Part-Time Faculty Association at Columbia College *and* Tanya Harasym, et al.

Part-Time Faculty Association at Columbia College *and* Clint Vaupel

Part-Time Faculty Association at Columbia College *and* Columbia College Chicago. Cases 13–CB–165873, 13–CB–202023, and 13–CB–202035

April 24, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

On May 24, 2018, Administrative Law Judge Kimberly R. Sorg-Graves issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Parties each filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board orders that the Respondent, Part-Time Faculty Association at Columbia College, Chicago, Illinois, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing and refusing to recognize the full-time staff at Columbia College Chicago (the Employer) who teach part-time (the FTST) as bargaining-unit members within

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

On August 30, 2016, in Case 13–RC–146452, the Regional Director for Region 13 determined that the full-time staff members who teach courses on a part-time basis in addition to their other job duties (known as the "FTST") are properly included in the bargaining unit represented by the Respondent in their capacity as part-time faculty. In view of that determination, the judge in this proceeding granted the Charging Parties' motion in limine to preclude the relitigation of the status of the FTST. Although the Respondent argues in its exceptions that it had a good-faith belief that the FTST were not properly included in the bargaining unit it represents, it did not except to the judge's grant of the motion in limine. We find that by failing to do so, the Respondent failed to preserve its right to challenge the status of the FTST in this proceeding. See Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations. Further, even if the Respondent had excepted to the judge's ruling, we would find that the judge correctly found that the FTST were properly included in the unit for the reasons set forth in her decision.

The judge found, under a duty-of-fair-representation analysis, that the Respondent violated Sec. 8(b)(2) by causing or attempting to cause Columbia College Chicago to discriminate against the FTST in making course assignments. We agree with her analysis and adopt her finding. We further note that, in some Sec. 8(b)(2) cases, the Board has applied both a duty-of-fair-representation analysis and an analysis under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See, e.g., *Machinists District 70 (Spirit Aerosystems)*, 363 NLRB No. 165, slip op. at 1 fn. 3 (2016). Doing likewise here, we find that the Sec. 8(b)(2) violation is also established on a *Wright Line* analysis. Specifically, the Sec. 7 activity at issue is the FTST's membership in another union, the United Staff of Columbia College (US of CC), in their capacity as full-time staff, and the record shows that the Respondent's interference with the FTST's course assignments and refusal to process their course assignment grievances were motivated by their membership in US of CC, i.e., by the Respondent's favoritism towards unit members who were not members of US of CC. In addition, there is no evidence that the Respondent would have taken these actions in the absence of the FTST's membership in US of CC.

In adopting the judge's finding that the Respondent violated Sec. 8(b)(1)(A) and (3) by seeking to enforce an arbitration award and by filing an action to compel the arbitration of grievances in federal district court, we do not rely on the judge's characterization of the Board's prior determination of the status of the FTST as having "preempted" the lawsuits. Instead, we find that the judge correctly relied on Board precedent holding that the analysis set forth in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), does not apply when a party files a lawsuit that aims at achieving a result that is incompatible with a prior Board ruling. See, e.g., *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 (1991) ("[W]here 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*."), enfd. 973 F.2d 230 (3d Cir. 1992). Here, the prior Board ruling was that the FTST, in their capacity as part-time faculty, are properly included in the unit represented by the Respondent, and the Respondent's lawsuits were incompatible with that ruling. Accordingly, the lawsuits had an illegal objective, and the judge properly found that the Respondent violated the Act by prosecuting them notwithstanding the protection that would otherwise apply under the Petition Clause of the First Amendment.

[2] We amend the judge's remedy to provide that the make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). The *Ogle Protection* formula applies where, as here, the Board is remedying "a violation of the Act which does not involve cessation of employment status or interim earnings that would in the course of time reduce backpay." Id. at 683; see also *Pepsi America, Inc.*, 339 NLRB 986, 986 fn. 2 (2003). We note that the judge correctly provided a tax compensation remedy in the recommended order. See *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

We shall modify the judge's recommended Order to conform to the Board's standard remedial language for the violations found and in accordance with *Ferguson Electric Co*., 335 NLRB 142 (2001). We shall substitute a new notice to conform to the Order as modified.

the meaning of the unit description in the Respondent and the Employer's 2013–2017 collective-bargaining agreement.

(b) Causing or attempting to cause the Employer to discriminate against any employees in violation of Section 8(a)(3) of the Act, as amended, by failing to afford them the work-assignment preferences given to bargaining-unit employees under the collective-bargaining agreement because they are FTST, members of the United Staff of Columbia College, or for any other arbitrary and/or discriminatory reason.

(c) Refusing to process grievances on behalf of the FTST pursuant to the collective-bargaining agreement.

(d) Maintaining grievances that seek to compel the Employer to exclude the FTST from the bargaining unit and preclude them from receiving work assignments according to the terms of the collective-bargaining agreement.

(e) Maintaining a lawsuit seeking enforcement of Arbitrator Robert Perkovich's January 11, 2017 Award, which award is incompatible with the Board's decision in Case 13–RC–146452 and precludes the Employer from applying the collective-bargaining agreement to the FTST.

(f) Filing and maintaining a lawsuit seeking to compel the arbitration of grievances that, in part, seek to preclude the Employer from applying the collective-bargaining agreement to the FTST.

(g) Refusing to negotiate on behalf of the FTST during negotiations for a successor collective-bargaining agreement.

(h) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize the FTST as bargaining-unit members within the meaning of the unit description in the Respondent and the Employer's 2013–2017 collective-bargaining agreement.

(b) Request that the Employer treat the FTST as bargaining-unit members and afford them the work-assignment preferences given to bargaining-unit employees under the collective-bargaining agreement.

(c) Process grievances on behalf of the FTST pursuant to the collective-bargaining agreement.

(d) To the extent not already done, withdraw grievances, or portions thereof, that attempt to compel the Employer to exclude the FTST from the bargaining unit and preclude them from receiving work assignments according to the terms of the collective-bargaining agreement.

