

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

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

and

Case 13–CB–165873

TANYA HARASYM, et al., Individuals

and

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

and

Case 13–CB–202023

CLINT VAUPEL, an Individual

and

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

and

Case 13–CB–202035

COLUMBIA COLLEGE CHICAGO

**COUNSEL FOR THE GENERAL COUNSEL’S
ANSWERING BRIEF TO RESPONDENT’S EXCEPTIONS**

Respectfully Submitted:

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Pursuant to Section 102.46 of the Board’s Rules and Regulations, Series 8, as amended, Counsel for the General Counsel (“General Counsel”) submits this Answering Brief to Respondent’s Exceptions to Administrative Law Judge (“ALJ”) Kimberly R. Sorg-Graves’s May 24, 2018 Decision and Order. General Counsel relies upon the Statement of the Case and accompanying factual findings as set for in the ALJ’s Decision and the record of the hearing in this matter.

I. INTRODUCTION

This case comes before the Board as the latest installment of Part-Time Faculty Association at Columbia College’s (“PFAC” or “Respondent”) ongoing campaign to deny a group of bargaining unit employees their rights as unit members. Respondent’s active and open refusal to represent the unit members at issue—full-time staff at Columbia College Chicago who also teach part-time (“FTST”)—has been continuous since at least 2015 despite—indeed, in contravention of—Board rulings resolving any potential uncertainty with respect to their membership status.

The ALJ’s well-reasoned decision details each of the unlawful actions undertaken by Respondent in its continued efforts to deprive the FTST of their right to representation, free from hostile discrimination. These acts include failing to recognize the FTST as unit members; demanding that the College not treat them as unit members or afford them work assignments under the CBA; filing grievances in furtherance of that demand, and filing a lawsuit seeking to compel arbitration of such grievance; refusing to process grievances on behalf of the FTST over work assignments; maintaining a lawsuit seeking to enforce an arbitrator’s award that conflicted with the Board’s representational determination; and refusing to negotiate on behalf of FTST

employees in bargaining a successor collective-bargaining agreement. Significantly, Respondent does not deny taking any of these actions.

The ALJ's factual findings are supported by overwhelming evidence and her legal conclusions are supported by well-established Board law. The ALJ's sound decision took all relevant facts into account and applied proper legal principles. Accordingly, her decision should be sustained and Respondent's Exceptions should be dismissed in their entirety.

II. RESPONDENT'S EXCEPTIONS RELATING TO THE UNDERLYING REPRESENTATIONAL ISSUE

Respondent devotes a considerable portion of its brief in attempting to relitigate the Board's representational determinations regarding the status of the FTST as members of the unit of its part-time faculty ("the unit"). As the ALJ properly determined, the Regional Director's Decision, affirmed by the Board, that the FTST are included in the unit is the binding legal authority on the representational issue and has a preclusive effect on relitigation of the issue in any subsequent proceeding, including the instant unfair labor practice proceeding. Further, the Board's Rules and Regulations and underlying policy considerations render Respondent's appeals to the Board to renounce its February 14, 2017 affirmance of the Regional Director's Decision and reopen the representational issue improper. The Board should affirm the ALJ's findings that the representational issue is settled and reject Respondent's invitation to revisit the matter.¹

¹ Counsel for the General Counsel moves to strike the "Background" portion of Respondent's Exceptions, beginning on page 5, for failure to conform to the Board's Rules and Regulations. Section 102.46 requires, inter alia, exceptions to specify and identify the portion of the ALJ's decision to which exception is taken. Respondent's "Background" contains no reference to the ALJ's decision whatsoever and, therefore, must be stricken or disregarded in its entirety.

A. The ALJ Properly Ruled that the Regional Director's Determination that the FTST Are Included in the Unit is the Final and Binding Legal Authority on the Representational Issue (Exceptions 6, 7)

In February 2015, having perceived that their interests were not being fully accounted for in the College's assignment of courses, the FTST sought representation in their capacity as part-time faculty. Thus, the United Staff of Columbia College, another union at the College which already represented the FTST in their capacity as full-time staff, filed a petition to represent the FTST in their capacity as part-time faculty in Case 13-RC-146452. JD 6:5-7. Critically, Respondent PFAC opposed the petition, asserting that it was the exclusive representative of all part-time faculty at the College. JD 6:8-10.

The petition was administratively dismissed by the Region 13 Regional Director on April 28, 2015, based on his finding that the FTST were already part of the bargaining unit of part-time faculty represented by Respondent. JD 6:11-18; GC Exh. 5. As the ALJ properly found, this administrative dismissal, which was not timely appealed, resolved the representational issue and had a preclusive effect on raising the issue in any later proceeding. JD 16:15-18. Based on the dismissal, FTST individuals sent letters to Respondent in June 2015, requesting information on how to join the Union as members. CP Exh. 5. Yet, not only did Respondent refuse to provide such information, it continued to file grievances against the College for its assignment of work to FTST individuals pursuant to the CBA. JD 6:34-40; JD 8:4-8; JD 8:29-44.

