Act,
29 U.S.C. § 159 7

Section 10(b) of the National Labor Relations Act,
29 U.S.C. § 160(b) 41

Rules and Regulations

Section 102.46(a)(1)(i)(D) of the Board’s Rules and Regulations,
29 C.F.R. §102.46(a)(1)(i)(D) 3

Section 102.46(a)(1)(ii) of the Board’s Rules and Regulations,
29 C.F.R. §102.46(a)(1)(ii) 3, 8

Section 102.67(b) of the Board’s Rules and Regulations,
29 C.F.R. §102.67(b) 5, 33

Section 102.67(f) of the Board’s Rules and Regulations
29 C.F.R. §102.67(f) 5, 17

Section 102.67(g) of the Board’s Rules and Regulations,
29 C.F.R. §102.67(g) 5, 7

Introduction

This case involves a union that has flagrantly denied union representation to a group of employees, in the face of (1) two rulings by the Regional Director of Region 13 (one of which was not appealed, and, as to the second, the Board denied the union's request for review), (2) a federal court decision, affirmed by the court of appeals, and (3) its own representations to Region 13. Each of these establishes that this group of employees are members of the bargaining unit represented by that union.

The victims of these unlawful acts are a group of full-time staff employees of Columbia College Chicago ("the College") who also teach part-time at the College, but not as part of their staff duties ("FTST") (T. 68, 198), and who have been seeking representation by the union that represents part-time faculty at the College (Respondent Part-Time Faculty Association at Columbia College ("PFAC")) (T. 66, 198-99). However, those efforts to be represented have been repeatedly stymied by PFAC. After being rebuffed by PFAC, FTST sought representation, in their capacities as part-time faculty, by another union at the College, which represents staff employees in their capacity as staff (the United Staff of Columbia College ("US of CC")) (GC Ex. 4). But PFAC opposed that petition, asserting that FTST, when working as part-time faculty, were already represented by PFAC, and therefore could not be represented by US of CC in their capacity as part-time faculty (CP Ex. 2; T. 122-23). Relying largely on those representations, the Regional Director of Region 13 dismissed US of CC's petition, ruling that FTST are represented by PFAC in their capacity as part-time faculty (GC Ex. 5; T. 71-72).

Based on that ruling, FTST sought representation by PFAC in their capacity as part-time faculty, as members of PFAC's bargaining unit (CP Exs. 5-11; T. 262-63, 270, 272-75). However, PFAC resisted (CP Exs. 6-11; T. 263, 270, 272-75).

Even after the Regional Director issued a second unit determination on August 30, 2016, based on evidence adduced at a lengthy representation hearing – finding that FTST are, and have been, dual function employees and, when teaching part-time, they are and have been included in PFAC’s bargaining unit (GC Ex. 13) – PFAC continued to resist (CP Ex. 4; T. 223). PFAC refused to provide representation to FTST in connection with a grievance they filed against the College for not assigning courses to them as members of PFAC’s bargaining unit, and PFAC refused to take their grievance to arbitration, on the ground that FTST, in their capacity as part-time faculty, are not included in PFAC’s bargaining unit (GC Exs. 9, 10, 11, 32-36; T. 79, 81-83, 85, 88, 143-44, 202-09, 211-13, 221, 244-45). PFAC’s refusal to represent FTST continued, despite the Board’s denial of PFAC’s request to review the Regional Director’s August 30 decision (GC Ex. 19; T. 129, 284-85) and the Board’s failure to grant PFAC’s request to stay the Regional Director’s decision (T. 284-85).

PFAC compounded its unlawful conduct by obtaining, and seeking to enforce, an arbitration award that conflicted with the Regional Director’s decision that FTST are in PFAC’s bargaining unit (GC Exs. 14, 15, 17 & 18; T. 62, 92-95). In addition, PFAC has filed, maintained, and sought to compel arbitration of grievances that allege that FTST are excluded from its bargaining unit (GC Exs. 21, 22 23A, 23B, 24A, 24B, 25, 26, 27, 28, 29A, 29B, 30 & 31; T. 96-99, 102-14, 159-62), including doing so after the Regional Director’s decision on April 28, 2015 (GC Exs. 26, 27 & 28), and after the Regional Director’s decision on August 30, 2016 (GC Exs. 29A, 29B, 30 & 31; T. 115-17). And, PFAC has refused to represent FTST in collective bargaining negotiations with the College with respect to a successor collective bargaining agreement (GC Exs. 38-40; T. 217-20).

Thus, PFAC violated and is violating Section 8(b)(1)(A), 8(b)(2), and 8(b)(3) of the Act.¹

¹ Seven FTST employees – Tanya Harasym, Larry Kapson, Eric Koppen, Weston Morris, Anthony Santiago, Jill Sultz and Clint Vaupel – filed the charge in Case 13-CB-165873 against PFAC on behalf of all affected FTST. Vaupel filed the charge in Case 13-CB-202023 on

Following a hearing on November 28 and 29, 2017, the ALJ issued a decision dated May 24, 2018, finding that PFAC violated the Act as alleged. PFAC filed exceptions, none of which has any merit, as explained below.²

Argument

I. PFAC's First Exception – That the Board Should Consider and Reverse the Determination in the Representation Case – is Without Merit

PFAC contends that the Board should consider and reverse the unit determination made in Case 13-RC-146452 (PFAC Exc. at 8-11). That contention is without merit.

A. PFAC Has Not Properly Raised the Issue of the Inclusion of FTST in its Bargaining Unit

In its exceptions, PFAC does not provide any argument as to why the Regional Director's determination of August 30, 2016 was wrong. Instead, it merely states that, "[f]or 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" (PFAC Exc. at 10). However, PFAC may not do so.

Section 102.46(a)(1)(i)(D) of the Board's rules provides that, "[i]f no supporting brief is filed [as in the present case], the exceptions document must also include the citation of authorities and argument in support of the exceptions. Under Section 102.46(a)(1)(ii) of the Board's rules, "[a]ny exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded."

behalf of all affected FTST. The College also filed its own charge in Case 13-CB-202035.

² The Individual Charging Parties filed a motion to strike PFAC's exceptions, which was granted in part and denied in part. On July 31, 2018, PFAC submitted revised exceptions, to which the Individual Charging Parties hereby respond.

Thus, PFAC’s failure to have provided any explanation, argument and citation of authorities in support of any such contention waived its right to challenge the rulings in the representation case. *Tramont Mfg., LLC*, 365 NLRB No. 59 (2017), review granted in part & denied in part, 890 F.3d 1114 (D.C. Cir. 2018); *Holsum De Puerto Rico, Inc.*, 344 NLRB 694, 695 n.1 (2005), enf’d, 456 F.3d 265 (1st Cir. 2006); *Southside Med. Ctr., Inc.*, 356 NLRB 295, 296 n.1 (2010); *Gaetano & Associates*, 344 NLRB 531, 531 n.6 (2005), enf’d, 183 Fed. Appx. 17 (2d Cir. 2006). Contrary to PFAC’s assertion, it has failed to “preserve[] all arguments set forth in Case 13-RC-146452” (PFAC Exc. at 10).

B. PFAC Erroneously Asserts That the Present Case is the Board's “First Opportunity to Rule Directly” on the Regional Director's Decision in the Representation Case

PFAC asserts that the present case is the Board's “first opportunity to rule directly on the Regional Director's decision” in the representation case (No. 13-RC-146452) (PFAC Exc. at 8-9). But that is not true.

As PFAC acknowledges, “P-fac filed a timely request for review of the Regional Director's” decision of August 30, 2016 in the representation case (PFAC Exc. at 9), and the record supports that fact (T. 284-85; see also T. 129). PFAC also acknowledges that “the Board denied the request for review” (PFAC Exc. at 9), and the record supports that undisputed fact (GC Ex. 19).

Thus, the Board had a complete and full opportunity to rule directly on the Regional Director's decision in the representation case. And it did so, by denying PFAC’s request for review.

C. PFAC is Precluded From Relitigating the Determination in the Representation Case

In his decision of April 28, 2015, the Regional Director found – based largely on PFAC’s own representations, and those of the College – that, when they teach part-time (not as part of their duties as staff), the FTST are members of PFAC’s bargaining unit as long as they have taught at

least one semester at the College (GC Ex. 5 p. 2). No party sought review of that decision (T. 284). Later, following a twelve-day representation hearing in which PFAC actively participated, the Regional Director again found on August 30, 2016 that, in their part-time teaching capacity, FTST are already included in PFAC’s bargaining unit (GC Ex. 13 p. 13) and that “any agreement between the Employer and PFAC to exclude the petitioned-for group of employees, in their capacity as part-time faculty [viz, the FTST] would be contrary to Board policy” (GC Ex. 13 p. 14). The Board denied PFAC’s request for review (GC Ex. 19).

Under the Board’s rules, those determinations by the Regional Director – including that FTST are included in PFAC’s bargaining unit – were final. See Section 102.67(b) of the Board’s Rules (“The decision of the Regional Director shall be final”) and Section 102.67(f) that were in effect at the time the representation case was filed (“Denial of a request for review shall constitute an affirmance of the Regional Director’s action which shall also preclude relitigating any such issues [i.e., “any issue which was, or could have been, raised in the representation proceeding”] in any related subsequent unfair labor practice proceeding”).³ *Wolf Creek Nuclear Operating Corp.*, 365 NLRB No. 55 (2017) (“as a matter of Board law and procedure ... a Regional Director's decision is final – and thus may have preclusive effect – if no request for review is made (as here) or if the Board denies a request for review”; “[i]t does not matter that the Board itself did not address the issue”); *The Mirage Casino-Hotel*, 364 NLRB No. 1, n.2 (2016); *Golden West Broadcasters-KTLA*, 220 NLRB 937, 938 (1975); *Yellow Freight System, Inc. v. Automobile Mechanics Local 701 Intern. Ass'n of Machinists*, 684 F.2d 526, 529 (7th Cir. 1982).⁴

³ That provision appears in Section 102.67(g) of the Board’s current rules.

⁴ PFAC acknowledges the Board’s non-relitigation doctrine, stating that, because it is “[m]indful of the Board's non-relitigation doctrine, P-fac will not attempt to repeat those arguments here” (PFAC’s Exc. at 10). PFAC’s failure to include in its exceptions any grounds for questioning

A federal district court ruled on this very question in a case brought by PFAC against the College, in which PFAC contended that the Board’s denial of review in the representation case was not final. The court rejected that contention (GC Ex. 20; 2017 WL 5192023 (N.D. Ill. 2017)). The Seventh Circuit affirmed that decision. 892 F.3d 860 (7th Cir. 2018). Thus, it is established – and is not subject to relitigation – that FTST are included in PFAC’s bargaining unit.

D. In Denying Review, the Board Did Not Merely Affirm the Regional Director’s “Actions”

PFAC quibbles about the Board's citation of *Williams-Sonoma Direct, Inc.*, 365 NLRB No. 13 (2017), in its order denying PFAC’s request for review in the representation case, contending that the Board thereby “left open the possibility that it would revisit the Regional Director's *reasoning* if not his *actions*,” because, in *Williams-Sonoma*, the “Board declined to adopt the reasoning of the Regional Director although it upheld his action” (PFAC Exc. at 10; emphasis by PFAC). But PFAC’s argument fails. First, unlike the Board’s order in *Williams-Sonoma*, in Case 13-RC-146452 the Board did not so qualify its ruling. Thus, when the Board denied PFAC’s request for review, it did not state that it was not adopting the Regional Director’s decision as its own.