(e) To the extent not already done, withdraw or if necessary otherwise seek dismissal of any action in Case 17–CV–513 in the United States District Court for the Northern District of Illinois Eastern Division.

(f) Reimburse the Employer for all reasonable expenses and legal fees incurred since February 14, 2017, in defense of Case 17–CV–513 in the United States District Court for the Northern District of Illinois Eastern Division, with interest as set forth in the remedy section of the judge's decision.

(g) To the extent not already done, withdraw or if necessary otherwise seek dismissal of any action in Case 17–CV–4203 in the United States District Court for the Northern District of Illinois Eastern Division.

(h) Reimburse the Employer for all reasonable expenses and legal fees incurred since February 14, 2017, in defense of Case 17–CV–4203 in the United States District Court for the Northern District of Illinois Eastern Division, with interest as set forth in the remedy section of the judge's decision.

(i) Within 14 days from the date of this Order, notify the Employer and the FTST, in writing, that it rescinds its request for the Employer to exclude the FTST from the bargaining unit and to preclude them from work assignments under the collective-bargaining agreement.

(j) Make the FTST whole for any loss of earnings, seniority, and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision, as amended in this decision, and to the extent that the Employer has already made any of the FTST whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, reimburse the Employer for half of that amount.

(k) Compensate the FTST for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to the extent the Employer has already fully compensated any of the FTST for the adverse tax consequences, reimburse the Employer for half of that amount.

(l) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(m) Within 14 days from the date of this Order, remove from its files any reference to not recognizing any FTST as a bargaining-unit member, and within 3 days thereafter, notify the FTST in writing that this has been

done and that any prior refusal to recognize them as bargaining-unit members will not be used against them in any way.

(n) Within 14 days after service by the Region, post at its union office in Chicago, Illinois, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(o) Within 14 days after service by the Region, deliver to the Regional Director for Region 13 signed copies of the notice in sufficient number for posting by Columbia College Chicago at its Chicago, Illinois facility, if it wishes, in all places where notices to employees are customarily posted.

(p) Within 21 days after service by the Region, file with the Regional Director for Region 13 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 24, 2019

John F. Ring, Chairman

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize the full-time staff who teach part-time (the FTST) as bargaining-unit members within the meaning of the unit description in our 2013–2017 collective-bargaining agreement with Columbia College Chicago (the Employer).

WE WILL NOT cause or attempt to cause the Employer to discriminate against you in violation of Section 8(a)(3) of the Act, as amended, by failing to afford you the work-assignment preferences given to bargaining-unit employees under the collective-bargaining agreement because you are FTST, members of the United Staff of Columbia College, or for any other arbitrary and/or discriminatory reason.

WE WILL NOT refuse to process grievances on behalf of the FTST pursuant to the collective-bargaining agreement.

WE WILL NOT maintain grievances that seek to compel the Employer to exclude the FTST from the bargaining unit and preclude the FTST from receiving work assignments according to the terms of the collective-bargaining agreement.

WE WILL NOT maintain a lawsuit seeking enforcement of an award that is incompatible with the Board's decision in Case 13–RC–146452 and precludes the Employer from applying the collective-bargaining agreement to the FTST.

WE WILL NOT file and maintain a lawsuit seeking to compel the arbitration of grievances that, in part, seek to preclude the Employer from applying the collective-bargaining agreement to the FTST.

WE WILL NOT refuse to negotiate on behalf of the FTST during negotiations for a successor collective-bargaining agreement.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

WE WILL recognize the FTST as bargaining-unit members within the meaning of the unit description in our 2013–2017 collective-bargaining agreement with the Employer.

WE WILL request that the Employer treat the FTST as bargaining-unit members and afford them the work-assignment preferences given to bargaining-unit employees under the collective-bargaining agreement.

WE WILL process grievances on behalf of the FTST pursuant to the collective-bargaining agreement.

WE WILL, to the extent not already done, withdraw grievances, or portions thereof, that seek to compel the Employer to exclude the FTST from the bargaining unit and preclude them from receiving work assignments according to the terms of the collective-bargaining agreement.

WE WILL, to the extent not already done, withdraw or if necessary otherwise seek dismissal of any action in Case 17–CV–513 in the United States District Court for the Northern District of Illinois Eastern Division.

WE WILL reimburse the Employer for all reasonable expenses and legal fees incurred since February 14, 2017, in defense of Case 17–CV–513 in the United States District Court for the Northern District of Illinois Eastern Division, with interest.

WE WILL, to the extent not already done, withdraw or if necessary otherwise seek dismissal of any action in Case 17–CV–4203 in the United States District Court for the Northern District of Illinois Eastern Division.

WE WILL reimburse the Employer for all reasonable expenses and legal fees incurred since February 14, 2017, in defense of Case 17–CV–4203 in the United States District Court for the Northern District of Illinois Eastern Division, with interest.

WE WILL, within 14 days from the date of this Order, notify the Employer and the FTST, in writing, that we rescind our request for the Employer to exclude the FTST from the bargaining unit and to preclude them from work assignments under the collective-bargaining agreement.

WE WILL make the FTST whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, and to the extent that the Employer has already made any of the FTST whole for any loss of earnings and other benefits suffered as a result of our discrimination against them WE WILL reimburse the Employer for half of that amount.

WE WILL compensate the FTST for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to the extent the Employer has already fully compensated any of the FTST for the adverse tax consequences, WE WILL reimburse the Employer for half of that amount.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to not recognizing any FTST as a bargaining-unit member, and within 3 days thereafter, WE WILL notify the FTST in writing that this has been done and that any prior refusal to recognize them as bargaining-unit members will not be used against them in any way.

PART-TIME FACULTY ASSOCIATION AT COLUMBIA COLLEGE

The Board's decision can be found at https://www.nlrb.gov/case/13-CB-165873 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Sylvia L. Posey and *Catherine Terrell, Esqs.,* for the General Counsel.
Michael H. Slutsky, Esq. (Allison, Slutsky & Kennedy P.C.), for the Individual Charging Parties.
Alex Barbour, Esq. (Cozen O'Connor), for Charging Party Columbia College Chicago.
Michael P. Persoon, Esq. (Depres, Schwartz & Geoghegan, LTD.), for the Respondent Union.