Subsequently, the Regional Director revoked his earlier dismissal of the petition and conducted a full hearing on the question of representation raised by the petition. Upon review of the evidence received during the exhaustive twelve-day hearing, on August 30, 2016, the Regional Director issued a Decision and Order, once again finding that the FTST were part of Respondent's unit. GC Exh. 13. Respondent sought review of the decision and, on February 14,

2017, the Board denied review and affirmed the decision of the Regional Director that FTST were part of Respondent's unit. JD 8:28-29; GC Exh. 19.

The Board's affirmance of the Regional Director's representational decision rendered that decision final and binding and, accordingly, unequivocally put to rest any question with respect to FTST's membership status. See 29 C.F.R. § 102.67(g). However, rather than accept that determination and satisfy its statutory duty to equally and in good faith represent the FTST, Respondent has instead continued to flout the determination.

Meanwhile, based on the Regional Director's definitive decision that they were, and always had been, PFAC unit members, the FTST individuals again sent Respondent letters requesting information about joining the Union in November 2016. GC Exh. 4. PFAC once again ignored the requests and refused to instruct the FTST regarding steps to become dues-paying members. JD 9:1-3. Respondent has instead remained steadfast in its refusal to acknowledge the membership status of the FTST and has actively sought to prohibit the College from conferring any benefits and rights to them under the CBA at every turn. JD 16:39-17:14.

In its Exception 7, Respondent argues that the ALJ erred in finding the Regional Director's August 30, 2016 Order constituted a final Board determination of the representational issue on the basis that the Board, in denying Respondent's request for review thereof, did not explicitly adopt the Regional Director's rationale. Respondent's argument is so clearly untenable that it hardly warrants a response. The Board's Rules and Regulations make clear that Regional Directors' determinations on representational issues are final and the Board's denial of review of such decisions constitute an affirmance of the Regional Director's determination. See 29 C.F.R. § 102.67(g). The cases affirming the finality of a Regional Director's decision in the face of the Board's denial of review are legion. See, e.g., *Wolf Creek Nuclear Operating Corp.*,

365 NLRB No. 55 (2017); *Pollard, A. G., Co.*, 161 NLRB 1454, 1455 (1966). That the Board chose not to explicitly address the Regional Director's rationale in its refusal to grant review had no bearing on the finality of the issue. See *Wolf Creek Nuclear Operating Corp.*, supra at slip. op. 1 (rejecting the proposition that the Board's denial of review is not the same as an official ruling on the subject at issue). Accordingly, Respondent's choice to treat the determination that the FTST were unit members as anything but final was misguided and, in the face of established Board policy, cannot be relied upon as a "good faith" defense for its discriminatory actions.

Based on the finality of the Regional Director's Board-affirmed unit determination, the ALJ's decision to grant the Charging Party's motion in limine to preclude relitigation of the unit issue was proper. Respondent argues, in its Exception 6, that this was error based on statements, made by a Board attorney representing the General Counsel before the District Court in Case 17-CV-513, to the effect that the representation issue "has not been fully determined by the Board" and that the Board would have an opportunity to address the issue in the instant unfair labor practice proceedings. As the ALJ properly found, this statement directly conflicts with the Board's Rules and Regulations previously cited and Respondent has cited no authority for the proposition that the attorney had the authority to supersede the Board's own Rules and Regulations or otherwise bind the Board or its judges. JD 11, n. 11.

Further, contrary to Respondent's contentions that the Board attorney's statements were made in order to secure a favorable ruling by the District Court and allow the Board to intervene in the proceedings, the Court, in fact, made clear that it did not view the statements as having any legal effect on the finality of the Regional Director's decision under the Board's Rules and Regulations. GC Exh. 20 at 15-16, n. 10. Moreover, any ambiguity as to the intent or effect of the statements was resolved by the Board's subsequent submission to the Court, in which it

maintained that “its statements to this Court are not inconsistent with the Board’s Rules and Regulations,” a statement with which the Court agreed. *Id.* Accordingly, there is no basis upon which to find that Respondent was prejudiced by the statements such that Respondent should be permitted to relitigate the representational issue in the instant proceedings. Nor should Respondent otherwise be permitted to invoke these statements as justification for its actions running afoul of the Board’s unit determination, as addressed below in Section III(A).

B. The Board Should Not Disturb its Ruling Affirming the Regional Director’s Representational Determination (Exception 1)

In the alternative, and in a desperate attempt to undo its continuous breach of its FTST members’ right to representation, Respondent, in its first exception, urges the Board to reverse the Regional Director’s August 30, 2016 unit determination. The Board should reject Respondent’s pleas based on the sound policy considerations underlying its own regulatory authority governing the matter.

Respondent’s argument that this is the Board’s “first opportunity to rule directly on the Regional Director’s decision” is patently incorrect. Respondent provided the Board with an opportunity to rule on the Regional Director’s unit determination when it raised the issue in its October 4, 2016 Request for Review of the Regional Director’s Order to the Board in Case 13-RC-146452. Respondent specifically requested that the Board review and reverse the Regional Director’s finding that the “‘FTST’ employees are ‘already included in the P-fac unit in their capacity as part-time faculty and covered by the P-fac contract.’” Thus, there can be no dispute that the representational issue was put squarely before the Board.