Second and more significantly, contrary to PFAC’s assertion, for purposes of the Board’s preclusion rule, there is no substantive dichotomy, when the Board denies a request for review, between affirming a regional director’s actions or reasoning, because, “as a matter of Board law and procedure ... a *Regional Director's decision is final* – and thus may have preclusive effect – if no request for review is made (as here) *or if the Board denies a request for review.*” *Wolf Creek Nuclear Operating Corp.*, 365 NLRB No. 55 (2017). Thus, a regional director’s *decision* is final when the Board denies review. A decision cannot be “final” if it can be relitigated. *Wolf Creek* (a

the Regional Director’s unit determination is addressed above.

decision is “final, for purposes of preclusion, when it is a firm and stable one, the last word” on the subject; (internal quotations omitted)). Indeed, the Board in *Wolf Creek* expressly ruled that the finality of regional directors’ decisions does not depend on whether the Board adopts a regional director’s reasoning, because, in terms of the finality of the decision, “[i]t *does not matter* that the Board itself did not address the issue.” *Id.* (emphasis added).

E. PFAC Misconstrues the Board’s Non-Relitigation Rule

PFAC argues that the Board’s non-relitigation rule, currently in Section 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” (PFAC Exc. at 10; italics by PFAC).

But that is *not* what the express terms of Section 102.67(g) of the Board’s rules states. It states “Denial of a request for review shall constitute an affirmance of the Regional Director’s action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.” Contrary to PFAC’s assertion, the rule is not written as a limitation on “a ‘party’” from “relitigating.” Nor does it say anything about the Board itself being outside the scope of the rule. As the Board ruled in *Wolf Creek*, “as a matter of Board law and procedure ... a Regional Director’s decision is final – and thus may have preclusive effect – if no request for review is made (as here) or if the Board denies a request for review.”

F. In Any Event, PFAC Cannot Challenge the Ruling in the Representation Case Because it Failed to Except to the ALJ’s Ruling Barring Evidence on the Issue of Unit Inclusion

Prior to the hearing, the ALJ granted the Individual Charging Parties’ motion in limine, precluding all parties from “presenting evidence or relitigating any issue which was, or could have been, raised in the underlying representation proceeding, including whether the FTST are included

in the PFAC bargaining unit” (GC Ex. 1(y)). However, in its exceptions, PFAC did not except to that ruling by the ALJ. PFAC’s only references in its exceptions to the ALJ’s exclusion of such evidence were that the “ALJ erred by refusing to hear evidence and argument regarding the proper scope of the unit,” and “[h]ence the ALJ should have permitted P-fac to present evidence and argument on the proper scope of the unit PFAC” (PFAC Exc. No. 6, at 15 & 18). But PFAC wholly failed to support those cryptic statements with any explanation, argument or citation of authority as to how or why the ALJ erred in granting the motion in limine or excluding such evidence.

Under Section 102.46(a)(1)(D) of the Board’s rules, “If no supporting brief is filed [as in the present case], the exceptions document must also include the citation of authorities and argument in support of the exceptions.” Under Section 102.46(a)(1)(ii), “[a]ny exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.”

Thus, PFAC’s failure to have excepted to the ALJ’s having granted the motion in limine (and her reaffirming that ruling in her post-hearing decision) – or, at the least, PFAC’s failure to have provided any explanation, argument and citation of authorities in support of any such exception – waived its right to challenge that ruling by the ALJ. *In Re White Elec. Constr. Co.*, 345 NLRB 1095, 1096 (2005); *Ichikoh Mfg., Inc.*, 312 NLRB 1022 (1993), *enf’d*, 41 F.3d 1507 (6th Cir. 1994); *Tramont Mfg., LLC*, 365 NLRB No. 59; *Holsum De Puerto Rico, Inc.*, 344 NLRB at 695 n.1; *Southside Med. Ctr., Inc.*, 356 NLRB at 296 n.1; *Gaetano & Associates*, 344 NLRB at 531 n.6.⁵

Because PFAC cannot now ask the Board to consider an issue as to which PFAC has not

⁵ PFAC also waived this issue by failing to raise it in its in post-hearing brief to the ALJ (*Approved Electric Corp*, 356 NLRB 238, 240 n.1 (2010); *Dayton Newspapers*, 339 NLRB 650, 653 n.8 (2003), *enf’d* in part & denied in part on other grounds, 402 F.3d 651 (6th Cir. 2005)), and by failing to offer the record from the representation case at the ULP hearing (*Bodine v. Warden of Joseph Harp Correction Center*, 217 Fed. Appx. 811, 814 (10th Cir. 2007)).

excepted, there is no basis in the record in this case for the Board to “reconsider” the unit determination in the representation case.

II. PFAC’s Second Exception – That the ALJ “Misconstrued” a Brief PFAC Submitted to Region 13 – is Without Merit

PFAC asserts that 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.” PFAC claims that the ALJ thereby “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” (PFAC Exc. at 11; emphasis by PFAC).

PFAC concedes that “the opening pages of P-fac's brief did in fact recite that P-fac ‘is already the exclusive representative of *'all part-time faculty'* at the College” (PFAC Exc. at 11, quoting CP Ex. 2 at 2). In fact PFAC asserted in that brief – without noting any exceptions – that FTST are in PFAC’s bargaining unit, stating, for example, that:

- “Because P-fac is already the exclusive representative of *'all part-time faculty'* at the College, US of CC is barred as a matter of law from being recognized as the exclusive representative of *some* part-time faculty at the College” (CP Ex. 2 p. 2; italics in original).
- “The Board cannot recognize US of CC as the exclusive representative of ‘FTST’ because P-fac is the exclusive representative of part-time faculty” (CP Ex. 2 p. 12; bold omitted).
- The petition “must be dismissed” because “P-fac is the exclusive representative of part-time faculty” (CP Ex. 2 p. 12).
- FTST “desire to also moonlight from their day job [as staff] as part-time faculty” and, in that capacity, FTST “take on a second and distinct status as part-time faculty represented by P-fac” (CP Ex. 2 p. 12).

Now, PFAC contends that, later in its brief, it clarified “that in P-fac's view *none* of the FTST

qualified for membership in the bargaining unit” despite their part-time teaching duties, because FTST were excluded under the recognition clause that excludes “full-time staff members” (PFAC Exc. at 11-12).⁶ But, that exclusion only applies to staff performing teaching duties *as part of their staff duties*, not when working as part-time faculty apart from their staff duties, as the Regional Director twice found (GC Ex. 5 p. 2; GC Ex. 13 pp. 13-14).⁷

Moreover, PFAC’s present attempt to recharacterize its brief was contradicted by a letter PFAC itself sent to the College only four months after PFAC submitted its brief to Region 13, in which PFAC acknowledged that its brief in response to the order to show cause said that FTST “had not ever been excluded from” PFAC’s unit (GC Ex. 8 p. 2 n.1).

Thus, contrary PFAC’s second exception, the ALJ correctly found that “[t]hroughout its response to the show cause notice, PFAC repeatedly contended that it represented . . . any full-time staff who moonlighted as part- time faculty” (ALJ Dec. at 6).

III. PFAC’s Third Exception – Regarding the ALJ’s Finding With Respect to FTST Having Accrued Seniority – is Without Merit

PFAC contends that 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,” asserting that “[t]here 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” (PFAC Exc. at 13).

But, in making this argument, PFAC mischaracterizes the ALJ’s decision. In the passage PFAC relies on (PFAC Exc. at 13, citing ALJ Dec. at 6, citing Tr. 91), the ALJ simply recited what

⁶ PFAC makes the same erroneous statement earlier in its Exceptions (at 5).

⁷ Full-time staff who teach as *part of their staff duties* are identified in Appendix V to the collective bargaining agreement between the College and PFAC (CG Ex. 3 p. 31). Those employees are distinct from the group of staff employees who teach part-time, *apart from their staff duties* (FTST) (T. 176, 185), and are not at issue in this case.

the College did, following the Regional Director's decision in April, 2015: the College attempted to verify the seniority status of the FTST employees in order to afford the FTST teaching assignments based upon the accumulated course credits for courses they had taught as part-time faculty, but, because PFAC refused to recognize its obligation to represent the FTST, "the College started granting them course assignments as Unit members with their appropriate accrued teaching credits/seniority for the spring 2017 semester" (T. 91.) By "appropriate," the ALJ necessarily was referring to the number of course credits each FTST had accrued, based on their prior part-time teaching at the College. Had the College not begun to assign courses to FTST based on their accumulated course credits, it would have continued to discriminate against them by treating them differently from other part-time faculty, notwithstanding the Regional Director's decision.

The College's use of accumulated seniority for FTST was borne out by the Regional Director's decision of August 30, 2016, in which he found that "employees in the petitioned for group [i.e., FTST] are already included in the PFAC unit in their capacity as part-time faculty and covered by the PFAC contract" (GC Ex. 13 p. 13).

Yet, fundamentally, the ALJ's reference to using "appropriate seniority" as a description of what the College did to conform to the Regional Director's decision in April, 2015 was wholly immaterial to any findings she made regarding PFAC's violations of the Act, or to any remedy she ordered. Her findings and remedy were limited to PFAC's exclusion of FTST from PFAC's bargaining unit, and said nothing whatsoever about seniority or course credits.

Moreover, the two cases PFAC cites (PFAC Exc. at 14) are inapposite. *Nord v. Griffin*, 86 F.2d 481 (7th Cir. 1936), concerned a National Railroad Adjustment Board's determination that affected seniority rights of an employee who had not been a party to that proceeding and had no notice of it. The case had nothing to do with whether unions have any due process rights, or with

any obligations to bargain under the NLRA. In the other case cited by PFAC, *Federal-Mogul Corp.*, 209 NLRB 343 (1974),⁸ the Board held that the employer had refused to apply the extant collective-bargaining agreement to employees accreted to the unit and insisted on bargaining over the terms and conditions of employment of the accreted employees who were already covered by the extant collective-bargaining agreement. That has no bearing on the present case, where the Regional Director determined in the representation case that FTST are already in PFAC's bargaining unit.

IV. PFAC's Fourth Exception – Regarding the ALJ's Referring to the District Court's Awarding Costs Against PFAC – is Without Merit

PFAC assents that 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” (PFAC Exc. at 14, citing ALJ Dec. at 10 & GC Ex. 41). PFAC says that the “court only ordered P-fac to pay ‘costs,’ a legal term of art that does not include the entire cost of a litigation” and that the “ALJ appeared to put some stock in the fact that the district court had awarded costs against P-fac” (PFAC Exc. at 14).

The federal court did award costs to the College in that case (GC Ex. 41). But the ALJ did not put any “stock in” that fact. One can scour the ALJ's decision and will not find a single reference or use of the fact that the court awarded costs against PFAC in that case. This exception is simply a makeweight.

V. PFAC's Fifth Exception – That the ALJ Mischaracterized PFAC's Opposition to the Regional Director's Unit Determination – is Without Merit

PFAC contends that 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’” (PFAC Exc. at 14,

⁸ PFAC cites *Federal-Mogul* for this same proposition earlier in its Exceptions (at 7).

citing ALJ Dec. at 12). PFAC asserts that “[t]here is nothing in the record that could reasonably be construed as advancing such a legally dubious position” (PFAC Exc. at 15).

That is not true. For example, shortly after the arbitration award was issued, one of the FTST employees sent an email to PFAC’s attorney again requesting that PFAC represent FTST, based on the Regional Director’s determination on August 30, 2016, and the Board’s denial of PFAC’s request for review of that determination, to which PFAC’s attorney asserted that “[t]his matter has been resolved by arbitration in which the arbitrator, acting under his lawful authority, interpreted the Contract and held that ... both the Union and the Employer excluded FTST from the bargaining unit.” PFAC’s attorney further stated that “[t]he Union relies on this final and binding arbitration award in refusing to acknowledge you or any other FTST as a member of the bargaining unit” (GC Ex. 37 p. 1). Thus, PFAC contended that the arbitration award, based on contract interpretation, took precedence over the Regional Director’s unit determination, notwithstanding the Board’s denial of PFAC’s request for review.

Similarly, a few months later, Clint Vaupel, one of the FTST employees, requested that PFAC represent FTST’s interests, as PFAC unit members, in collective bargaining negotiations with the College, based on the Regional Director’s final and binding unit determination of August 30, 2016, and stating that any reliance on the arbitration award to exclude FTST from the unit would be unlawful. PFAC’s attorney responded that “[y]ou, and other so-called ‘FTST’ are not included in the P-fac unit. You are excluded from that unit. There is a final and binding arbitration that put this matter to rest....” (GC Ex. 39).