DECISION

STATEMENT OF THE CASE

KIMBERLY R. SORG-GRAVES, Administrative Law Judge. On December 9, 2015, seven individual charging parties (Charging Parties)[1] filed Case 13–CB–165873 with Region 13 (Region) of the National Labor Relations Board (Board) alleging that the Part-Time Faculty Association at Columbia College (PFAC or Respondent Union) had breached its duty of fair representation in violation of Section 8(b)(1)(A) and (2) of the National Labor Relations Act (Act) by failing to recognize and to apply the

[1] The named Charging Parties are Tanya Harasym, Larry Kapson, Eric Koppen, Weston Morris, Anthony Santiago, Jill Sultz, and Clint Vaupel, but the charges were filed on behalf of all similarly situated employees.

terms of the collective-bargaining agreement between the Columbia College Chicago (College) and PFAC in effect from September 1, 2013, to August 31, 2017 (CBA) to the employees at issue and failing to process their grievances pursuant to that agreement.[2]

The charges raised unresolved issues of representation concerning whether the bargaining unit in the CBA included the part-time teaching/faculty positions of employees of the College, who are full-time staff, and who teach part-time, apart from their full-time staff positions (FTST).[3] To resolve these issues, the Region revoked its earlier dismissal of the petition in representation Case 13–RC–146452, which was filed by the United Staff of Columbia College (USCC). USCC represents the FTST in their capacity as full-time staff at the College and sought to separately represent them as part-time faculty through Case 13–RC–146452 (USCC petition).

The Regional Director issued a decision (Regional Director's decision) on August 30, 2016, dismissing USCC's petition in Case 13–RC–146452 on the basis that the FTST employees were represented by PFAC in their capacity as part-time faculty and that the CBA barred a representation election with regards to the FTST. PFAC filed a request for review and a motion to stay the Regional Director's decision with the Board. On February 14, 2017, the Board denied PFAC's request for review stating that "no party has argued that the petition should not have been dismissed." On April 19, 2017, the Region issued the consolidated complaint in the instant matter.

On July 7, 2017, Clint Vaupel, an individual, filed Case 13–CB–202023 and on July 7, 2017, the College filed Case 13–CB–202035. Both cases allege that PFAC had violated Section 8(b)(1)(A), 8(b)(2), and 8(b)(3) of the Act by obtaining an arbitration award that purported to exclude the FTST employees from the bargaining unit covered by the CBA (Unit) contrary to the Regional Director's decision, filing a federal court case to enforce that arbitration award, filing a lawsuit to compel arbitration of grievances alleging that the College failed to exclude FTST from the Unit and/or refused to deny the FTST course assignments under the CBA, and insisting that FTST interests be excluded from the negotiations for a successor agreement to the CBA.

On May 25, 2017, the Charging Parties filed a motion in limine seeking to prevent any party from presenting evidence or re-litigating in the instant unfair labor practice proceedings the issue of whether the FTST are included in the Unit that was the subject of the underlying Regional Director's decision in Case 13–RC–146452. On September 5, 2017, I issued an order granting the motion in limine. (GC Exh. 1(y).)

On September 29, 2017, the Region issued the second consolidated complaint in this matter to which PFAC and the College filed timely answers. (GC Exh. 1(z), 1(bb), and 1(cc).)

Before the start of the hearing in this matter on November 28, 2017, the College entered into an informal Board settlement agreement of the provisions of the second consolidated complaint which alleged that the College violated the Act. Based thereon, I granted General Counsel's unopposed motion to withdraw the portions of the second consolidated complaint that reference the College or Case 13–CA–165872, including in the caption.[4]

I heard this matter on November 28 and 29, 2017, in Chicago, Illinois, and I afforded all parties a full opportunity to appear, introduce evidence in accordance with my order granting the motion in limine, examine and cross-examine witnesses, and argue orally on the record. Respondent Union did not call any witnesses. By stipulation of the parties, Respondent Union submitted documentary evidence into the record without the documents being authenticated by a witness. General Counsel, Respondent Union, and the Charging Parties filed posttrial briefs in support of their positions on January 19, 2018.[5]

After carefully considering the entire record, including my observation of the demeanor of the witnesses, I find that

FINDINGS OF FACT

Jurisdiction and Labor Organization Status

The College is a nonprofit education corporation with its main administrative office and a place of business located in Chicago, Illinois (the campus), where it engages in the operation of a private not-for-profit college. In conducting its operations, the college annually purchases and receives goods valued in excess of $5000 directly from points outside the State of Illinois. PFAC admits, and I find, that the College has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (GC Exh. 1(z), 1(bb), and 1(cc).) PFAC admits, and I find, that it has been a labor organization with the meaning of Section 2(5) of the Act. (GC Exh. 1(z), 1(bb), and 1(cc).) Based on the foregoing, I find that this dispute affects commerce, and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

1. Background

The College operates a private university in Chicago, Illinois, which enrolls approximately 9000 students per semester and offers three primary fields of study: fine and performing arts, media arts, and liberal arts and sciences. The college employs approximately 220 full-time faculty, 700 to 1000 part-time faculty, 350 full-time staff, 350 part-time staff, and 34 dual function employees, who hold both a part-time staff position and a part-time faculty position. (Tr. 66–67; GC Exh. 13, pg. 3.)

On March 4, 1998, PFAC was certified as the bargaining representative for the following employees of the College: "All part-time faculty members who have been employed as part-time faculty members for at least" [language clarifying the

[2] As discussed more below, the Charging Parties also filed Case 13–CA–165872 against the College. The College entered into an informal Board settlement agreement in Case 13–CA–165872, and it was withdrawn from these proceedings.

[3] FTST is the acronym used by the parties to refer to the employees at issue and is derived from the phrase "Full-Time Staff, who Teach part-time."