Notably, and contrary to Respondent’s argument, nothing in Section 102.67 had precluded the Board from granting Respondent’s 2016 Request for Review at the time simply because it sought review of the Regional Director’s rationale but not his action. To the contrary,

Section 102.67(d) specifically provides that the Board may grant review upon various grounds, including when the Regional Director's decision on a substantial factual issue is clearly erroneous and such error prejudicially affects the rights of a party, which is what Respondent argued in its Request for Review. In other words, nothing prevented the Board from reviewing the very question raised by Respondent's Request for Review—whether the FTST were already members of the unit of part-time faculty represented by PFAC.

The Board should not now, over a year and a half later, change course and accede to Respondent's plea to re-open the resolved representational issue. While Respondent insists that Section 102.67(g) only forbids a party from relitigating a settled representational issue in a subsequent unfair labor practice proceeding, as opposed to the Board's authority to address the issue, the policy considerations barring relitigation apply with equal force to the Board's power to reconsider its earlier ruling. As the Supreme Court observed, Congress vested in Regional Directors decisional authority in representation cases upon its judgment that Regional Directors "have an expertise concerning unit determination" sufficiently comparable to the Board's expertise and, therefore, concluded that such determinations are primarily left to the Regional Directors. *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 141-42 (1971). To grant reconsideration and allow Respondent to relitigate matters disposed of in the representation proceeding would be a derogation of the Board's own policy, create uncertainty about the finality of Board representational procedures, encourage protracted litigation, and contravene the statutory scheme for the promotion of stability in labor relations.

The FTST have waited much too long already for their right to representation. The Board should, therefore, reject Respondent's exhortations to revisit the settled question of the FTST's

membership status and affirm the ALJ's findings concerning the unlawfulness of Respondent's actions in contravention of the unit determination.

III. THE ALJ PROPERLY DETERMINED THAT RESPONDENT VIOLATED SECTION 8(B)(1)(A), (2), AND (3) BY ITS FAILURE TO RECOGNIZE THE FTST AS UNIT MEMBERS AND BY ITS RELATED CONDUCT

The ALJ found, based on overwhelming evidence, that Respondent violated Section 8(b)(1)(A), (2), and (3) of the Act by its refusal to recognize the FTST as unit members and by committing various acts in violation of its duty of fair representation. The ALJ's decision took all relevant facts into consideration and properly applied settled Board law. Accordingly, the ALJ's 8(b)(1)(A), (2), and (3) findings should be sustained.

A. The ALJ Properly Determined that Respondent's Refusal to Recognize the FTST as Unit Members Was Not Grounded in Any Valid "Good Faith" Belief and, Therefore, its Related Conduct Violated Section 8(b)(1)(A) (Exceptions 2, 8, 9)

Significantly, Respondent does not dispute its well-documented position that the FTST were not entitled to its representation on the basis that they were not members of the part-time faculty unit it represents. Indeed, Respondent held this position openly, including by expressly informing member and Charging Party Clint Vaupel that it "does not recognize you as a member of the bargaining unit or a member of [PFAC]" and by informing the College that "none of the [FTST] are either in the P-fac bargaining unit or members of P-fac." JD 7:24-29. Rather, Respondent rests its defense on its contention that its actions (and inaction) in furtherance of that position were based on "good faith legal error" that there was no final Board determination that the FTST were included in the unit it represents. As such, it takes exception to the ALJ's findings and rulings underlying her conclusion that Respondent, in fact, "had no valid 'good faith' believe that it did not represent the FTST." JD 16: 28-30.

In support of Respondent's exceptions, it argues first that it had credible grounds for its conclusion that there was no final Board determination on the unit issue. For the reasons discussed above in Section II(A), the Board should summarily reject this argument. The Board's clarity on its policy concerning the finality of representational decisions forecloses any reasonable conclusion that Respondent's actions in direct contravention of the Regional Director's unit determination were premised on a "good faith" belief.

Furthermore, Respondent's actions belie its feigned ignorance on the primacy of the Board's representational processes. As the ALJ correctly found, the uncontroverted evidence supports a finding that PFAC was well aware of the Board's primary jurisdiction in representational matters. JD 15: 10-23. Most prominently, in submitting to arbitration its October 17, 2016 grievance concerning the College's assignment of work to the FTST, Respondent did not ask the arbitrator to resolve the unit issue, which had already been resolved by that point by the Regional Director's August 30, 2016 Order. JD 15:12-17. Indeed, as the District Court found in Case 17-CV-513, Respondent acknowledged the primacy of the Board's determination that the FTST are included in the PFAC bargaining unit and expressly disavowed any intention to challenge that decision, submitting that

“[PFAC] is *not* using [the] arbitration as collateral challenge to the [Director's] ruling. It presented that challenge directly to the Board itself via a Petition for Review and awaits a ruling. So long as the [April 30, 2016] Decision and Order remains in effect (although not 'final') the Union will comply with it and fairly represent the FTST.”

GC Exh. 20 at 20.

Rather, the question presented to the arbitrator was how to implement the decision with respect to determining seniority status of the FTST. *Id.*

Respondent's sudden about-face in defense of the instant unfair labor practice proceeding is nothing more than a disingenuous attempt to avoid liability for its blatant disregard for the Board's unit determination and its members' rights.