In addition, in its post-hearing brief to the ALJ, PFAC stated that:

- The Regional Director’s “statements in dismissing the FTST election petition [i.e., US of CC’s petition] that they are ‘already in the unit’ [should not] be controlling as that was a (wrong) contract interpretation and not an exercise of authority to certify a bargaining unit” (PFAC Post-Hearing Br. at 2).

- “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” because the “Regional Director was engaged in contract interpretation” (PFAC Post-Hearing Br. at 4).
- “the Regional Director was making a contract interpretation when he made comments regarding the unit status of the FTST employees,” and the Regional Director “was not interpreting the National Labor Relations Act or any agency rule in making statements regarding FTST unit status” (PFAC Post-Hearing Br. at 9).
- “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...” (PFAC Post-Hearing Br. at 11).

The record before the ALJ also included the district court’s decision vacating the arbitration award, which referred to PFAC’s “unavailing attempt to circumvent the Board’s representational ruling by reference to the ‘contractual’ nature of the arbitrator’s award” (GC Ex. 20 at 15).

VI. PFAC’s Sixth Exception – That the ALJ Erred in Refusing to Hear Evidence Regarding the Scope of the Unit, Despite the Board “Taking the Position That the ALJ Would Rule on the Proper Scope of the Unit” – is Without Merit

PFAC quotes statements made by Michael Ellement, an attorney in the NLRB General Counsel’s Contempt, Compliance & Special Litigation Branch, in the federal court case in which PFAC was attempting to enforce the arbitration award (PFAC Exc. at 15-16). In particular, PFAC relies on Ellement’s statement regarding the Board’s denial of PFAC’s request for review in the representation case, where Ellement said that the Board “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.” PFAC claims that the ALJ found, contrary to Ellement’s statement, that “the *Board* could not be bound by” Ellement’s statements, and that she could find that the Regional Director’s unit determination was final and not subject to relitigation before her (PFAC Exc. at 17; emphasis by PFAC).

A. The ALJ Did Not Commit the Errors Claimed by PFAC

PFAC ascribes errors to the ALJ's decision in this respect, none of which is meritorious. First, PFAC says "it was simply wrong for the ALJ to conclude that [Ellement] who explicitly spoke on behalf of the Board was only "representing the General Counsel" and not the Board (PFAC Exc. at 18, citing ALJ Dec at 11, n.11). But, the ALJ's noting that the statement was "made by a Board attorney representing General Counsel," as opposed to the Board, made no difference to her ruling, which was principally based on the principle that an attorney cannot alter the Board's rules. PFAC in fact agrees with that principle, acknowledging that "of course a single attorney cannot change the meaning of federal regulations nationwide" (PFAC Exc. at 18).

Second, despite this, PFAC claims that a single attorney can "bind the government as to positions it may take in particular litigation" (PFAC Exc. at 18, citing *United States v. Yildiz*, 355 F.3d 80, 82 (2d Cir. 2004)). But *Yildiz* involved the use of statements *of fact* in a *criminal* case made by a *government informer*, and the court held that "a government agent's out-of-court statements are *not admissible* for their truth in a criminal prosecution as admissions by a party opponent." 355 F.3d at 82 (emphasis added). Moreover, the passage quoted by PFAC from *Yildiz* referred to the holding in another case, *United States v. Salerno*, 937 F.2d 797, 811 (2d Cir. 1991), where the court held that the principle about use of attorney statements applied in *criminal* cases, where defendants may use prior *jury arguments*, but only if the argument "involves an *assertion of fact*" and the statements are the "*equivalent of testimonial statements*" made by the client" (emphasis added). The present case is not a criminal case, and Ellement's statements were not statements of fact and were not "equivalent of testimonial statements." See also *United States v. Zizzo*, 120 F.3d 1338, 1351 n.4 (7th Cir.1997) (statements made by government employees in criminal cases are not admissible because "no individual should be able to bind the sovereign").

Third, PFAC contends that, even if the ALJ were right, “that would not render the ALJ’s decision proper,” because PFAC would be deprived of due process by the General Counsel’s maintaining that “the Regional Director’s dismissal in 13-RC-146452 was final and indeed ‘conclusive,’” despite Ellement’s having “disavowed” that position (PFAC Exc. at 18). But the problem that PFAC complains about is a product of the Board’s non-relitigation rule, which has been in existence for many years. Because PFAC fully participated in that representation case, and availed itself of the right to file a request for review with the Board, there could be no due process violation.

Based on these arguments, PFAC asserts that the ALJ should have permitted it to present evidence and argument on the proper scope of the unit (PFAC Exc. at 18). But that issue was foreclosed under the Board’s non-relitigation rule. And the evidence relating to such an issue was barred by the ALJ’s order granting the Individual Charging Parties’ motion in limine, a ruling that PFAC does not except to. See response to Exception No. 1, section I F above.

B. The Doctrine of Judicial Estoppel Does Not Apply

PFAC asserts that “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” (PFAC Exc. at 17). PFAC primarily relies on *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001). There, the Court said that there are generally three factors that “typically inform the decision whether to apply the doctrine in a particular case”:

- (1) A “party’s later position must be clearly inconsistent with its earlier position.”
- (2) The party must have “succeeded in persuading a court to accept that party’s earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled... Absent success in a prior proceeding, a party’s later inconsistent position introduces no risk of inconsistent court determinations ... and thus poses little threat to judicial integrity.”

- (3) The party “seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.”

532 U.S. at 750-51 (internal quotations omitted). None of those elements is present in this case, because (1) the General Counsel’s position in this case has been consistent with the Board’s non-relitigation rule, whereas Ellement’s statement did not purport to interpret or even take into account those rules (as further explained below); (2) in federal court, the General Counsel was not successful, since the district court did not rely on Ellement’s statements (GC Ex. 15-16 n.10); and (3), in the present case, the General Counsel is not depriving PFAC of any advantage, but is merely asking the Board to apply its well-established non-relitigation rule.

C. Ellement’s Statements Failed to Take Into Account the Board’s Rules and Were Contrary to the Board’s Rules

The statements Ellement made in court did not take into account the Board’s rules regarding the finality of a regional director’s determinations in representation cases and their preclusive effect in a subsequent related unfair labor practice case (Sections 102.67(b) & (f)). Nor did Ellement take into account that a party to the ULP cases – the Charging Parties, who were not litigants in the federal court case – would invoke the Board’s finality and preclusion rules.

That that was the case is evident from Ellement’s statements, which were statements of generalities and were in the abstract. Immediately following Ellement’s statements, the attorney for the College, Joseph Tilson, disputed what Ellement had said, because “[t]he problem with Mr. Ellement’s argument is the board’s own rules” (Transcript at 10, Ex. A to PFAC’s Response to CPs’ Motion in Limine). The College’s attorney then explained that, under the Board’s rules, the Board’s denial of PFAC’s request for review had the effect of affirming the regional director’s determination in its entirety *Id.* Throughout the remainder of the court hearing, Ellement did not dispute that the Board’s rules so provide or that they govern the issues of finality and preclusive effect. Nor did he

claim that his statements to the court superseded the Board's rules.

In fact, the Board itself had recently held that, insofar as the finality of regional directors' decisions is concerned, and insofar as the effect of those decisions, “[i]t does not matter that the Board itself did not address the issue.” *Wolf Creek Nuclear Operating Corp.*, 365 NLRB No. 55 (emphasis added). There, the Board ruled that, “as a matter of Board law and procedure ... a *Regional Director's decision is final* – and thus may have preclusive effect – if no request for review is made (as here) or *if the Board denies a request for review.*” *Id.* (emphasis added).

In sum, Ellement's statements do not affect the finality of the Regional Director's unit determination or its preclusive effect, because they did not take into account the Board's rules.

D. In Any Event, Ellement's Statements Could Not Alter the Board's Rules

No matter what Ellement said in court, his statements cannot alter the Board's rules.

Aside from the cases cited by the ALJ holding that statements made by the Board's General Counsel are not binding on the Board (ALJ Dec. at 11 n.11), the Board has held that “... it would be inappropriate for the Board to consider itself bound by the representations of the General Counsel concerning a matter of law....” *Harvey Mfg.*, 309 NLRB 465, 472 n.12 (1992). The General Counsel's “primary function is to investigate charges and prosecute cases before the Board. The task of making binding interpretations of the meaning of the Act is a judicial function, vested in the Board Members with ultimate power of review in the courts.” *West Texas Utilities Co.*, 85 NLRB 1396, 1399 (1949), *enf'd*, 184 F.2d 233 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 939 (1951).

Indeed, the Supreme Court has held that “[t]he courts may not accept appellate counsel's *post hoc* rationalizations for agency action [;]... an agency's discretionary order [may] be upheld, if at all, on the same basis articulated in the order by the agency itself.” *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962). An “agency's lawyer is not authorized to amend its rules in order to make

them more palatable to the reviewing court.” *Hoctor v. U.S. Dept. of Agriculture*, 82 F.3d 165, 171 (7th Cir.1996). See also *Ashland Oil, Inc. v. FTC*, 548 F.2d 977, 981 (D.C. Cir. 1976) (government counsel’s “statements could not bind the court to ignore the rationale on which the [agency’s] decision was actually based”); *Davis Cnty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir.1997) (upholding portion of agency rule, despite statement of its counsel at oral argument that the entire rule would need to be vacated if part of the rule were invalid); *Wilmina Shipping AS v. United States Dep’t of Homeland Sec.*, 75 F. Supp. 3d 163 (D.D.C. 2014) (statements made by agency’s counsel at court hearing about meaning of order cannot override agency’s order itself).

More generally, “Board law is fundamental that it is not bound by advice given to respondents by Board agents, especially where employee rights are violated pursuant to that advice.” *Martel Const.*, 311 NLRB 921, 927 (1993), *enf’d*, 35 F.3d 571 (9th Cir.1994) (internal quotation omitted). “The general rule is that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law.” *Kelley v. NLRB*, 79 F.3d 1238, 1249 (1st Cir. 1996) (party’s attorney was not entitled to rely on oral statements by Board employee; “[s]uch information, almost by definition, is not nearly as reliable as simply looking up the text of a regulation”). See also *Ivaldi v. NLRB*, 48 F.3d 444, 451 (9th Cir. 1995).

Accordingly, to the extent, if any, Ellement’s statements were inconsistent with the Board’s own rules, they are not binding on the Board.

VII. PFAC’s Seventh Exception – That the ALJ Erred in Ruling That PFAC Acted Arbitrarily and in Bad Faith, Based on the Regional Director’s Unit Determination Being Final – is Without Merit

PFAC contends that the ALJ erred in ruling that PFAC acted arbitrarily and in bad faith, to the extent the ALJ based that ruling on PFAC’s failing to comply with the Regional Director’s unit determination of August 30, 2016, because, according to PFAC, that unit determination was not final

(PFAC Exc. at 19-20).

PFAC bases this argument on the same contention that it made in Exception No. 1: that, when the Board denied PFAC's request to review the Regional Director's unit determination of August 30, 2016, the Board did not adopt the Regional Director's reasoning, and the Regional Director's determination was not final (PFAC Exc. at 19). PFAC's contention that the Regional Director's determination – including its reasoning – was not final, is wrong, for the reasons explained above, with respect to Exception No. 1.

PFAC asserts that its actions “were *not* taken in bad faith” because “the issue of FTST's inclusion in the P-fac unit is still awaiting final Board resolution” (PFAC Exc. at 19; emphasis by PFAC). PFAC admits that that it “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” (PFAC Exc. at 19; emphasis by PFAC). That admission is fatal to PFAC's defense to the merits of the claims, because, as explained above with respect to Exception No. 1, the Regional Director's unit determination was *final* once the Board denied PFAC's request for review, and PFAC is precluded from relitigating that unit determination in this case, as explained with respect to PFAC's first exception.