[4] I specifically granted General Counsel's to withdraw GC Exh. 1(a) and 1(b), all portions of the second consolidated complaint in GC Exh. 1(z) that refer to Case 13–CA–165872, including in the caption and the allegations in par. VII and all references to paragraph VII. (Tr. 10–13.)

[5] The College did not submit a brief.

amount of semesters and college credit hours an individual must teach before qualifying as a part-time faculty bargaining unit member]; but excluding, inter alia, "Columbia College full-time staff members."

On September 24, 2000, the College and PFAC amended the language of the unit description to include "all part-time faculty members who have completed teaching at least one (1) semester at Columbia College Chicago, excluding," inter alia, "Columbia College Chicago full-time staff members" (Unit).[6] (GC Exh. 3, pg. 1.)

The employees at issue in the instant matter are the full-time staff, who also moonlight as part-time faculty aside from their full-time staff positions, referred to as FTST. For example, since about 2003, Charging Party Clint Vaupel (Vaupel) has overseen the College's facility in which cinema and television arts are taught. Vaupel ensures that the students, teachers, and classrooms have the necessary gear to complete the course work. Vaupel addresses issues that arise with the gear such as audio/video technical issues. This is a full-time staff position for which he is paid a modest salary. His position does not require the teaching of a course. (Tr. 195–196.) Over about the last 9 years, Vaupel has also contracted on a part-time basis with the College to teach between 1 and 3 courses each semester and over that time has taught more than 100 college credit hours. (Tr. 198; GC Exh. 6, pg. 3.)

The Unit description remained unchanged in the successive collective-bargaining agreements between PFAC and the College the most recent of which was the CBA. (GC Exh. 3, pg. 23.) Before the CBA, which became effective on September 1, 2013, the College assigned courses fully at its discretion. (Tr. 68.) The CBA provided a new structure for the assignment of courses. First the College assigns courses to full-time faculty and then assigns the courses that full-time staff with teaching responsibilities as part of their staff positions must teach.[7] The remaining courses are assigned by the College through a new tiering/seniority system designed to provide a specific order and number of courses offered to Unit members based upon their tier/seniority measured in the following ranges of college credits taught: 200 or more (tier A plus), 51 to 199 (tier A), 33 to 50 (tier B), completed one semester of teaching but have obtained 32 or less credits (tier C). Once the required offers of course assignments have been made pursuant to the tiering/seniority system, the College can offer course assignments to other qualified persons. (GC Exh. 3, pgs. 12–13.) In applying this system, the College defaulted all of the FTST to the lowest tier of 32 or less credits regardless of the number of credits they had taught. (Tr. 69.)[8]

Vaupel testified that he and other FTST heard rumblings as early as November 2013 that they were excluded from the Unit, which would affect their tier/seniority for course assignments. (Tr. 224.) Vaupel also admitted to being aware of a May 22, 2014 letter sent by the College to individuals named in the letter in response to a request for recognition of FTST in the Unit. In the letter the College stated its position that at that time FTST were not a part of the Unit. (Tr. 244; RU Exh. 1.)[9]

Because of the lead time needed in making the next semester's course assignments, the tier/seniority system was not fully implemented until the course assignments for the summer/fall 2014 courses. (Tr. 70–71.) Under the 2013–2014 CBA tier system, the College treated the FTST as non-Unit members and did not assign them pursuant to tier/seniority levels A or B. The College instead was assigning FTST courses pursuant to tier C, regardless of the number of credit hours they had previously taught. Vaupel testified that he experienced a delay in being assigned courses based on his past experience and for a time period received fewer assignments than he had in the past. (Tr. 201.)

From the time that the College was required to implement the tier system, PFAC filed a series of grievances repeatedly disputing the College's assignment of courses pursuant to the CBA for various reasons including the College's assignment of courses to FTST.

Respondent Union did not call any witnesses, but by its counsel's questions on cross-examination of the College's in-house counsel for labor relations Terence P. Smith, Respondent attempted to get Smith to testify that PFAC had not directly asserted that FTST were excluded from the Unit in processing these grievances. Smith was unable to recall specific statements to support his understanding that PFAC contended that FTST were improperly assigned courses because they were excluded from the Unit in the grievances, but consistently testified that that was his understanding. (Tr. 120-121.) I credit Smith's testimony in this regard because the language of the grievances discussed below corroborates his testimony.

On September 17, 2014, PFAC filed a class action grievance with the College alleging, among other things, that "bargaining unit work was still being given to non-bargaining unit members other than those stipulated in the [CBA]. More specifically, a database was created showing all of the teaching assignments given to Full-Time Staff." (Tr. 98; GC Exh. 23A-B, pg. 2.) A second similar class action grievance was filed on September 17, 2014, also alleging that the College had improperly assigned courses to non-bargaining unit members. (Tr. 99–102; GC Exh. 24A-B.)

On December 18, 2014, PFAC filed a class action grievance alleging that the College violated the CBA by improperly assigning courses, in part, as evidenced by "individuals who are Full-Time Staff but are not listed on Appendix V as those with teaching as a part of their job description yet are assigned PFAC bargaining unit work." (Tr. 102–104; GC Exh. 25.)

[6] USCC has represented the College's full-time and part-time staff employees with regards to their staff positions since July 11, 2006. (GC Exh. 13, pg. 5.)

[7] Appendix V of the CBA lists nineteen full-time staff positions for which teaching is a requirement and the number of courses required for each position. (GC Exh. 3, pg. 31.)

[8] The grievances filed by PFAC evidence that it also disputed the College's application of the tier system for reasons other than its position that the FTST are not in the bargaining unit.

[9] At the hearing, Respondent Union asserted the affirmative defense that the statute of limitations had run on the allegations in Case 13–CB–165873. Therefore, Respondent Union was allowed to present evidence, which would otherwise be excluded by my order granting the Charging Parties' motion in limine, for the limited purpose of supporting this defense.