Respondent next takes aim at the ALJ's finding that even during the period when no Board action was in effect regarding unit issue, Respondent lacked a "good faith" belief that it did not represent the FTST. JD 16:26-30. The ALJ based this finding on Respondent's written statements to the Region in moving to have United Staff of Columbia College's petition to represent the FTST dismissed in Case 13-RC-146452. JD 16:20-30; Respondent's March 12, 2015 Response to the Order to Show Cause, CP Exh. 2. The ALJ found that by such statements, Respondent insisted that it was the sole representative of all part-time faculty employed by the College, which includes the FTST, and that the Region had relied on such statements in administratively dismissing the petition on April 28, 2015. JD: 20-30. In excepting to this finding, Respondent argues that the ALJ misinterpreted its position to the Region and erred in refusing to allow Respondent to submit evidence that would clarify its position and the Region's understanding thereof. Specifically, the ALJ excluded testimony about meetings that were held between the College, Region 13, and PFAC following the Region's administrative dismissal. Tr. 138:2-139:22.

The ALJ's evidentiary ruling was proper and, moreover, did not prejudice Respondent. For one, the discussions Respondent sought to introduce occurred *after* the Region had already made its decision to dismiss the petition. Id.; Respondent's Exceptions to the ALJ at 24. Thus, they would have had no bearing on the basis for the dismissal. To the extent the Region's administrative dismissal of the petition was based on Respondent's written statements, the statements speak for themselves. Second, as Respondent itself acknowledges on page 25 of its

exceptions brief, whatever points were made to the Region in the discussions at issue by the evidentiary ruling, they were also made in writing to the Region and such written statements *were* submitted into evidence. See CP Exh. 2. Thus, the testimony proffered by Respondent would have been merely cumulative.

The ALJ's factual findings based on Respondent's written position to the Region in response to the petition were also appropriate. As noted above, the ALJ found that, by these statements, Respondent purported to be the sole representative of all part-time faculty employed by the College, including the FTST, only to subsequently refuse to afford the FTST any benefit of that representation. JD 16:23-26. Respondent argues that, in fact, its position was and has always been that whatever the possibility of the FTST entering the unit may have been, there were *purely contractual* prerequisites to representation that FTST had not yet met at the time the petition was filed and, accordingly, the FTST were not members of the unit at the time, although they were eligible to become members. What Respondent fails to acknowledge in its brief is that the ALJ did take this argument into account in her analysis. Specifically, on page 16, in footnote 14, the ALJ recognized that there were contractual prerequisites to be included in the unit.

Furthermore, the distinction Respondent purports to draw does nothing to absolve its bad faith in failing to represent the FTST. Critically, the FTST repeatedly requested to become members and asked PFAC to provide them with information regarding the steps they needed to take to do so. JD 7:1-3; 9:1-3; CP Exh. 5; GC Exh. 4. These requests were ignored by PFAC, even after it claimed to the Region to be the representative of the FTST, provided they met the contractual prerequisites of becoming members. D 7:1-3; 9:1-3. In other words, PFAC clearly acted in bad faith when it insisted that the Region dismiss the petition on the basis that the FTST, irrespective of their status at the time of the petition, could become members of its unit and yet

continued to deny the FTST any reasonable opportunity to do so and enjoy the benefits of representation.

For these reasons, the ALJ's findings that Respondent lacked any good faith belief in depriving the FTST of representation must be sustained and Respondent's exceptions dismissed.

B. The ALJ Properly Determined that Respondent Violated the Act when it Declared that it Would Not Represent the FTST's Interests in Negotiations Over a Successor Agreement (Exception 13)

The ALJ properly found that Respondent violated Section 8(b)(1)(A) and (3) of the Act by refusing to bargain on behalf of the FTST's interests when negotiating a successor contract with the College. JD 21:10-22. Significantly, Respondent does not deny that it refused to bargain with the College on behalf of the FTST. Rather, Respondent argues that this finding was in error because the issue had not yet become ripe because, at the time of the hearing, negotiations were still ongoing.

Critically, Respondent has provided no Board law in support of its contention that a duty of fair representation claim based on a union's refusal to negotiate can only be brought upon completion of bargaining. Certainly, this case presents unusual circumstances in that unions are seldom as transparent about their intent to deprive members of representation as Respondent was. Thus, as a practical matter, the final negotiated product is often the only evidence charging parties have to establish a breach. Such was the case in *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65 (1991), cited by Respondent. That case dealt with a challenge to the settlement agreement negotiated by the defendant union, and, accordingly, the terms of settlement itself was necessarily relied upon as evidence of the union's breach.

Here, in contrast, the unfair labor practice is predicated on Respondent's express refusal to even discuss mandatory terms and conditions of the FTST's employment during the course of

negotiations. Respondent's own admission of its unwillingness to bargain on behalf of the FTST is sufficient evidence of its breach and, therefore, unlike in *Air Line Pilots*, the Board need not wait for the final negotiated agreement as evidence.