PFAC cites the ALJ'S decision in *Teamsters Local Union No. 206*, Case Nos. 19-CB-168283, 19-CB-178098 & 19-CB-192630 (October 31, 2017) (exceptions pending with Board), for the proposition that the ALJ “refus[ed] 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’” (PFAC Exc. at 19). But, unlike the present case, in that case there had been *no representation proceeding at all*, and the ALJ said that, absent such a prior representation proceeding, there could be no “‘undermining’ of any Board decision regarding the

representational rights of employees.” Slip Op. at 31.⁹

PFAC claims that it could not comply with the Regional Director’s unit determination because otherwise it would have waived the issue (PFAC Exc. at 20). But there was no issue that could have been waived after the Board denied review of the Regional Director’s unit determination. That determination was final, and PFAC had no basis for continuing to contest it.¹⁰ PFAC also repeats its estoppel argument from Exception No. 6 (at 20), which, as explained above with respect to that exception, is unfounded.

VIII. PFAC’s Eighth Exception – That the ALJ Erred in Finding That PFAC Breached its Duty of Fair Representation, Because the Regional Director’s Unit Determination Was Assertedly Not Final – is Without Merit

PFAC contends that the ALJ erred in finding that PFAC breached its duty of fair representation by acting arbitrarily or in bad faith by various actions that the ALJ found to be unlawful, which were all predicated on the Regional Director's unit determination (PFAC Exc. at 20-21). PFAC says that, “[b]ecause the Board should reverse the Regional Director's decision placing FTST in the P-fac unit, all of these allegations should be dismissed” (PFAC Exc. at 21). But this argument fails because, as explained above, the Regional Director's unit determination was final when the Board denied PFAC’s request for review, and is not subject to relitigation in this case.

A. PFAC’s Claims of Lack of Bad Faith Fall Flat

As a fall-back position, PFAC contends that it “took the referenced actions toward FTST

⁹ The ALJ in that case recognized the principle that PFAC otherwise disputes, that “an arbitrator may adjudicate the dispute, even though the superior authority of the Board can be invoked at any point, citing *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964). Slip Op. at 30.

¹⁰ In this context, PFAC cites *Bath Iron Works*, 302 NLRB 898 (1991) (PFAC Exc. at 20), but that case concerned whether the union had waived its right to bargain under the management-rights clause, 302 NLRB at 902, an issue that has nothing to do with the present case.

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” (PFAC Exc. at 21). PFAC says that it was merely “legally mistaken in concluding that the Regional Director's dismissal in case 13-RC-146452 was a non-final Board determination” (PFAC Exc. at 21-22). In support of that assertion, PFAC relies on four considerations, but none supports the conclusion that it merely acted negligently or mistakenly.

- (1) PFAC asserts that “the extensive in-court argument made by a CCSLB attorney [Ellement] 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*.” However, PFAC could not reasonably rely on a statement that contradicted a clear and long-standing Board rule.
- (2) PFAC asserts that “the reasoned, written arbitration award that ran contrary to the Regional Director's decision.” However, this assertion is spurious. “A series of controlling case law, beginning with the Supreme Court's decision in *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964),” establishes that regional directors’ representation decisions “trump arbitration award[s].” *Part-Time Faculty Association at Columbia College Chicago v. Columbia College Chicago*, 892 F.3d 860, 865 (7th Cir. 2018), citing *Smith Steel Workers v. A.O. Smith Corp.*, 420 F.2d 1 (7th Cir. 1969); *Yellow Freight System, Inc. v. Automobile Mechanics Local 701 International Association of Machinists*, 684 F.2d 526 (7th Cir. 1982). “[T]hose cases speak in strikingly broad terms” regarding the primacy of the Board’s representation determinations over contrary rulings by arbitrators.” 892 F.3d at 867. PFAC has failed to offer any good faith basis for acting in direct defiance of this “series of controlling case law” that “speak[s] in strikingly broad terms” against PFAC’s claiming to have taken refuge in an arbitration award that it concedes “ran contrary to the Regional Director's decision.” Indeed, a federal district court (GC Ex. 20), affirmed by the court of appeals, held that the arbitration award “is unenforceable as a matter of law” because it “directly conflicts with a representation decision of the Board.” 892 F.3d 860, 868 (7th Cir. 2018). And the Board itself previously ruled in this case that the award is of no consequence, when, in an order issued on November 27, 2017, the Board denied PFAC’s motion to dismiss the complaint, which was based on the arbitration award, noting that the federal court had vacated the award, due to the “well established” principle “that the Board's determination regarding unit scope takes precedence over a conflicting arbitration decision,” citing *Carey*. To this day, PFAC continues to rely on that award (PFAC Exc. at 5, 7, 8), notwithstanding the many adverse rulings to the contrary.
- (3) PFAC asserts that “the Board's statement in denying P-fac's request for review ... that it affirmed only that *action* of the Regional Director, and that otherwise cited *Williams-Sonoma*, 365 NLRB No. 13.” However, the Board’s order in Case 13-RC-146452 did not state that it was only affirming the Regional Director’s action, and,

even if it had, under the Board's rules, the Regional Director's decision was final. *Wolf Creek*, 365 NLRB No. 55 ("as a matter of Board law and procedure ... a Regional Director's decision is final – and thus may have preclusive effect – if no request for review is made (as here) or if the Board denies a request for review"; "[i]t does not matter that the Board itself did not address the issue"). This doctrine goes back decades. E.g., *Golden West Broadcasters-KTLA*, 220 NLRB 937, 938 (1975) (because issues respondent raised in ULP case "were raised and litigated at length in" the representation proceeding, respondent was precluded from relitigating those issues in ULP case, under "well settled" principles; granting motion for summary judgment since respondent "has not raised any issue which is properly litigable in this unfair labor practice proceeding"); *Yellow Freight System, Inc. v. Automobile Mechanics Local 701 Intern. Ass'n of Machinists*, 684 F.2d 526, 529 (7th Cir. 1982) ("The NLRB declined this request for review, and thus affirmed the regional director's decision"), and it was reaffirmed by the Board while this case was pending. *The Mirage Casino-Hotel*, 364 NLRB No. 1, n.2 (2016). See also response to PFAC's Exceptions 1 & 6.

- (4) PFAC asserts that "the unambiguous past practice of the parties, which had excluded FTST from the P-fac unit (see CP Ex. 2 at 4-8)." However, that cannot show any good faith basis for PFAC's actions because:
 - (a) Any evidence PFAC had regarding past practice was either offered at the twelve-day representation hearing, or should have been, and, notwithstanding any such evidence, the Regional Director found, on August 30, 2016, that FTST are, and have been, included in PFAC's bargaining unit.
 - (b) The "evidence" PFAC relies on is a passage in the brief PFAC filed in response to the show cause order initially issued in response to US of CC's petition. That brief was offered into evidence at the ULP hearing by the Individual Charging Parties, and was admitted, not for the truth of the assertions in the brief and not as to whether FTST are included in PFAC's unit, but to show PFAC's representations that FTST were included in its bargaining unit, contrary to PFAC's pre-petition position and its position after the Regional Director's ruling in April 2015, as evidence of PFAC's bad faith (T. 123-25). Thus, PFAC cannot rely on that brief to substantively support a past-practice.

PFAC cites (at 23) the ALJ'S decision in *Teamsters Local Union No. 206*, Case Nos. 19-CB-168283, 19-CB-178098 & 19-CB-192630 (October 31, 2017) (exceptions pending with Board), but that case concerned a union's making bargaining demands regarding a group of accreted employees, and the ALJ's comment that PFAC refers to was about not ascribing bad faith to the *charging party-employer*. It had nothing to do with the duty of fair representation, or the legal

standards applicable to such cases.

Thus, PFAC's effort to hide behind a smoke screen that it was only "*negligently* mistaken about its duties toward the FTST employees" (PFAC Exc. at 22; emphasis added) is unavailing. See *Teamsters, Chauffeurs, Warehousemen & Helpers, Local 631*, 340 NLRB 881, 884 (2003) ("if mistakes disfavor nonmembers, dissidents, or some other identifiable group, such 'mistakes' may be arbitrary, discriminatory or bad faith conduct breaching the duty of fair representation").

B. Whether PFAC Acted in Bad Faith is Immaterial

Fundamentally, PFAC's contentions about bad faith are immaterial, for a number of reasons.

1. Good Faith is Not a Defense

"[P]roof of good faith on the part of a union is not a defense to a charge based on the duty of fair representation since arbitrary conduct without evidence of bad faith has been found to constitute a breach of the duty." *International Brotherhood of Teamsters, Local 727 (Global Experience Specialists, Inc.)*, 360 NLRB 65, 72 (2013), citing *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 800 (7th Cir. 1976). Thus, even if PFAC could show that it acted in good faith – which it cannot – that would not be a defense to the present charges.

2. PFAC's Conduct Was Arbitrary and Discriminatory

A breach of the statutory duty of fair representation occurs "when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, *or* in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967) (emphasis added). By using the disjunctive "*or*," the Supreme Court recognized that a showing of *any one* of these three elements – arbitrary, discriminatory, *or* in bad faith – establishes a breach of the duty of fair representation. *Air Line Pilots Ass'n, Intern. v. O'Neill*, 499 U.S. 65, 73, 77 (1991) (referring to "the tripartite standard announced in *Vaca*" and to the "the arbitrariness component" of the DFR standard); *Roadway Express, Inc.*, 355 NLRB 197,

205 n. 22 (2010), enf'd, 427 Fed. Appx. 838, 842 (4th Cir. 2011); *Rupcich v. United Food and Commercial Workers International Union*, 2016 WL 4376512, at *5 (7th Cir. 2016); *Filippo v. Northern Indiana Public Service Corp., Inc.*, 141 F.3d 744, 748-49 (7th Cir. 1998); *Amalgamated Transit Union Div. 822*, 305 NLRB 946, 949 (1991) (“The Board as well as a majority of the courts have held that a union can violate its duty of fair representation absent any evidence of bad faith if it is shown that the union acted in a perfunctory or arbitrary manner”).

a. PFAC’s Conduct Was Arbitrary

A union's action is “arbitrary” “if [its conduct] can be fairly characterized as so far outside a ‘wide range of reasonableness’ that it is wholly ‘irrational.’” *Air Line Pilots v. O’Neill*, 499 U.S. at 78 (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)). A course of action may be considered irrational when it is without a rational basis or explanation. *McLeod v. Arrow Marine Transport, Inc.*, 258 F.3d 608, 613 (7th Cir. 2001). A union's actions may be considered arbitrary if they have treated substantively similar employees in a different manner. *Rupcich*, 2016 WL 4376512, at *7. “Treating similar situations differently without adequate explanation is the very embodiment of arbitrary conduct.” *Id.*

Here, PFAC’s conduct was the “very embodiment of arbitrary conduct” in that the terms and conditions of employment of FTST, when working as part-time faculty, are identical to the working conditions of other part-time faculty, as the Regional Director found (GC Ex. 13), yet PFAC treated these identically-situated employees – FTST (when teaching part-time apart from their staff duties) and other part-time faculty – differently. Indeed, it is undisputed that, following the Regional Director’s decision of April 28, 2015 (and after the decision of August 30, 2016), PFAC treated FTST differently from other part-time faculty, by excluding them from its unit, and by causing, or attempting to cause, the College to assign them courses as if they were non-bargaining unit

members.

Moreover, PFAC's treatment of FTST was without a rational basis, as illustrated by its letter of July 15, 2015 to the College (GC Ex. 8), which was facially inconsistent with the Regional Director's decision, or was a transparent attempt to avoid the import of that decision.