On February 13, 2015, the USCC filed Petition 13–RC–146452 seeking to represent the FTST, whom USCC already represents in their capacity as full-time staff, in their capacity as part-time faculty. (GC Exh. 4.) The Region investigated the petition and issued a show cause notice to both the College and PFAC. Throughout its response to the show cause notice, PFAC repeatedly contended that it represented the part-time faculty, which included any full-time staff who moonlighted as part-time faculty consistent with the CBA. (CP Exhibit 2, pgs. 12–13). Based upon the College's and PFAC's responses to the show cause order, on April 28, 2015, the Region dismissed the petition stating:

> The facts remain that when these employees are not acting in their capacity as staff employees, they are part-time faculty, the certified unit includes all part-time faculty, and the PFAC and [the College] both acknowledge that all part-time faculty are included in the existing Unit. In conclusion, it is determined that there is no question concerning representation for the petitioned-for employees. (GC Exh. 5, pg. 2; CP Exhs. 1 and 2.)

2. PFAC's refusal to represent the FTST

Based upon the determinations in the dismissal letter of the USCC petition on May 11, 2015, the College sent PFAC a list of FTST with its calculations of the credit hours each FTST had accrued and asserted the College's belief that pursuant to the Region's determinations in the dismissal of the Petition the FTST were Unit members. (GC Exh. 6.) On that same date, PFAC responded contesting the College's assertion that the FTST on the list are within the Unit for ambiguous reasons.

By April 28, 2015, when the College learned of the Region's dismissal of the USCC Petition, the College had already made the summer sessions and most of the fall 2015 teaching assignments. (Tr. 77.) The College attempted to verify the seniority status of the FTST employees in order to afford the FTST teaching assignments based upon their appropriate tier by seniority, but this was not fully accomplished for the 2015 teaching assignments. Despite PFAC's refusal 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. (Tr. 91.)

On May 21, 2015, PFAC filed a class action grievance again alleging that the College violated the CBA by improperly assigning courses, in part, as evidenced by "individuals who are Full-Time Staff but are not listed on Appendix V as those with teaching as a part of their job description yet are assigned PFAC bargaining unit work." (Tr. 104–105; GC Exh. 26.)

June 5, 2015, PFAC filed a class action grievance again alleging that the College improperly assigned courses in part because "Full-Time Staff not listed in Appendix V continue to receive teaching assignments."

June 9 and 11, 2015, Lauren Targ emailed PFAC letters from herself and approximately 52 other FTST individuals requesting to become members of PFAC. (Tr. 262–264; CP Exh. 5.) Targ received no reply.

On July 15, 2015, PFAC sent the College a letter which contends that FTST are not in the Unit and should therefore be excluded from being offered Unit work. (GC Exh. 8.)

In July and August of 2015, Lauren Targ and Vaupel sent various emails to PFAC and the College demanding to be recognized as included in the Unit pursuant to the Region's findings in the dismissal of the USCC petition. While the College indicated its intent to comply with the Region's finding that FTST are included in the Unit, the Union responded that it was interacting with the College to resolve this issue without clarifying PFAC's position as to whether it recognized FTST as included in the Unit. (Tr. 264–275; CP Exhs. 6, 7, 8, 9, 10, and 11.)

On October 16, 2015, Vaupel and the other Charging Parties filed a grievance with the College alleging, inter alia, that FTST were not properly assigned courses to teach pursuant to the CBA because they were not recognized as Unit members. Vaupel also emailed the grievance to PFAC president Diana Vallera, along with a letter requesting PFAC's assistance, support, and representation in processing the grievance. (Tr. 204–205; GC Exhs. 9 and 32.)

Later that same day, PFAC's attorney Michael Persoon responded to Vaupel stating that "this issue is part of an ongoing labor-management dispute, including the status of any full-time staff in the part-time faculty unit." On October 19, 2015, Vaupel responded asking for PFAC to represent the FTST in their grievance regardless of any dispute PFAC had with the College. On October 20, 2015, Persoon responded, "[PFAC does] not read the NLRB order [referring to the Region's April 28, 2015 dismissal of the USCC petition] to say that any full time staff person who has ever taught a course is in the bargaining unit. . . .[PFAC] does not recognize you as a member of the bargaining unit or a member of [PFAC]." (Tr. 205–207; GC Exh. 33.) Persoon also sent an email to Terrence Smith explaining PFAC's reasons for its position "that none of the [FTST] are either in the P-fac bargaining unit or members of P-fac," including that "[n]one of these persons has ever appeared on a unit eligibility list or paid dues/fair share fees.[10] (GC Exh. 10.)

On October 26, 2015, Vaupel emailed Persoon a letter detailing portions of the Regional Director's decision supporting his contention that the decision found the FTST to be in the Unit and again requested a response as to whether PFAC would represent the FTST in pursuing their grievance. (Tr. 207–208; GC Exh. 34.)

During the fall of 2015, the Charging Parties processed their October 16, 2015 grievance through the steps of the CBA grievance process with the College denying the grievance on the basis that PFAC did not recognize the FTST as being included in the Unit. They did not attempt to arbitrate the grievance without PFAC's representation. (Tr. 208–210; GC Exhs. 11, 35, and 36.)

On December 9, 2015, the Charging parties filed Case 13–CA–165872 and Case 13–CB–165873 alleging that the College and PFAC had engaged in unfair labor practices by discriminating against the FTST in violation of the Act.

On December 21, 2015, PFAC filed a class action grievance

[10] The CBA contains a union-security clause entitled Art. III, Association Rights. (GC Exh. 3, pg. 3.)

alleging that the College again improperly assigned courses. Although the grievance does not explicitly state that FTST were improperly awarded Unit work it states that the assignments were not consistent with the Recognition clause of the CBA which contains the Unit description. (Tr. 107–108; GC Exh 3, pg. 1; GC Exh. 28.)

On April 22, 2016, the Region revoked the dismissal of USCC's petition to represent the FTST in their capacity as part-time faculty based upon representations by PFAC during the investigations of the unfair labor practices filed by the Charging Parties that the FTST were excluded from the Unit. (GC Exh. 12.)