Likewise, the only other case cited by Respondent is inapposite. In *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174 (9th Cir. 2010), the Ninth Circuit ruled that a duty of fair representation claim premised on certain bargaining proposals put forth by the union was not ripe because the parties had not completed negotiations and, therefore, the harm was merely speculative. Again, this case is distinguishable insofar as here, Respondent has foreclosed bargaining altogether by its refusing to represent the FTST at the table and, therefore, the Board need not wait for any responses by the College because there is nothing requiring a response. Thus, unlike in *Addington*, the harm is preordained, not speculative. As the *Addington* Court observed, "a litigant need not await the consummation of threatened injury to obtain preventive relief. If the injury is *certainly* impending, that is enough." *Id.* at 1179 (internal quotations omitted). Importantly, the Court made clear that its ripeness ruling was specific to the case at hand and that it was *not* holding that a DFR claim based on a union's position during bargaining is never ripe until after an agreement is reached. *Id.* at 1181.

Indeed, the Board finds conduct occurring *during* the course of bargaining to be unlawful all of the time. See, e.g., *Rocky Mountain Hospital*, 289 NLRB 1347 (1988) (refusal to bargain about union security, a mandatory subject of bargaining, unlawful). Where, as here, the evidence is Respondent's express refusal to negotiate over a specific mandatory subject of bargaining, the Board need not wait until the final agreement is reached to uphold the ALJ's determination that the Union's refusal was unlawful. Respondent's exception 13 is, therefore, without merit and should be dismissed.

C. The ALJ Properly Ruled that Charge 13-CB-165873 Was Not Time-Barred Under Section 10(b) of the Act (Exception 14)

The ALJ properly addressed Respondent's contention that the Charging Party's initial charge 13-CB-165873 was barred under Section 10(b) of the Act. Applying the dictates of *Machinists Local 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411, 422 (1960), the ALJ correctly ruled that the conduct giving rise to Respondent's unfair labor practices is not "inescapably grounded on events" outside of the 10(b) period. JD 22:27-23:3. Rather, the ALJ found that because Respondent's duty to the FTST is ongoing, each incident that gave rise to a breach of the duty constitutes a separate violation. *Id.* Moreover, the initial charge in this matter was filed within 6 months of the Charging Parties having notice of the Respondent's actions that are alleged to be unlawful in the Complaint. In this respect, the ALJ agreed with the General Counsel that clear and unequivocal notice of Respondent's refusal to represent the FTST came in the form of an October 20, 2015 email from Respondent's attorney, Michael Persoon, to Charging Party Clint Vaupel, conveying PFAC's position that it did not represent him (and presumably other FTST); the initial charge was filed less than 2 months later, on December 9, 2015. JD 23:31-37; GC Exh. 33. As the ALJ correctly noted, the record is devoid of any evidence establishing that Respondent provided earlier notice of the unequivocal position to the FTST, despite ongoing communications between the parties concerning this issue. JD 23:21-26. Accordingly, the ALJ properly concluded that the allegations contained in the Complaint were not barred under Section 10(b). JD 23:39-40.

Respondent's argument that the charge is time-barred rests entirely on the mistaken premise that operative notice of its refusal to represent the FTST occurred when Respondent and the College agreed to exclude the FTST in their 2013-17 contract. Respondent's reliance on this event is erroneous for several reasons. First, the violations in this case are predicated on the

Regional Director's representational determinations on April 28, 2015 and August 30, 2016. In fact, it was the April 28, 2015 Order that ultimately gave rise to Persoon's October 20, 2015 email responding to Vaupel's request to be represented pursuant to that decision. JD 6:20-7:28. At no point prior to the October 20, 2015 email did Respondent take a definitive position regarding whether FTST were included in the unit. Indeed, Respondent's statements to the Region urging it to dismiss the petition on the basis that Respondent is the exclusive representative of part-time faculty at best created ambiguity as to whether it represented the FTST.

Second, even if the contract were relevant to Respondent's unlawful actions, there is no evidence that the Charging Parties had clear and unequivocal notice of Respondent's refusal to recognize the FTST. While Vaupel testified that he and other FTST heard "rumblings" that the collective-bargaining agreement might affect their ability to teach, his testimony established only that this gave rise to a suspicion. Tr. 224-25. This suspicion based on rumors falls far short of evidence establishing clear and unequivocal notice of any violation.

Finally, as the ALJ discussed, Respondent's conduct constitutes a continuing violation of the Act under Board law. Respondent had an ongoing duty to the FTST and breached that duty each time it took action (or failed to take action) in contravention of its statutory obligations.

D. The ALJ Properly Determined that Respondent Violated Section 8(b)(1)(A) and (3) of the Act by its Lawsuits Seeking to Enforce the Arbitrator's Award and to Compel Arbitration of Other Grievances (Exceptions 4, 5, 11, 12)

As more fully set forth in the ALJ's decision (8:13-9:9:11), following the Regional Director's August 30, 2016 decision finding that the FTST were represented by Respondent, Respondent proceeded to file grievances with the College alleging improper assignment of work to FTST. One such grievance, dated October 17, 2016, was submitted to arbitration and, on

January 11, 2017, the arbitrator issued his award. Contrary to the Regional Director's decision, the arbitrator found that FTST were excluded from the unit.

Respondent filed Case 17-CV-513 in the United States District Court for the Northern District of Illinois Eastern Division seeking enforcement of the arbitrator's award on January 23, 2017. GC Exh. 17. Three weeks later, on February 14, 2017, the Board issued its order denying Respondent's request for review of the Regional Director's decision. GC Exh. 19. Yet, notwithstanding its earlier commitment to comply with the Order and "fairly represent the FTST" contained in its arbitration briefing,² even after the Board's denial of its request for review, Respondent continued to maintain its lawsuit in pursuit of enforcement of the arbitrator's award. On November 9, 2017, the District Court issued its decision, denying Respondent's position and granting the College's motion to vacate the arbitration award.³ GC Exh. 20.