PFAC's actions were arbitrary, to the point of being irrational, because PFAC had no legitimate reason for not treating FTST as bargaining unit members, and because it did so in the face of the Regional Director's decisions to the contrary, and contrary to the Board's certification of the unit, the recognition clause, and PFAC's and the College's own representations to the Regional Director in Case 146452. In addition, PFAC's actions were arbitrary since they were based on saying or doing whatever was necessary to prevent the FTST from being represented by a union, rather than being based on any rational principle.

b. PFAC's Conduct Was Discriminatory

Because of the tripartite standard, it is sufficient that PFAC's conduct was arbitrary. Nevertheless, in any event, PFAC's actions were also discriminatory on their face because they favored one group of PFAC bargaining unit members over another (the FTST) without any legitimate basis for doing so. This is the very type of invidious discrimination that constitutes a breach of the duty of fair representation. *Air Line Pilots v. O'Neill*, 499 U.S. at 81. In *O'Neill*, the Supreme Court drew the line between lawful distinctions a union may make – such as a “rational compromise on the initial allocation of the positions” – and invidious discrimination in violation of the duty of fair representation, such as when a union enables a favored group “to keep their jobs,” while the disfavored group is permanently relegated to the bottom of the seniority system. In the present case, PFAC has done just that: It treated the FTST as non-bargaining unit members, with the very lowest priority in obtaining class assignments. And it has done so for the invidious reason of

protecting the jobs and income of its favored group of members.

Similarly, “[f]or purposes of the duty of fair representation, ‘discrimination’ means that the defendant union has, without a rational basis, treated similarly situated employees in a disparate manner.” *Newman v. Corner Inv. Co., LLC*, 2012 WL 2072773, at *10 (D. Nev. 2012), *aff’d*, 570 Fed. Appx. 684 (9th Cir. 2014). This, too, is what PFAC has done: treating the FTST – who, when they teach part-time, are just like other part-time faculty members of PFAC’s bargaining unit – disparately. And, as the evidence adduced at the hearing demonstrated, PFAC failed to offer any plausible rational basis for doing so.

IX. PFAC’s Ninth Exception – That the ALJ Erred by Excluding Testimony About a Meeting With Region 13 Representatives – is Without Merit

PFAC contends that the ALJ erred in excluding testimony about a conversation PFAC’s attorney had with the Assistant Regional Director of Region 13 shortly after the Regional Director’s decision of April 28, 2015 (PFAC Exc. at 23-25). PFAC offered that testimony in order to show that PFAC had not changed its position, from asserting, in response to the show cause order, that FTST were *in its unit*, to asserting after the April 28, 2015 decision that FTST *were not in its unit* (T.139). But such testimony was irrelevant to that issue, since PFAC’s own documents explicitly stated its position. PFAC stated its position *before* the April 28, 2015 decision in its brief in response to the show cause order (CP Ex. 2). And PFAC’s position *after* the Regional Director’s Decision of April 28, 2015, is undisputed, since it was set forth in letters written on behalf of PFAC in the wake of that decision by the Regional Director. In a letter to the College dated May 11, 2015, PFAC’s attorney acknowledged that the Regional Director’s order “reasserts the exclusive representative status of P-fac as all part-time faculty (and really enforces our jurisdiction),” but he claimed that the decision did “not make any determinations as to whether any of the particular petitioned-for employees ‘meet the bargaining unit criteria’ of the P-fac recognition clause.” The letter demanded that the College

“cease assigning courses to these persons [FTST] as if they are in the P-fac unit or have any accrued credit hours” (GC Ex. 7). As the College’s representative read it, PFAC’s letter was putting the College “on notice that recognizing any of these people [FTST] or giving them any status in the PFAC unit they [PFAC] considered that an unlawful act” (T. 76).

PFAC reaffirmed its refusal to represent FTST in a letter to the College dated July 15, 2015 stating that “the only way that the current contract allows full-time staff to be assigned courses is under Appendix V” (GC Ex. 8, p.1; see also GC Ex. 8, p.2). Appendix V covers only full-time staff who teach *as part of their staff duties*. Thus, PFAC asserted that no FTST could be assigned courses as members of PFAC’s bargaining unit. Indeed, the letter referred to FTST as “outsiders,” claiming that, despite the Regional Director’s decision, PFAC was “asserting the new rights of its current contract for the benefit of unit members against outsiders” (GC Ex. 8 p. 4).

Thus, any testimony about what PFAC said at a meeting with the Assistant Regional Director was irrelevant to what PFAC’s position was.

PFAC also claims that the testimony was relevant to whether the Region knew what PFAC’s position was (T. 140). But, whether the Region was aware of PFAC’s position immediately after the Regional Director’s decision of April 28, 2015 is immaterial. In any event, PFAC made its position regarding FTST’s inclusion in its unit abundantly clear a few months later, in response to FTST employees seeking assistance from and representation by PFAC regarding the grievance they filed against the College about not being assigned to courses as members of PFAC’s bargaining unit (GC Exs. 9, 10, 32-26; T. 79, 82, 202-08, 212-13, 221).

PFAC also claims that the testimony would have shown that it had not misled the Region (PFAC Exc. at 25). But the ALJ did not find that PFAC had misled the Region. She found that, in his decision of April 28, 2015, the Regional Director had relied on PFAC’s representations in the

brief it submitted in response to the show cause order (ALJ Dec. at 16), but that finding was based on the Regional Director's so stating in his decision (GC Ex. 5 p. 2), which was based on PFAC's own brief (CP Ex. 2).

In any event, PFAC waived this argument by failing to make an offer of proof as to what the testimony would have been. Fed .R. Evid. 103(a)(2); *O'Rourke v. City of Providence*, 235 F.3d 713, 735 (1st Cir. 2001).

X. PFAC's Tenth Exception – That the ALJ Erred by Holding That PFAC Violated Section 8(b)(2) and 8(b)(1)(A) of the Act – is Without Merit

PFAC contends that, for a number of reasons, the ALJ erred by holding that it violated Section 8(b)(2) and 8(b)(1)(A) of the Act (PFAC Exc. at 26-28), none of which reasons is correct.

A. PFAC Did Not Lack Notice

PFAC claims that it “had no notice of the factual basis of the 8(b)(2) allegations against it” (PFAC Exc. at 26). However, the second consolidated complaint alleged (GC Exs. 1(e), 1(g) 1(q) & 1(z) ¶ VIII(b)) that PFAC violated Section 8(b)(2) of the Act by attempting to cause and causing the College to discriminate against its employees in violation of Section 8(a)(3) of the Act, based on the conduct alleged in paragraph VI(a)(ii) and (b) of the complaint, which alleged that PFAC requested the College not to treat FTST as members of its bargaining unit, including when assigning courses; and by refusing to accept and process a grievance FTST filed in the fall of 2015. These were the very bases relied on for the ALJ's finding that PFAC violated Section 8(b)(2). And PFAC, of course, had notice of these allegations, having answered them (GC Ex. 1(bb)).

Rather than contending that it did not have notice of the claims against it, PFAC quotes from the ALJ's decision, where she stated “it is unclear as to which analysis General Counsel is asserting establishes the Section 8(b)(2) allegation” (ALJD at 18 n.15). By “which analysis” the ALJ was referring to the preceding page of her decision, in which she observed that violations of Section

8(b)(2) may be established under a *Wright Line* analysis or by a duty-of-fair representation analysis (ALJ Dec. at 17). The ALJ used the latter, as she made clear in her decision (ALJ Dec. at 18 n. 15). Since PFAC does not except to the ALJ’s use of a duty-of-fair representation analysis to establish the violations of Section 8(b)(2), PFAC has no legitimate beef regarding that finding. Indeed, in its post-hearing brief to the ALJ, in arguing against the Section 8(b)(2) claim, PFAC cited *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) (PFAC Post-Hearing Br. at 16), a foundational DFR decision.

PFAC argues that the ALJ “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” (PFAC Exc. at 26). But, in light of the above – explaining that the ALJ used a duty-of-fair representation analysis to establish the violations of Section 8(b)(2), which is permissible (*SSA Pacific, Inc*, 366 NLRB No. 51 (2018) – PFAC has no basis for that contention.

PFAC cites *United Food and Commercial Workers Locals 951, 7 and 1036 (Meijer, Inc.)*, 329 NLRB 730 (1999), for the proposition that it is proper to dismiss a Section 8(b)(2) allegation where the General Counsel fails to present supporting arguments (PFAC Exc. at 26). But that case does not so hold; rather there the ALJ reached the merits of the Section 8(b)(2) claims, even though the General Counsel had not made arguments relating to those claims.

PFAC also cites *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1074 (1st Cir. 1981), but there the court said that there would be a due process issue if a finding were based on “a violation neither charged in the complaint nor litigated at the hearing.” In the present case, as explained above, the violation was both alleged in the complaint, and litigated at the hearing.

B. The Evidence Supported the Finding That PFAC Violated Section 8(b)(2)

PFAC contends that “the facts the ALJ relied upon do not support a finding that 8(b)(2) was violated” (PFAC Exc. at 26). But that is not true.

Referring to the ALJ's finding that it violated Section 8(b)(2) by refusing to process the grievances filed by the FTST employees (ALJ Dec. at 18), PFAC asserts that, although "a refusal to process a grievance may give rise to an 8(b)(1)(A) violation ..., the ALJ does not explain how this *non-action* by P-fac could possibly 'cause or attempt to cause' the College to discriminate," since "refusing to process a grievance simply permits an employer to do as it sees fit" (PFAC Exc. at 26-27). However, the law is to the contrary. Section 8(b)(2) of the Act provides that it shall be an unfair labor practice for a union to cause or attempt to cause an employer to discriminate against an employee, in violation of Section 8(a)(3), "on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." "[A] (union) and an employer also respectively violate Section 8(b)(2) and 8(a)(3) when, for arbitrary or irrelevant reasons or upon the basis of an unfair classification, the union attempts to cause or does cause an employer to derogate the status of an employee." *United States Postal Service*, 362 NLRB No. 103 (2015), quoting *Miranda Fuel Co.*, 140 NLRB 181 (1962).

In *Independent Metal Workers, Locals 1 & 2 (Hughes Tool Co.)*, 147 NLRB 1573, 1577 (1964), the trial examiner found that the union's "failure to handle [an employee's] grievance violated Section 8(b)(2)," because "the withholding from [the employee] of treatment which would have been given to him had he been eligible for membership in [the union] establishes a violation of Section 8(b)(2)." 147 NLRB at 1604. The examiner relied on the seminal case of *Miranda Fuel Company*, 140 NLRB 181 (1962), where the Board held "that a labor organization violates Section 8(b)(2) when 'for arbitrary or irrelevant reasons or upon the basis of an unfair classification the union attempts to cause or does cause an employer to derogate the employment status of an employee,' and that 'union membership is encouraged or discouraged whenever a union causes an employer to affect an individual's employment status.'" Applying *Miranda Fuel*, the examiner ruled

that “[w]hat is said in *Miranda* with respect to *union action* would appear equally applicable to *inaction* which was founded upon ‘arbitrary or irrelevant reasons or upon the basis of an unfair classification.’” 147 NLRB at 1605 (emphasis added). He therefore found that the union’s “failure to process or investigate [the employee’s] grievance violated Section 8(b)(1)(A), 8(b)(2), and 8(b)(3) of the Act.” *Id.* The Board held that the trial examiner had “correctly found” that the union had violated, inter alia, Section 8(b)(2), “for the reasons given by the Trial Examiner.” The decision in *Independent Metal Workers* directly refutes PFAC’s argument, as do other cases. *Rubber Workers, Local 12 (Business League of Gadsden)*, 150 NLRB 312, 315 (1964), *enf’d*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967) (“the duty of fair representation may be breached not only by action, but by inaction as well”); *Local Union No. 1010, United Furniture Worker (Leggett & Platt, Inc.)*, 261 NLRB 524, 531 (1982) (the “‘duty of fair representation can be breached by discriminatory inaction,’” quoting *Local Union No. 12, United Rubber, Cork Linoleum & Plastic Workers v. NLRB*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967)).

C. The ALJ Did Not Err in Finding That PFAC Violated Section 8(b)(2) in Part by Disputing FTST’s Inclusion on a College’s List of Employees Eligible for Part-Time Teaching Assignments

PFAC asserts that the ALJ erred in finding that PFAC violated Section 8(b)(2) by sending an email to the College on May 11, 2015 disputing the College’s inclusion of FTST on a list of employees eligible for part-time teaching assignments (PFAC Exc. at 27-28). PFAC says that the email states that “P-fac does not agree with the College’s position that *every* FTST employee was now in the bargaining unit” (PFAC Exc. at 23; emphasis by PFAC).