The Region conducted a full representational hearing on USCC's petition. On August 30, 2016, the Regional Director issued his decision finding that the FTST are represented by PFAC in their capacity as part-time faculty, and therefore, the CBA constituted a representational bar to USCC's petition. The decision notes that the FTST's full-time employment as staff for the College is not significantly different than other Unit members, who also moonlight as part-time faculty for the College while working full-time work for another employer. The decision went on to state that "any ambiguity caused by the Employer and Intervenor PFAC's interpretation of the collective-bargaining agreement does not alter the clear fact that as part-time faculty these individuals are appropriately included within the plain language of the Unit description and are members of the PFAC bargaining unit. Moreover, any agreement between the Employer and PFAC to exclude the petitioned-for group of employees, in their capacity as part-time faculty, would be contrary to Board policy. See e.g., *Cabrill Lanes*, 202 NLRB 921, 923 fn. 12 (1973) (Board refused to accept agreement by the employer and union to exclude three out of five employees from the bargaining unit, where all were regular part-time employees.)" (GC Exh. 13, p. 14.) PFAC filed a timely request for review of the Regional Director's Decision with the Board.

October 17, 2016, PFAC filed a grievance with the College alleging, in pertinent part, that the College had improperly assigned FTST teaching credits/seniority. To support its claim that FTST had no seniority status, the grievance states:

> None of the so-called "FTST" or other persons similarly identified by the College as having P-fac unit seniority for the first time following the Regional Director's order in 13-RC-146452 have paid the necessary union dues or agency fees to accrue or maintain seniority in the P-fac unit. (GC Exh. 14.)

This grievance was submitted to arbitration by the parties on a stipulated record.

October 21, 2016, PFAC filed a class action grievance alleging that the College failed to assign courses in accordance with the CBA, Articles I Recognition and VII Appointment/ Reappointment, among other provisions. (Tr. 108–110; GC Exh. 29B, GC Exh. 3.) An almost identical grievance was filed on February 21, 2017, alleging that the College's failure to assign courses pursuant to the CBA continued in the spring of 2017. (Tr. 111–112; GC Exh. 30.)

November 22, 2016, Vaupel emailed PFAC letters from himself and approximately 28 other FTST individuals requesting to become members of PFAC. (GC Exh. 4.) Vaupel received no response.

On January 11, 2017, Arbitrator Robert Perkovich issued his (Arbitrator's award) in regards to the October 17, 2016 grievance. Contrary to the Regional Director's decision, the arbitrator found that FTST were excluded from the Unit, and therefore, should not have been assigned courses by the College. (GC Exh. 15.) PFAC submitted a copy of the Arbitrator's award to the Board in support of its request for review of the arbitrator's decision.

On January 23, 2017, PFAC filed Case 17-CV-513 in the United States District Court for the Northern District of Illinois Eastern Division seeking to enforce the Arbitrator's award.

On February 3, 2017, Persoon sent an email to Smith on PFAC's behalf commenting that PFAC trusted that the College would "not entertain further grievances from FTST under the P-fac contract." (GC Exh. 16.)

On February 14, 2017, the Board issued its order denying PFAC's request for review of the Regional Director's decision stating: "We affirm the Regional Director's action in dismissing the petition as no party has argued that the petition should not have been dismissed. See *Williams-Sonoma Direct, Inc.*, 365 NLRB No. 13 (2017)." (GC Exh. 19.)

In a chain of email exchanges between Persoon and Vaupel from February 13 to 16, 2017, Persoon expressed PFAC's position that Vaupel and other FTST had no standing to pursue a grievance under the CBA based upon the Arbitrator's award interpreting the contract to exclude the FTST from the Unit.

General Counsel intervened in District Court Case 17-CV-513 for the sole purpose of requesting a stay in the proceedings. On March 15, 2017, while arguing to the District Court in support of a stay in PFAC's suit to enforce the Arbitrator's award an attorney for General Counsel stated that "the scope of the unit issue has been determined by the regional director, but it has not been fully determined by the Board." (GC Exh. 1(u), pg. 1.) As discussed below, PFAC relies upon this statement to support its claim that it had a "good faith" belief that the FTST were excluded from the Unit.

On June 2, 2017, PFAC filed Case 17-CV-4203 in the United States District Court for the Northern District of Illinois Eastern Division seeking to force the College to arbitrate grievances, which in part grieved the College's assignment of courses to FTST in accordance with the Arbitrator's award. (GC Exh. 21.) PFAC maintained Case 17-CV-4203 through the date of the hearing, but had engaged in settlement talks in an attempt to resolve that case. (GC Exhs. 21 and 22.) PFAC's brief notes that this case was settled after the hearing.

On June 5, 2017, Vaupel, on the behalf of the FTST, sent a letter to PFAC President Vallera and the College's special counsel on labor relations, Smith, asking that FTST interests be protected from discrimination in the upcoming negotiations for a successor agreement to the CBA in accordance with the Regional Director's decision finding FTST in their capacity as part-time faculty are included in the Unit. On June 6, 2017, Persoon responded to Vaupel and carbon copied Smith stating that PFAC, relying upon the Arbitrator's award, did not recognize the FTST as being in the Unit and noted that General

Counsel had intervened in the District Court proceedings but had not argued to the court that the Arbitrator's award was not enforceable. Therefore, PFAC would not be representing FTST's concerns in successor contract negotiations. Vaupel responded informing Persoon of the FTST's opinion that PFAC's reliance on the Arbitrator's award was wrong. (GC Exhs. 38, 39, and 40.)

On July 7, 2017, Clint Vaupel on behalf of the FTST filed Case 13–CB–202023 alleging that PFAC violated Sections 8(b)(1)(A), (2), and (3) by obtaining the Arbitrator's award, seeking to enforce that award in Case 17-CV-513, and by continuing to insist that the FTST were not in the Unit. (GC Exh. 1(m).)