Meanwhile, on June 2, 2017, Respondent filed a second lawsuit in District Court, Case 17-CV-4203, seeking to compel arbitration of grievances over the College's assignment of courses to FTST, again relying on the arbitrator's award. GC Exh. 21. Respondent maintained this lawsuit through the date of the hearing in the present case.

The ALJ properly found Respondent's filing and maintenance of its lawsuits in furtherance of its position that the FTST were excluded from the unit and in reliance on the arbitrator's decision violated Section 8(b)(1)(A) and (3). JD 21:4-8. The ALJ's legal findings are the result of straightforward application of clear Board law. As the District Court ruled, the

² GC Exh. 20 at 20.

³ Respondent excepts to the ALJ's statement that "the District Court issued a judgment in favor of the College for the cost of litigation in the case" on the basis that an award of litigation costs carries no legal significance. R Exception 4. Respondent's exception should be dismissed insofar as there is no basis upon which to find that the ALJ, who included this statement in her factual findings, relied on the Court's award to support her legal conclusions as to the unlawfulness of Respondent's lawsuit.

arbitrator's award directly contravened the Regional Director's representational decision, as affirmed by the Board. GC Exh. 20 at 17-18. The ALJ cited cases presenting nearly identical factual patterns, in which the Board held that a union's attempt to seek enforcement of an arbitration award that directly conflicts with a Board unit determination constitutes an unlawful restraint and coercion of employees, unlawful attempt to cause the employer to discriminate against them, and impermissible insistence on changing the scope of the bargaining unit under Section 8(b)(1)(A) and (3) of the Act. JD 20:24-21:2; see, e.g., *Local 340, New York New Jersey Regional Joint Board (Brooks Brothers)*, 365 NLRB No. 61 (2017); *Allied Trades Council (Duane Reade, Inc.)*, 342 NLRB 1010 (2004); *Teamsters Local 776 (Rite Aid Corp.)*, 305 NLRB 832 (1991).

In its Exception 11, Respondent takes issue with the ALJ's reference to preemption with respect to the effect of Board determinations in representational proceedings on lawsuits seeking to enforce conflicting arbitration awards. Relatedly, Respondent argues in its Exception 12 that the ALJ erred in failing to find that its lawsuit to enforce the arbitrator's conflicting award enjoyed First Amendment protection.

While the ALJ's use of the term 'preemption' may be imprecise, a full reading of her analysis makes clear that she was relying on the principle that Board decisions on representation take precedence over arbitration awards on the same issue, as announced by the Supreme Court in *Carey v. Wesinghouse*, 375 U.S. 261, 272 (1964). JD 20:24-38. Under this principle, because the Board has primary jurisdiction over representation issues, once the Board makes a determination on an issue of unit placement, any arbitral decision to the contrary must fall. Applying this principle, the Board in *Rite Aid* held 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*.”⁴ 305 NLRB at 834. In such cases, the lawsuit enjoys no constitutional protection and may be found to be an unfair labor practice under traditional NLRA principles. *Id.*

The ALJ was correct in applying these principles to the present case. Thus, the Regional Director found that the FTST were in the unit. Notwithstanding this conclusion and the Board's subsequent affirmance, Respondent continued to pursue its lawsuit aimed at enforcing a conflicting arbitrator's award. In other words, the lawsuit was clearly aimed at achieving a result that was incompatible with the Regional Director's ruling and, therefore, had an “illegal objective” under *Bill Johnson's Restaurants, Inc. v. NLRB*. 461 U.S. at 737 n. 5.

In sum, the ALJ's analysis of Respondent's lawsuits was well reasoned and followed established Board principles. As such, Respondent's exceptions to her findings and legal conclusions should be dismissed.⁵

⁴ 461 U.S. 731, 737 n. 5 (1983).

⁵ In its Exception 5, Respondent excepts to the ALJ's characterization of Respondent's position as “only an arbitrator can decide the representational issue in this case because it involves contract interpretation,” arguing that the record is devoid of any reference to this being Respondent's position (JD 12:16-17). While Respondent correctly notes that the ALJ did not identify which portions of the record she relied on for this statement, the record is replete with support for her characterization of Respondent's position. For example, support is readily found in a number of Respondent's communications to Charging Party Vaupel, including that “[t]here 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 Exh. 39); that because the “P-fac contract has been definitively interpreted [by the arbitrator's award] to exclude so-called ‘FTST’ such as yourself from the P-fac unit,” “[a]s such, you are not in the P-fac unit and you have no standing to file a grievance under the CCC-P-fac contract” (GC Exh. 37); and “[t]his matter has been resolved by arbitration in which the arbitrator, acting under his lawful authority . . .” found that the FTST have been excluded from PFAC's bargaining unit, and 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 its bargaining unit” (GC Exh. 37). These statements make clear that Respondent's position was that the arbitrator's decision was the final word on the representational issue notwithstanding the primacy of the Board's decision to the contrary.