But the actual email was not so limited. It demanded that the College “cease assigning courses to these persons [FTST] as if they are in the P-fac unit or have any accrued credit hours” (GC Ex. 7). The College read the letter as putting it on notice that PFAC considered it unlawful for

the College to recognize FTST or to give them any status in the PFAC unit (T. 76).¹¹

PFAC also contends that it was seeking to bargain with the College about the terms of FTST's entry into the unit (PFAC Exc. at 28). But that is a red herring, because there were no issues to be bargained, inasmuch as the Regional Director had found that FTST were included in PFAC's bargaining unit (GC Ex. 5), and there were no terms of employment to negotiate.

PFAC also repeats its contention that the Board should reverse the Regional Director's conclusion that FTST are included in the PFAC unit (PFAC Exc. at 28), but that argument should be rejected for the reasons explained above.

XI. PFAC's Eleventh Exception – That Federal Lawsuits Are Not Subject to the Exemption for Baseless Claims Under *Bill Johnson's* – is Without Merit

The ALJ found that PFAC violated Sections 8(b)(1)(A) and (3) by filing and maintaining the two federal lawsuits to the extent they maintained that the College improperly assigned courses to FTST based on PFAC's assertion that they were excluded from its unit (ALJ Dec. at 19-21). Although the Supreme Court held in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), that the Board may enjoin baseless litigation that interferes with employees' Section 7 rights, PFAC asserts that the ALJ erred by holding that PFAC's federal lawsuit seeking to enforce an arbitration award was preempted, because "[p]reemption doctrines do not apply to federal lawsuits arising from federal rights of action" (PFAC Exc. at 28-29).

¹¹ PFAC says that this email was sent "between the Region's initial dismissal of the petition in 13-RC-146452 [on April 28, 2015] and its subsequent revocation of that dismissal," "before P-fac received assurances from Board attorneys that the Regional Director's ultimate August 30, 2016 Dismissal was not a final Board determination" (PFAC Exc. at 28 n.3). However, there is no evidence that "P-fac received assurances from Board attorneys." If that is an oblique reference to Ellement's statements in federal court, they were made *two years later*, on March 15, 2017 (Ex. A to PFAC's Opp. to CP's Motion in Limine) and, in any event, could not vary the Board's rules, as explained above. Instead, because no party sought review of the Regional Director's decision of April 28, 2015 (T. 284), that decision was final under Section 102.67(b) of the Board's rules.

However, the doctrine recognized in *Bill Johnson's* applies to federal court lawsuits. *Allied Mechanical Services, Inc.*, 357 NLRB 1223 (2011), review granted on other grds, 734 F.3d 486, 501 (6th Cir. 2013); *Petrochem Insulation, Inc.*, 330 NLRB 47 (1999), review denied & enf'd, 240 F.3d 26 (D.C. Cir. 2001), cert. denied, 534 U.S. 992 (2001) (filing and prosecuting federal court lawsuit against unions violated Section 8(a)(1) of the Act); *Grinnell Fire Protection Systems Co.*, 328 NLRB 585 (1999), review denied & enf'd, 236 F.3d 187 (4th Cir. 2000), cert. denied, 534 U.S. 818 (2001) (*Bill Johnson's* applies to federal lawsuit).

Although the ALJ used the term “preempted” when citing cases holding that it is an unfair labor practices to defy a regional director’s unit determination by obtaining and attempting to enforce a contrary arbitration award (ALJ Dec. at 20-21), in fact those cases squarely support her conclusion, inasmuch as they hold that, “where the Board has previously ruled on a given matter, and where the lawsuit is aimed at achieving a result that is incompatible with the Board's ruling, the lawsuit falls within the ‘illegal objective’ exception to *Bill Johnson's*. Accordingly, the lawsuit enjoys no special protection. If it is unlawful under traditional NLRA principles, it can be condemned as an unfair labor practice.” *Teamsters Local 776 (Rite Aid Corp.)*, 305 NLRB 832, 835 (1991), enf'd, 973 F.2d 230, 234 (3d Cir. 1992), cert. denied, 507 U.S. 959 (1993). Accord *Local 340, New York New Jersey Regional Joint Board (Brooks Brothers)*, 365 NLRB No. 61 slip op. at 4 n.8 (2017); *Allied Trades Council (Duane Reade, Inc.)*, 342 NLRB 1010, 1013 n.4 (2004); *Teamsters Local 952 (Pepsi Cola Bottling Co.)*, 305 NLRB 268, 268 (1991).

XII. PFAC’s Twelfth Exception – That the ALJ Erred by Ruling That PFAC’s Lawsuit to Enforce an Arbitration Award had an Illegal Objective – is Without Merit

PFAC contends that the ALJ erred by concluding that PFAC’s lawsuits to enforce the arbitration award and to compel arbitration of other grievances involving the College’s assigning courses to FTST had an illegal objective and thus lacked First Amendment protection (PFAC Exc.

at 29-32, citing ALJ Dec. at 19- 21). PFAC’s arguments in support of this exception are unfounded.

A. PFAC’s Attempt to Distinguish the Cases the ALJ Relied on Utterly Fails

PFAC asserts that “the lack of a final Board determination distinguishes P-Fac’s lawsuits from the cases relied upon by the ALJ... all of which involved a final Board determination” (PFAC Exc. at 30). But PFAC is flatly wrong. In all three cases relied on by the ALJ – *Rite Aid Corp.*, 305 NLRB 832; *Brooks Brothers*, 365 NLRB No. 61; and *Duane Reade, Inc.*, 342 NLRB 1010 (2004) – there was no final Board determination of the underlying representation issues that was in any way different from the present case: Either the Board had denied review of the regional directors’ decisions in the representation case (*Brooks Brothers* and *Rite Aid*) or the union had not filed a request for review of the regional director’s representation determination (*Duane Reade*).

B. PFAC’s Suits had an Illegal Objective

PFAC contends that its suits did not have an illegal objective because the Regional Director's unit decision “did not represent the Board's final determination of the issues” and because “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” one of those suits (PFAC Exc. at 29-30). However, PFAC acknowledges that these two arguments repeat its contentions in Exceptions 1 and 6 (PFAC Exc. at 30), and they are wrong, for the reasons explained with respect to those two exceptions.

PFAC further contends that its lawsuits were protected by the First Amendment, and therefore did not have an illegal objective (PFAC Exc. at 30-32). But that assertion flies in the face of the Board’s explicit holdings in the cases that the ALJ relied on:

- In *Rite Aid*, the Board ruled that, “where the lawsuit is aimed at achieving a result that is incompatible with the Board's ruling, the lawsuit falls within the “illegal objective” exception to *Bill Johnson's*. Accordingly, the lawsuit enjoys no special protection. If it is unlawful under traditional NLRA principles, it can be condemned

as an unfair labor practice.” 305 NLRB at 835 (footnote omitted). The Board held: “That lawsuit was aimed at achieving a result that is incompatible with the Regional Director’s ruling. Accordingly, the lawsuit was for an ‘illegal objective’ within the meaning of footnote 5 of *Bill Johnson’s*. In view of this, and because the lawsuit violates Section 8(b)(1)(A), (2), and (3) under established NLRA principles, the lawsuit can be condemned as an unfair labor practice under these subsections....” 305 NLRB at 835 (footnotes omitted).

- In *Duane Reade*, the Board said: “As in *Rite Aid*, supra, maintaining the request for arbitration despite a contrary Board decision falls within the ‘illegal objective’ exception in fn. 5 of *Bill Johnson’s*....” 342 NLRB at 1014, n.4.
- And, most recently, in *Brooks Brothers*, 365 NLRB No. 61 n.8, the Board explained that, as in *Rite Aid*, “the Board found that maintaining a lawsuit aimed at achieving a result that is incompatible with a contrary Board ruling fell within the ‘illegal objective’ exception articulated in fn. 5 of *Bill Johnson’s* ... and therefore lacked constitutional protection.”

See also *Pepsi Cola Bottling Co.*, 305 NLRB 268, 268 (1991).

C. PFAC’s Reference to a Concurring Opinion and the Noerr-Pennington Doctrine are Unavailing

PFAC cites Justice Scalia’s concurring opinion in *BE & K Const. Co. v. NLRB*, 536 U.S. 516, 537 (2002), and the *Noerr-Pennington* doctrine (PFAC Exc. at 32), but a Justice’s concurring opinion is not precedential (*Maryland v. Wilson*, 519 U.S. 408, 412-13 (1997) (a statement in a concurrence does not “constitute[] binding precedent”)), and PFAC does not contend that the *Noerr-Pennington* doctrine – which “protects otherwise illegal activity that nevertheless constitutes a genuine attempt to persuade the legislature or the executive to take particular action” *Venetian Casino Resort, LLC*, 366 NLRB No. 14 n.1 (2018) – itself applies to the present case.

D. That the Region Deferred Certain Charges is not a Defense

PFAC argues that, “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,*” and that 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...” (PFAC Exc. at 30; italics by PFAC). That some of the claims in the grievances were subject to arbitration does not mean that all of them were, or that an arbitrator would have any authority to question the Regional Director’s unit determinations.

In addition, a deferral of a case to arbitration is not a decision on the merits. *Jewish Federation Council of Greater Los Angeles*, 306 NLRB 507, 508 (1992); *Sheet Metal Workers International Association Local #18 (Everbrite, LLC)*, 359 NLRB 1095, 1096 (2013) (deferral is a threshold issue, “which must be decided in the negative before the merits of the unfair labor practice allegations can be considered”). And, consistent with this principle, the deferral letter stated that it did not constitute a decision on the merits (R. Ex. 3). Most significantly, that letter, dated November 24, 2015, did not overrule or, in any way undermine, the Regional Director’s unit determination of April 28, 2015, and therefore gave PFAC no basis for questioning that determination.

XIII. PFAC’s Thirteenth Exception – That the ALJ Erred in Holding That PFAC Breached its DFR by not Representing FTST’s Interests in Successor Bargaining – is Without Merit

PFAC contends that the ALJ erred in holding that it breached its duty of fair representation by “telling FTST employee Clint Vaupel that P-fac would not represent the interests of FTST in successor contract negotiations” with the College, because “[t]he alleged breach of the duty of fair representation was not yet ripe” (PFAC Exc. at 32, citing ALJ Dec. at 21; GC Ex. 39).

PFAC asserts that “[b]reaches 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,” quoting *Air Line Pilots Ass’n v. O’Neill*, 499 U.S. 65, 78 (1991), for the proposition that “the *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” (PFAC Exc. at 32-33; emphasis by PFAC).

This exception must be rejected, first, because it was not raised in PFAC's post-hearing brief to the ALJ, and is therefore waived. *Approved Electric Corp*, 356 NLRB 238, 240 n.1 (2010); *Dayton Newspapers*, 339 NLRB 650, 653 n.8 (2003), enf'd in part & denied in part on other grounds, 402 F.3d 651 (6th Cir. 2005).

Second, even if this ground had not been waived, the Court in *O'Neill* did not hold that *only* the final product of the bargaining process may constitute evidence of a breach of the duty. 499 U.S. at 78. The Court only considered whether a settlement agreement violated the DFR, which, by definition, is the final product of negotiations.