On July 10, 2017, the College filed Case 13–CB–202035 alleging that PFAC violated Sections 8(b)(1)(A), (2), and (3) by pursuing grievances and attempting to cause the College to discriminate against the FTST in violation of Section 8(a)(3) by seeking to deny the FTST rights under the CBA, by filing Case 17-CV-4203, by seeking to compel the arbitration of grievances that would deny FTST their rights as Unit members under the CBA, and notifying the College that it does not recognize FTST as part of the Unit and refusing to provide information concerning the FTST in preparation for negotiations for a subsequent collective-bargaining agreement. (GC Exh. 1(o).)

On July 13, 2017, PFAC filed a class action grievance alleging that the College failed to assign courses in accordance with the CBA including by "[FTST] receiving assignments before A tier instructors received 1st and 2nd classes." Because at least some of the FTST, such as Vaupel, have enough teaching credits to be in tier A, the language of the grievance suggests that PFAC's position was that FTST could not be in tier A because they are excluded from the Unit, which was Smith's understanding from negotiating on the behalf of the College with PFAC over these grievances. (GC Exh. 31.)

On November 9, 2017, the U.S. District Court issued its decision in Case 17-CV-513 denying PFAC's petition to confirm the Arbitrator's award and granting the College's motion to vacate the award. On November 14, 2017, the District Court issued a judgment in favor of the College for the cost of litigation in the case. (GC Exhs. 18, 20, and 41.)

PROCEDURAL ISSUE

At hearing PFAC questioned whether it was allowed to present evidence to relitigate the representational issue that was addressed by the Regional Director's decision in this unfair labor practice proceeding. I re-affirmed my decision in my prehearing order in response to the Charging Parties' motion in limine to preclude the relitigation of the unit issue for the reasons cited in my order. For the convenience of the reader, I readdress them here.

As the Board held in *Wolf Creek Nuclear Operating Corp.*, 365 NLRB No. 55 (2017), a "Regional Director's decision is final—and thus may have a preclusive effect—if no request for review is made [as was the case in *Wolf Creek*] or if the Board denies a request for review. It does not matter that the Board itself did not address the issue." In *Wolf Creek,* the Board cites Section 102.67(g) [formerly Sec. 102.67(f)] which states that "Denial of a request for review [of a regional director's decision] 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." Id. See, Section 102.67(g) of the Board's Rules and Regulations, Series 8, as amended; *Williams-Sonoma Direct*, supra at slip op. 1; *Local 340, New York New Jersey Regional Joint Board (Brooks Brothers, A Division of Retail Brand Alliance, Inc.*, 365 NLRB No. 61, slip op. 1 (2017).

The one exception to this rule is when the party

> seeking relitigation of the previously decided issue satisfies its burden of presenting new factual circumstances that would vitiate the preclusive effect of the earlier ruling." Id.; *Carry Cos. of Illinois*, 310 NLRB 860, 860 (1993) ("changed circumstances" exception to preclusion not established because "the Petitioner has failed to produce" evidence of such); *Harvey's Resort Hotel*, 271 NLRB 306, 306-307 (1984) (applying preclusion in context of unfair labor practice proceedings and holding that when it is clear that an issue was "fully litigated," i.e., "put in issue and resolved in the earlier proceeding," preclusion applies unless evidence of changed circumstances is produced). Id.

At no time has PFAC raised evidence of a change in the factual circumstances or newly acquired formerly unavailable evidence of a change in the Unit employees' employment conditions that would vitiate the preclusive effect of the Regional Director's decision. Instead, PFAC points to its contention that the Regional Director's decision was in error and/or did not constitute full litigation of the representational issue. Such contentions do not evidence changed circumstances that would affect the unit determination; therefore, I find that PFAC has failed to assert that there are factual circumstances that warrant the relitigation of the unit issue.[11]

Accordingly, I affirm my order precluding evidence offered for the purpose of relitigating the representational issue.

[11] In asserting that the representational issue should be litigated in these proceedings, PFAC also relies upon a statement made by a Board attorney representing General Counsel in the District Court proceeding in Case 17-CV-513. The attorney stated that the representation issue "has not been fully determined by the Board." This statement which contradicts the Board's Rules and Regulations and Board precedent, does not negate the preclusive effect of the Board's denial of PFAC's request for review. See *George Joseph Orchard Siding, Inc.*, 325 NLRB 252, 255 (1998) ("the General Counsel's memoranda, or indeed other communications or positions of the General Counsel, like the positions of the counsel for the General Counsel made at trial, are but the position of a party to the complaint litigation. As such the General Counsel's positions-as opposed to joint General Counsel-Board determinations or provisions-are not binding on the Board or its judges and are effective only to the extent they are persuasive"); *George Banta Co.*, 256 NLRB 1197, 1221 (1981) (counsel for General Counsel's assertion of a legal principle is not binding upon the Board). Thus, I find that the statement made by the attorney for General Counsel has no legal effect on the finality of the Regional Director's decision that the FTST are included in the PFAC bargaining unit.

ANALYSIS

PFAC contends that for various reasons it was privileged to maintain its position that the FTST are excluded from the Unit, and therefore, was privileged to inform them and the College of its position, to refuse to represent the FTST in grievance processing, and to file, maintain and seek to enforce grievances and the Arbitrator's award in furtherance of this position. As discussed below, PFAC's contention that the FTST are excluded from the Unit is contrary to its own assertions and the Board's determination resolving the representational issue. Because of the Board's primacy in resolving representational issues, I find, as discussed more fully below, that PFAC's refusal to recognize the FTST as included in the Unit and the actions that it took in furtherance of this position as alleged in the consolidated complaint violate Sections 8(b)(1)(A), (2), and (3).

1. Are the FTST included in the Unit?

PFAC contends that the Region's administrative dismissal of the USCC petition did not determine that the FTST were in the Unit and that the Regional Director's decision was in error and points to the Arbitrator's contrary interpretation and findings to substantiate these claims. PFAC further contends that only an arbitrator can decide the representational issue in this case because it involves contract interpretation.