In any event, even assuming that the ALJ did mischaracterize Respondent's position, her legal conclusions were based on Respondent's *actions* of relying on the arbitrator's invalid

E. The ALJ Properly Determined that Respondent's Actions Taken in an Attempt to Cause the College to Discriminate Against the FTSTs in Making Teaching Assignments Violated Section 8(b)(2) of the Act, as Alleged in the Complaint (Exceptions 3, 10)

Respondent argues that the ALJ's 8(b)(2) findings were in error on the grounds that 1) Respondent had no notice of the factual basis of the 8(b)(2) allegation, and 2) the facts do not establish an 8(b)(2) violation. Respondent's arguments fail on both counts.

With respect to notice, Respondent's selective citation to footnote 15 of the ALJ's decision on page 18 omits a critical portion. As the ALJ observed in that portion of her decision, consolidated complaint paragraph VIII(b) specifically identifies the conduct alleged in consolidated complaint paragraphs VI(a)(ii) and (b) as the basis for the 8(b)(2) charge, as follows:

Paragraph VI(a)(ii) alleges that Respondent, since about May 11, 2015

Requested the Employer not treat FTST as Unit employees, including when assigning courses, or as having any accrued credit hours under the agreement described above in paragraph V(b).

Paragraph VI(b) alleges that

Since about October 20, 2015, and at all material times, [Respondent] Union has refused to accept and process a grievance filed, or attempted to be filed, by the Charging Parties on behalf of themselves and similarly situated employees under the provisions of the agreement described above in paragraph V(b). The grievance stated that since the Fall 2015 semester, the Employer failed to properly assign courses to the grievants and other affected FTST by refusing to recognize them as Unit employees, refusing to recognize past course credits, and by refusing to include them on unit eligibility lists.

decision. Thus, even if Respondent did not hold the position that *only* an arbitrator could decide the representational issue, the fact remains that it was improper to put any stock into the arbitrator's decision in the face of a conflicting Board ruling.

Thus, there can be no question that Respondent was properly put on notice of the specific conduct relied upon to form the basis of the 8(b)(2) allegation, despite its disingenuous attempt to lure the Board into believing otherwise.

Respondent's contention that the facts do not support a finding of an 8(b)(2) violation similarly rings hollow. The ALJ based her 8(b)(2) finding on Respondent's causing or attempting to cause the College to discriminate against the FTST in making work assignments, as alleged in paragraph VI(a)(ii) of the Consolidated Complaint. JD 19:21-14. The ALJ relied on a May 11, 2015 email from Respondent to the College. JD 18:1-17; 19:12-14; GC Exh 7.

As background, following the Regional Director's April 28, 2015 administrative dismissal of the petition, the College attempted to comply with the Region's unit determination by updating the unit classifications and providing Respondent with a list of FTST members that were eligible for work assignment as bargaining unit members.⁶ GC Exh. 6. The College's attempts to comply were met with fierce opposition when, in an email on May 11, 2015, Respondent stated its opposition to the College's recognition of *any* of the FTST as having status in the unit and insisted that the College "cease assigning courses to these persons as if they are in the P-fac unit[.]" GC Exh. 7. Notably, Respondent doubled down on this position when, on July 15, 2015, it sent the College a letter stating that the FTST are not in the unit and should be excluded from being offered unit work. GC Exh. 8.

A bargaining representative violates Section 8(b)(2) when, upon the basis of an unfair classification, it attempts to cause or does cause an employer to derogate the employment status

⁶ In its Exception 3, Respondent argues that the ALJ improperly found that "the College started granting [the FTST] course assignments as Unit members with their appropriate accrued teaching credits/seniority," on the basis that the question of the FTST's seniority is a contractual matter not at issue in the instant proceeding. Respondent's exception to this portion of the ALJ's factual findings is not material to her legal conclusions or otherwise binding on the parties and, therefore, need not be addressed by the Board.

of an employee. *Miranda Fuel Co.*, 140 NLRB 181, 186 (1962). Here, Respondent did just that by attempting to deprive FTST employees of work assignments and precluding their accrual of seniority for reasons unauthorized under the contract, namely, based on its indefensible claim that the employees were not part of the bargaining unit.

The ALJ further found that Respondent violated Section 8(b)(2) by its refusal to process grievances on behalf of the FTST, as alleged in paragraph VI(b) of the Consolidated Complaint. JD 19: 1-11. Reasonably concluding that Respondent would not willingly represent them in the attainment of course assignments, several FTST individuals, including Charging Parties Clint Vaupel and Tanya Harasym, determined that their best option was to file a grievance against the College, which they did on October 16, 2015. The grievance alleged that the College violated the PFAC contract by (1) refusing to recognize FTST as members of the PFAC bargaining Unit; (2) failing to properly assign classes to the grievants and other affected FTST; (3) refusing to recognize their past course credits; and (4) refusing to include them on unit eligibility lists. GC Exh. 32. The FTST grievance was the first time the College could recall an individual employee needing to file a grievance without assistance from Respondent.⁷ Until that time, Respondent had provided representation to all of its members by filing grievances on their behalf. Faced with this atypical situation, and unclear as to how it should proceed, the College contacted Respondent to seek guidance on processing the grievance. Tr. 83, 86.