PFAC cites *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1181-82 (9th Cir. 2010) (PFAC Exc. at 33). But, unlike that case, in the present case PFAC outright refused to represent FTST in collective bargaining negotiations, or to consider their interests in any way. In a letter dated June 6, 2017 to one FTST employee, Vaupel, PFAC's attorney wrote that "[y]ou, and other so-called 'FTST' are not included in the P-fac unit. You are excluded from that unit. There is a final and binding arbitration that put this matter to rest and we expect that arbitration to soon be a judgment enforceable by a federal judge" (GC Ex. 39; T. 218-19). PFAC's attorney went on to state that "P-fac will not provide you any information as to its collective bargaining and will not take direction from you as to its bargaining over either mandatory or permissive subjects" (GC Ex. 39). Further, after Vaupel had refuted those assertions and renewed his requests that PFAC bargain on behalf of FTST as members of PFAC's bargaining unit (GC Ex. 40; T. 219), PFAC did not respond (T. 219-20). Thus, PFAC made it abundantly clear that, under no circumstances would it bargain with the College on behalf of FTST. This outright refusal differentiates this case from *Addington*. *Scerba v. Allied Pilots Ass'n*, 2013 WL 6481583, at *9 (S.D.N.Y. 2013), aff'd, 589 Fed. Appx. 554 (2d Cir. 2014), cert. denied, 135 S. Ct. 2313 (2015) ("a union's decision not to represent the

plaintiff's interests at all" "will accrue when that decision is known"). In *Scerba*, the court explained that, although the ratification date may be the *latest possible date* on which DFR plaintiffs could have learned of the breach, that does not undercut the principle that a claim accrues "when the plaintiff knows or reasonably should know of the breach, and this may occur before, after, or simultaneously with ratification, depending on the particular facts of each case." 2013 WL 6481583, at *8.

XIV. PFAC's Fourteenth Exception – That One of the Charges Was Untimely – is Without Merit

PFAC does not contest the timeliness of two of the three charges, 13-CB-202023 & 13-CB-202035. PFAC argues that the ALJ erred "by ruling that charge 13-CB-165873 was not time-barred under § 10(b) of the Act" (PFAC Exc. at 33, citing ALJ Dec. at 21-23). PFAC's primary tack is to attempt to distinguish the cases cited by the ALJ. PFAC also contends that FTST were aware of their exclusion from PFAC's unit more than six-months before the charge in Case 13-CB-165873 was filed. Neither argument can succeed.

A. PFAC Fails to Distinguish the Cases Cited by the ALJ

The ALJ explained that PFAC had inaccurately quoted one of the cases PFAC relied on (ALJ Dec. at 22). In fact, the ALJ was correct in stating that *NLRB v. Jerry Durham Drywall*, 974 F.2d 1000, 1005 (8th Cir.1992), held that, "the continuing violation theory no longer applies" "[w]hen there is notice of a clear and unequivocal repudiation...." And she went on to find – based on the undisputed facts – that PFAC did not provide clear and unmistakable notice to the FTST employees that it excluded them from its bargaining unit, until October 20, 2015, which was less than two months before the Individual Charging Parties filed the charge in Case 13-CB-165873. Nevertheless, PFAC continues to claim – erroneously – that *Durham Drywall* supports its statute of limitations defense (PFAC Exc. at 33, 37-38).

The ALJ (Dec. at 22) relied on a distinction recognized in *Local Lodge No. 1424 International Association of Machinists (Bryan Mfg) v. NLRB*, 362 U.S. 411, 416-17 (1960), between the permissible and impermissible use of occurrences more than six-month before a charge is filed: the permissible use, where occurrences within the six-month limitations period in and of themselves may constitute unfair labor practices, and an impermissible use, where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice.

In the present case, there was no reliance on any earlier unfair labor practice – i.e., one that took place more than six months before the charge in Case 13-CB-165873 was filed – to prove the claims in the charge. The claims in that case are based entirely on occurrences within the six-month limitations period, which in and of themselves constitute, as a substantive matter, unfair labor practices. Thus, it was entirely proper for the ALJ to rely on *Local Lodge No. 1424*.

PFAC's contends that *Local Lodge No. 1424* supports its position, because the Court held that the case was time-barred (PFAC Exc. at 33). But, in that case, "the entire foundation of the unfair labor practice charged was the Union's time-barred lack of majority status *when the original collective bargaining agreement was signed*. In the absence of that fact enforcement of this otherwise valid union security clause was wholly benign." 362 U.S. at 417 (emphasis added). By contrast, the charge in Case 13-CB-165873 was not based on the collective bargaining agreement entered into between PFAC and the College,¹² but rather on PFAC's subsequently excluding the FTST from its unit, as to which PFAC continued to equivocate in its communications with FTST

¹² That agreement did not exclude FTST from the unit; rather, PFAC took the position that FTST were excluded. In *Local Lodge No. 1424*, the Court explicitly recognized that a claim based on an agreement that was "validly executed, but unlawfully administered" would not be time-barred. 362 U.S. at 423.

employees until October, 2015. In *Local Lodge No. 1424*, there was no issue regarding when charging parties had been given notice of the unlawful act, or whether any such notice was clear and unmistakable. The Board continues to hold that the “limitations period prescribed by Sec. 10(b) begins to run only when a party has clear and unequivocal notice” and that the “burden of showing such clear and unequivocal notice is on the party raising Sec. 10(b) as a defense.” *Minteq International, Inc.*, 364 NLRB No. 63 n.4 (2016), review denied, 855 F.3d 329 (D.C. Cir. 2017) (holding that the complaint was not time-barred); *Arts Way Vessels, Inc.*, 355 NLRB 1142 (2010).

The ALJ cited *International Brotherhood of Teamsters, Local 509 (Touchstone Television Productions, LLC d/b/a ABC Studios)*, 357 NLRB 1668 (2011), review denied & enf’d, 803 F.3d 1 (D. C. Cir. 2015), for the proposition that “a union’s refusal to include an individual’s name on the hiring hall list and/or refer him for work was a distinct unfair labor practice regardless of conduct outside of the 10(b) period” (ALJ Dec. at 22). PFAC seeks to distinguish that case on the ground that it “was a hiring hall case” and involved “violating the law in the *manner* in which it ran its hall” (PFAC Exc. at 37; emphasis by PFAC). However, that the case involved a hiring hall is a distinction without a difference; and the present case is similar to that case, in that it involves “the *manner* in which” PFAC administered the agreement, to exclude FTST from its unit.

The ALJ cited *Register Guard*, 351 NLRB 1110 n.2 (2007), for the proposition that “Section 10(b) does not preclude pursuit of a complaint allegation based on the maintenance and/or enforcement of an unlawful rule or policy within the 10(b) period, even if the rule or policy was promulgated earlier” (ALJ Dec. at 22). PFAC says that the continuing violation of maintaining a work place rule there “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” (PFAC Exc. at 34-35). PFAC is wrong for two

reasons. First, its contract with the College did not exclude FTST.¹³ Second, even if it had, there is no legal difference – for 10(b) purposes – between continuing to administer a rule that was promulgated outside the six-month period (which is not time-barred), and claiming that a contractual provision that became effective outside that period excludes FTST.

Another case the ALJ cited for the same proposition as *Register Guard* was *Control Services*, 305 NLRB 435, 435 n.2, 442 (1991), enf'd, 961 F.2d 1568 (3d Cir. 1992) (ALJ Dec. at 22).¹⁴ PFAC asserts that *Control Services* is distinguishable on the same two bases as *Register Guard*, but, as explained in the preceding paragraph, those attempts to distinguish the case fail. PFAC further contends that *Control Services* is distinguishable “on the basis that the ‘rules’ that were being enforced were ‘presumptively illegal,’” and “the exclusion of the FTST is not ‘presumptively illegal’ as unit scope is a lawful subject of bargaining” (PFAC Exc. at 35, citing *Hill-Rom Co. v. NLRB*, 957 F.2d 454, 457 (7th Cir. 1992)). PFAC is wrong, however, in claiming that the exclusion of FTST from its unit is immunized because “unit scope is a lawful subject of bargaining, because, as the Regional Director concluded, “any agreement between the Employer and PFAC to exclude the petitioned-for group of employees, in their capacity as part-time faculty [viz, the FTST] would be

¹³ PFAC later explains that the basis for asserting that the CBA excluded FTST is that the exclusion in the recognition clause (GC Ex. 3 p. 1) excludes “full-time staff members” (PFAC Exc. at 36-38). But the Regional Director twice found that that provision did not exclude staff employees from PFAC’s bargaining unit when they teach part-time, not as part of their staff duties (GC Ex. 5 p. 2; GC Ex. 13 p. 14). And, to the extent PFAC is relying on the Perkovich arbitration award, that award was vacated by the district court (GC Ex. 20), which the Seventh Circuit affirmed on the ground that the arbitration award “is unenforceable as a matter of law” because it “directly conflicts with a representation decision of the Board.” 892 F.3d 860, 868 (7th Cir. 2018).

¹⁴ PFAC does not attempt to distinguish or otherwise undercut another case the ALJ cited for this same proposition, *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (ALJ Dec. at 22).

contrary to Board policy” (GC Ex. 13 p. 14).¹⁵ That conclusion is well-supported by the Board’s cases.¹⁶

The ALJ cited *Arvin Industries*, 285 NLRB 753, 755 (1987), for the proposition that, where a provision is facially unlawful or presumptively unlawful, the violation is not “‘based upon’ or ‘inescapably grounded on’ events outside the 6-month 10(b) period” (ALJ Dec. at 22-23)). PFAC contends that *Arvin Industries* “involved an illegal contract term providing superseniority, that could only be justified on a post-contract showing of business necessity” and, “unlike the immediate effect of the P-fac recognition clause, the illegal superseniority provision was not self-executing” (PFAC Exc. at 35-36). But that contention is the same as PFAC’s attempt to distinguish the other cases relied on by the ALJ and, as explained above, is invalid; in the present case, the unlawful conduct is PFAC’s exclusion of the FTST employees from PFAC’s bargaining unit, not the terms of the CBA.¹⁷

¹⁵ PFAC cites *Hill-Rom Co.* earlier (at 5) and again later in its Exceptions (at 35-36), for the same point, but that case is inapplicable, as explained in the text, because the CBA, as applied by PFAC to exclude the FTST employees, was not a product of permissible bargaining.

¹⁶ *Harvey Russell*, 145 NLRB 1486, 1488 (1964) (cited by PFAC (at 38)) (“Parties are given broad latitude in the reaching of such agreements [stipulated election 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*”; emphasis added); *Cabrillo Lanes*, 202 NLRB 921, 923 n. 12 (1973); *Eureka Pipe Line Co.*, 115 NLRB 13, 14-15 (1956). Moreover, it is “well established that the Board may not certify petitioned-for units that are ‘arbitrary’ or ‘irrational’ – for example, where functional integration and similarities between two employee groups ‘are such that neither group can be said to have any separate community of interest justifying a separate bargaining unit.’” *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017). As the Board said there, bargaining units may “not be arbitrary, irrational, or ‘fractured’ – that is, composed of a gerrymandered grouping of employees whose interests are insufficiently distinct from those of other employees to constitute that grouping a separate appropriate unit.” See also *Stormont-Vail Healthcare, Inc.*, 340 NLRB 1205, 1209 (2003); *Pratt & Whitney*, 327 NLRB 1213, 1217 (1999).

¹⁷ PFAC also asserts that “it is lawful to exclude FTST employees from a unit of adjunct faculty” (PFAC Exc. at 35, citing *Marist College*, 03-RC-127374, 2016 WL 4473156 (2016)). But in *Marist* there was no final regional director’s decision determining that the employees are not

B. PFAC’s Contention That FTST Knew That They Were Excluded From PFAC’s Unit is Unsupported by the Evidence

PFAC states that FTST knew that they were excluded from PFAC’s bargaining unit, based on the testimony of one of the FTST employees, Clint Vaupel, that certain unidentified FTST “understood” as early as 2013 that the FTST were excluded from the PFAC “union” (PFAC Exc. at 37, quoting T. 258). But PFAC failed to offer any evidence as to which FTST so “understood.”

Most fundamentally, the violations at issue in Case 13-CB155873 are based on –

- (1) PFAC’s stating, in response to the show cause order, that PFAC already represented all part-time faculty and therefore US of CC could not represent FTST (CP Ex. 2 pp. 2 &12).
- (2) These representations by PFAC – that FTST are in its bargaining unit – superseded any of PFAC’s prior conduct or statements regarding whether or not FTST were in its unit.
- (3) In the decision of April 28, 2015, the Regional Director found that FTST are included in PFAC’s bargaining unit.
- (4) When FTST sought representation by PFAC based on the Regional Director’s decision of April 28, 2015, PFAC failed to state to FTST any clear position on whether it considered FTST to be in its bargaining unit (CP Exs. 5, 7-11; T. 262-63, 270-75).¹⁸
- (5) PFAC did not inform FTST that it would not represent them until PFAC’s attorney responded on October 20, 2015, to Vaupel’s request for assistance in connection with

excluded, and that, to exclude them, would violate Board policy (GC Ex. 13 p. 14). *Marist* is also inapposite because the recognition clause there excluded “all other employees whether or not they have teaching responsibilities.” Unlike that clear exclusion, the recognition clause in PFAC’s CBA with the College includes “all part-time faculty” and excludes “all other employees” and “full-time staff” (GC Ex. 3 p. 1), but does not specifically address employees who work in both positions. Further, *Marist* distinguished the Board’s previous decision concerning dual-function employees of Columbia College, 346 NLRB 726, 727-28 (2006), where the employees at issue – as in the present case – “held both included and excluded positions.” *Marist*, n.3.

¹⁸ By contrast, in its communications with the College in the summer of 2015, PFAC stated that it would not represent FTST (GC Exs. 7,8 & 27). But FTST were not a party to those communications.

the grievance Vaupel had filed (GC Ex. 33).¹⁹

These facts support a new claim, not based on the CBA between PFAC and the College. *NLRB v. R.L. Sweet Lumber Co.*, 515 F.2d 785, 792-93 (10th Cir. 1975), cert. denied, 423 U.S. 986 (1975) (“the contract execution date is not controlling,” because the “substantial active conduct adversely affecting” the charging party that constituted “the unfair labor practices found, fell within the six month period”); cf. *Sorenson Communications, LLC v. Federal Communications Commission*, 2018 WL 3542638, at *9 (D.C. Cir. 2018) (“This new order, based on a materially changed record, gave rise to a new claim”).

PFAC also refers to Vaupel’s having seen a letter written in 2014 from the College’s CEO, Kwang-Wu Kim, stating the College’s position at that time that FTST employees were excluded from the PFAC’s unit (PFAC Exc. at 37, citing T. 243-44). However, the letter concluded by saying that Kim understood “that Pfac and the United Staff of Columbia College union are addressing this issue internally with their parent union, the Illinois Education Association,” and, because of that, the “College takes no position on the matter ...” (R. Ex. 5). Thus, the letter itself does not establish an unequivocal statement by the College – much less by PFAC – that FTST would not be represented by PFAC in their capacity as part-time faculty, inasmuch as Kim recognized that that issue was being addressed by PFAC, US of CC and their parent union, the Illinois Education Association (“IEA”).²⁰

¹⁹ Indeed, PFAC’s first response to the grievance on October 16, 2015, stated that: “this issue is part of an ongoing labor-management dispute, including the status of any full-time staff in the part-time faculty bargaining unit” (GC Ex. 33 p. 2; T. 205-06). It was not until Vaupel, in an email on October 19, 2015, pressed PFAC’s attorney to provide a definite response (GC Ex. 33), that PFAC did so on October 20.

²⁰ Another document offered by PFAC (R. Ex. 4) also referred to IEA’s efforts to resolve that issue. PFAC’s attorney stated at the hearing that this document was offered to establish “that the charging parties at least as of December 17, 2014 had notice of the contents of this email”

PFAC refers to another passage from Vaupel's testimony that it claims shows "knowledge of exclusion in 2013 and 2014" (PFAC Exc. at 37, citing T. 228). However, in that testimony, PFAC failed to elicit a date as to *when* Vaupel so understood (T. 228-29).²¹

PFAC asserts that the reason that it "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" (PFAC Exc. at 37). But PFAC failed to cite anything in the record to support this assertion. And, as explained above, the CBA on its face does not exclude FTST. Instead, PFAC excluded FTST as part of a deliberate effort to favor one group (the part-time faculty who were not full-time staff) over another group (the part-time faculty who were full-time staff) (GC Ex. 8 p. 4 (stating that PFAC excluded FTST as "persons who were outside the bargaining unit" because PFAC "protected part-time work *for its members*"; emphasis added)).

PFAC cites other supposed evidence in support of its timeliness defense, such as that FTST had not appeared on a unit eligibility list, had not accrued seniority, and had not paid dues (PFAC Exc. at 38). However, in its argument in its post-hearing brief to the ALJ regarding the timeliness of the charge in Case 13-CB-165873, PFAC failed to assert any of these grounds (PFAC Post-Hearing Br. at 17-18), thereby waiving these contentions. *Approved Electric Corp*, 356 NLRB at

(T. 38) and that the document shows that the charging parties knew more than six months before filing the earliest of the charges that they were not treated by the College or by Union as being in PFAC's bargaining unit (T. 40). But only one of the charging parties (Tanya Harasym) is shown as a recipient (T. 38-39). More importantly, the document confirms that PFAC's position was unresolved at that time. Thus, the document in fact cuts against PFAC's limitations defense.

²¹ Similarly, Vaupel testified that there was a period of time during which he was not assigned courses until a few days before the semester began, but he was uncertain whether that first occurred in the fall of 2014, the spring of 2015, or the fall of 2015 (T. 201-02). And, in the fall, 2015 semester (just before the first charge was filed), Vaupel was assigned one course (T. 238), unlike most semesters when he was assigned two courses (T. 199, 235, 238-39). See *Bernal, Inc.*, 206 NLRB 72, 72 n.1 (1973) (Board reached merits of case because it was uncertain when the 10(b) period commenced).

240 n.1; *Dayton Newspapers*, 339 NLRB at 653 n.8. In any event, the claims in Case 13-CB-165873 are based on PFAC's conduct *after* the Regional Director's decision of April 28, 2015, and PFAC's failure and refusal to treat FTST as member of its bargaining unit in accordance with that decision.

C. PFAC's Exception Ignores the Substantial and Undisputed Evidence That PFAC Failed to Unequivocally Inform FTST Until Less Than Two Months Before the Charge Was Filed That They Were Excluded From PFAC's Unit

In support of its statute of limitation defense, PFAC offered a letter dated May 22, 2014, from Kwang-Wu Kim, President and CEO of the College (R. Ex. 5). However, as explained above, Kim concluded the letter by saying that he understood that PFAC and US of CC were "addressing this issue internally with their parent union" and, because of that, the "College takes no position on the matter ..." (R. Ex. 5). Thus, the letter itself does not establish an unequivocal statement by the College – much less by PFAC – that FTST would not be represented by PFAC in their capacity as part-time faculty.

Similarly, on cross-examination by PFAC, FTST employee Lauren Targ testified that "it was ambiguous" whether, as of 2014, she knew that PFAC excluded her "from its union" (T. 281-82). As Targ's email to PFAC's attorney of August 3, 2015, explained: FTST spent "the better part of 18 months trying to join P-fac, but were stonewalled and ultimately rejected" (CP Ex. 8 p. 1). Again, that email is consistent with the fact that PFAC did not provide a definite response. And the email does not state when FTST were "ultimately rejected," or which FTST were involved.

Likewise, according to Vaupel, he and other FTST, including Targ and Tanya Harasym, first *suspected* that they were being excluded from the PFAC unit in about November, 2013 (T. 224). They discussed "the rumblings" that they "were hearing about the new contract, how it would affect us," including "eliminating our ability to teach" (T. 225-26). Vaupel requested that PFAC provide a copy of the collective bargaining agreement and inquired about joining PFAC (T. 226-27). Vaupel

testified that PFAC's president Diana Vallera responded (T. 227), but Vaupel was not asked what Vallera's response was. Thus, this testimony at most shows that Vaupel (and perhaps others) had *suspicious*, based on "*rumblings*." There was no evidence of clear and unequivocal notice of any violation. Rather, at most, PFAC sent "conflicting signals or otherwise engage[d] in ambiguous conduct," which does not start the running of the limitations period. *Westrum Electric*, 365 NLRB No. 151 (2017).

PFAC argues that 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*'" (PFAC Exc. at 37 & 38; emphasis by PFAC, quoting ALJ Dec at 22). PFAC says that the ALJ erroneously framed the issue this way "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" (PFAC Exc. at 38). But, again, the "wrong" was PFAC's conduct after the Regional Director's decision of April 30, 2015, and PFAC brushes aside the substantial evidence that FTST did not have clear and unequivocal notice that they were excluded from PFAC's unit until October, 2015.

Therefore, the statute of limitations did not begin to run until October 20, 2015. The charge in Case 13-CB-165873 was filed within six months, on December 9, 2015 (GC Ex. 1(c)).

XV. The Individual Charging Parties Do Not Take a Position Regarding PFAC's Fifteenth Exception – That the ALJ Erred by Including an Award of Attorneys' Fees in Favor of the College

PFAC contends that the ALJ erred by including an award of attorneys' fees in favor of the College (PFAC Exc. at 39-40). Because that award would benefit only the College, the Individual Charging Parties do not take a position regarding this exception made by PFAC.

XVI. PFAC’s Sixteenth Exception – That Purports to Preserve its Argument for Future Compliance Proceeding That There Was No Economic Harm – Does Not Constitute a Cognizable Exception

PFAC asserts that it “preserves its argument for any future compliance proceeding that there was no economic harm to the FTST, relying on its post-hearing brief to the ALJ (PFAC Exc. at 40). That contention is wrong for two reasons. First, PFAC did not except to the finding that evidence of economic harm is not necessary to prove violations of Sections 8(b)(1)(A), (2) or (3) of the Act (ALJ Dec. a 23-24), thereby waiving any such exception. *White Elec. Constr. Co.*, 345 NLRB 1095, 1096 (2005); *Ichikoh Mfg., Inc.*, 312 NLRB 1022 (1993), enf’d, 41 F.3d 1507 (6th Cir. 1994).

Second, PFAC fails to explain how the ALJ supposedly erred in this respect. For that reason, PFAC does not present a proper exception under Sections 102.46(a)(1)(i)(D) and 102.46(a)(1)(ii) of the Board’s rules. *Tramont Mfg., LLC*, 365 NLRB No. 59; *Holsum De Puerto Rico, Inc.*, 344 NLRB at 695 n.1; *Southside Med. Ctr., Inc.*, 356 NLRB at 296 n.1; *Gaetano & Associates*, 344 NLRB at 531 n.6.

Conclusion

For the foregoing reasons, the Board should deny PFAC’s exceptions in their entirety and should affirm the ALJ’s decision.

Respectfully submitted,

/s/ Michael H. Slutsky

Attorney for Charging Parties Tanya Harasym, Larry Kapson, Eric Koppen, Weston Morris, Anthony Santiago, Jill Sultz and Clint Vaupel in Case 13-CB-165873; and for Charging Party Clint Vaupel in Case 13-CB-202023

Allison, Slutsky & Kennedy, P.C.
230 West Monroe Street, Suite 2600
Chicago, Illinois 60606
Ph: 312-364-9400; Fax: 312-326-9410
Slutsky@ask-attorneys.com
September 21, 2018

Certificate of Service

The undersigned attorney hereby certifies that he caused copies of the foregoing Individual Charging Parties' Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision to be served on the persons listed below by email, this 21st day of September 2018:

Michael P. Persoon
Despres, Schwartz & Geoghegan, Ltd
77 W. Washington St., Ste. 711
Chicago, Illinois 60602
mpersoon@dsgchicago.com

Terence Smith
Legal Counsel
Columbia College Chicago
600 S. Michigan Ave., Rm 507
Chicago, Illinois 60605
tsmith@colum.edu

Alex Barbour
Cozen O'Connor
123 North Wacker Drive, Suite 1800
Chicago, IL 60606
abarbour@cozen.com
jtilson@cozen.com

Sylvia Posey
Counsel for the General Counsel
National Labor Relations Board
Region 13
219 S. Dearborn Street, Suite 808
Chicago, IL 60604
Sylvia.Posey@nlrb.gov

/s/ Michael H. Slutsky
Michael H. Slutsky