Instead of providing assistance or moving the grievance forward, the uncontested evidence shows that in response to the FTST grievance, Respondent persisted in unlawfully denying them representation. Specifically, Respondent informed Charging Party Vaupel that

⁷ Prior to the FTST grievance, PFAC's steering committee routinely filed grievances, and the College communicated directly with the grievance coordinator regarding the processing and resolution of such grievances. Tr. 84-85.

“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 Exh. 33. When, on October 19, 2015, Vaupel sought clarification regarding the processing of the FTST grievance and PFAC’s willingness to provide representation to FTST members, Respondent unequivocally stated that “P-fac does not recognize [FTST members] as a member of the bargaining unit,” and refused to accept or process the grievance of employees who it determined were outside its unit, despite the Regional Director’s determination to the contrary. GC Exhs. 10, 33.

Respondent’s refusal to represent the FTST was deafening and left the College with no option but to refuse to process the grievance. Thus, at the second step, the College advanced its position that it could not process the grievance over Respondent’s objections and notified the FTST that the CBA mandated that only PFAC had authority to process grievances to the next step. GC Exh. 35. This prompted FTST individuals, through Charging Party Vaupel, once again, to request Respondent’s assistance in advancing the grievance to arbitration. GC Exh. 36; Tr. 211. Once again, Respondent doubled down and informed Vaupel that it would not take the “grievance” to arbitration because the grievants were not recognized as unit members. GC Exh. 36. In the face of Respondent’s unwillingness to pursue the grievances, the College was left with no choice but to deny the grievance. GC Exh. 35.

Taken together with its earlier insistence that the College refrain from conferring course assignments to the FTST under the contract, Respondent’s subsequent refusal to represent the FTST—a departure from its typical representational practices—when the College heeded its admonishment was more than passive “inaction,” as Respondent contends. See *SSA Pacific Inc.*, 336 NLRB No. 51 (2018) (union liable under Section 8(b)(2) for foreseeable and desired results stemming from its actions, however innocent or passive in appearance). Respondent was well

aware that its affirmative refusal to process the FTSTs' grievance would leave the College with no recourse but to deny the grievance in the face of its own countering demands. Respondent's contention that inaction cannot form the basis of an 8(b)(2) violation has been specifically rejected by the Board in cases where, as here, a refusal to process a grievance is based on an unfair unit classification. See, e.g., *Rubber Workers Local 12 (Business League of Gadsden)*, 150 NLRB 312, 315 (1964), *enfd.* 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967) (finding refusal to process grievance of African American employees, which caused the continuance of discriminatory conditions, violated Section 8(b)(2) because "the duty of fair representation may be breached not only by action, but by inaction as well"). Respondent's refusal to process FTST's grievance cannot be viewed in isolation. Rather, its refusal was directly related to its efforts to restrict the College in its assignment of work to the FTST for unlawful reasons that were grounded in its defiance of the Regional Director's unit determination. As such, the ALJ's 8(b)(2) findings must be upheld and Respondent's exceptions dismissed.

IV. THE ALJ'S REMEDY IS ENTIRELY APPROPRIATE AND WARRANTED IN LIGHT OF THE EGREGIOUSNESS OF RESPONDENT'S UNLAWFUL ACTIONS, AND A SHOWING OF ECONOMIC HARM IS NOT REQUIRED TO ESTABLISH A VIOLATION UNDER THE ACT (EXCEPTIONS 15, 16)

Respondent contests the appropriateness of the ALJ's award of reasonable expenses and legal fees incurred by the College in defending against Respondent's lawsuits. JD 25:36-39. The ALJ's award is both entirely appropriate and supported by Board precedent. In *Teamsters Local 776 (Rite Aid Corp.)*, 305 NLRB 832, 835 (1991), discussed above, for example, the Board ordered the union to reimburse the employer for legal fees incurred in defense of a lawsuit to enforce an arbitrator's award that conflicted with the Board's unit determination. The ALJ's award is consistent with that strikingly similar decision insofar as the College's expenses were

incurred solely because Respondent continued to maintain its suit after the Regional Director issued his representational decision, an action which the ALJ properly found violated the Act. Moreover, General Counsel submits that the ALJ's order is conservative in that it only covers expenses incurred after the Board's February 14, 2017 Order in the representational case, rather than the Regional Director's earlier August 30, 2016 decision.

Finally, for the reasons given by the ALJ on pages 23-24 of her decision, Respondent's reference to the alleged lack of economic harm suffered by the Charging Parties is not dispositive here inasmuch as such a showing is not necessary to prove a violation under Section 8(b)(1)(A), (2), or (3) under the Act.

V. CONCLUSION

Based on the foregoing, it is respectfully submitted that Respondent's Exceptions to the Decision of the ALJ are without merit and must be rejected in their entirety and that the ALJ's Decision should be affirmed.

Dated: September 21, 2018 at Chicago, IL

Respectfully Submitted,

/s/ Emily C.M. O'Neill

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

**AFFIDAVIT OF SERVICE OF: COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

I, the undersigned employee of the National Labor Relations Board, affirm that on September 21, 2018, I served the above-entitled document(s) by electronic mail, as noted below, upon the following persons, addressed to them at the following addresses:

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