Contrary to PFAC's contention, the Board's primary jurisdiction over representation issues pursuant to Section 9 of the Act is well established in the law. Board decisions on representational issues supersede arbitrators decisions on the same issues. The Supreme Court affirmed this primacy in *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 272 (1964), by holding that bargaining unit disputes may be submitted to an arbitrator, but "[s]hould the Board disagree with the arbitrator, by ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, the Board's ruling would, of course, take precedence. . . . The superior authority of the Board may be invoked at any time." See also, *Local 340, New York New Jersey Regional Joint Board (Brooks Brothers, A Division of Retail Brand Alliance, Inc.*, 365 NLRB No. 61 (Apr. 13, 2017) (relying upon *Carey* in holding that the arbitrator's decision is not controlling because it was superseded by the superior authority of the Board's subsequent unit clarification decision and order and that attempting to enforce the arbitrator's award constituted a separate violation of the Act); *Chauffeurs, Teamsters and Helpers Local 776 (Rite Aid, Corp.)*, 305 NLRB 832, 834 (1991); *Yellow Freight Systems, Inc. v. Auto. Mechanics Local 701 Int'l Assn. of Machinists, AFL-CIO*, 684 F.2d 526, 529 (7th Cir. 1982) (refusing to enforce an arbitrator's award that was in conflict with an earlier NLRB decision on a representation issue due to the Board's primacy in such issues).

In asserting that only an arbitrator can decide the representational issue in this case because it requires, in part, contract interpretation and analysis of past practice, PFAC fails to fully appreciate the Board's primacy in deciding representational issues. An arbitrator's award in any case is necessarily based upon contract interpretation and/or analysis of the practice of the parties. The Supreme Court in *Carey* found that a Board decision on the same representational issue has precedence over an arbitrator's determination on that issue. In *General Truck Drivers Local 952*, 305 NLRB 263 (1991), the Board held that the union violated Section 8(b)(1)(A), (2), and (3) of the Act by filing, maintaining, processing, and insisting on arbitration of grievances seeking to undermine two prior board representational unit determinations in decertification petitions. The Board also held that to the extent that the grievances sought to undermine those determinations "they intrude[d] on matters within the exclusive jurisdiction of the Board." One of the units was determined by a stipulated election agreement and the other was determined by a regional director's decision pursuant to a representational hearing. Similar to the instant case, collective-bargaining agreements and past practice existed between the representative and the employer. Thus, I find no merit to PFAC's contention that the Regional Director's decision does not have primacy over the Arbitrator's award because contract language and past practice was considered in the representational proceeding.[12]

Based thereon, I reject PFAC's argument, as did the District Court in 17-CV-513, that only an arbitrator could resolve the unit issue in this case because it involved in part contract interpretation and consideration of the parties' past practice. (GC Exh. 20, pg. 10–11.) I find that the Regional Director's decision that the FTST are included in the Unit is the binding legal authority on the representational issue, and my findings with regard to the unfair labor practices must be consistent with that decision.

2. Did PFAC owe the FTST a duty of fair representation?

A union owes each of the employees in the unit it represents a duty of fair representation. "By [a union's] selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially." *Wallace Corporation v. NLRB*,

[12] PFAC also seems to contend that in order for the Board's representational proceedings to have a preclusive effect, the underlying representational hearing must have been a unit clarification proceeding. PFAC contends that the Regional Director's decision is invalid because even if the petition in this case had been a unit clarification petition, it would have been improper. To support this contention, PFAC asserts the following quote from *Carey*:

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

Supra at 268–269. This assertion is simply not applicable to the instant case. Here PFAC was not seeking to expand its unit to include the FTST, which would warrant a unit clarification petition, or to expand the type of work the Unit performed. A unit clarification petition was not appropriate under the circumstances, and that fact does not negate the unresolved representational issue that the Regional Director's decision resolved—were the FTST already covered by an existing bargaining unit for which there was a contract bar preventing a test of that representation. Thus, I find no merit to PFAC's contention that it was improper for the Regional Director to decide the representational issue because it did not arise in the context of a unit clarification petition.

323 U.S. 248, 255 (1944). "When the … union accepted certification [under the Act] as the bargaining representative for the group it accepted a trust. It became bound to represent equally and in good faith the interests of the whole group." *Hughes Tool Company v. NLRB*, 147 F.2d 69, 74 (5th Cir.1945). Thus, PFAC owed the FTST fair representation.

To determine whether a union has met its representational duties, the Board still applies its rationale in *Miranda Fuel Co.*, 140 NLRB 181, 184 (1962), holding that:

> Section 7 thus gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment. This right of employees is a statutory limitation on statutory bargaining representatives, and we conclude that Section 8(b)(1)(A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious or unfair.

See, *National Association of Letter Carriers Branch 124*, 362 NLRB 865 (2015). The Supreme Court in *Vaca v. Sipes*, 386 U.S. 171, 176 (1967), similarly recognized that a union owes its members a duty of fair representation and must exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. The Supreme Court held that a union cannot take actions that negatively affect employees' employment based upon arbitrary, discriminatory, and/or bad faith reasons. Id. See also, *United Steelworkers v. Rawson*, 495 U.S. 362, 373 (1990) ("The Union's duty of fair representation arises from the National Labor Relations Act itself."). The Board and the Supreme Court have made clear that "A union's actions are considered arbitrary if the union has acted 'so far outside 'a wide range of reasonableness' as to be irrational." *Amalgamated Transit Union Local No. 1498 (Jefferson Partners L.P.)*, 360 NLRB 777 (2014) (quoting *Air Line Pilots Assn. v. O'Neill*, 499 U.S. 65, 67 (1991), and *Ford Motor Co. v Huffman*, 345 U.S. 330, 338 (1953)).

Thus, a union's actions are arbitrary if they are unrelated to its legitimate interest in performing its collective-bargaining function and in representing its entire constituency.

While it is impossible to fully characterize the full realm of arbitrary and non-arbitrary actions that a union may take, it is instructive to consider non-arbitrary, fair, reasonable, and objective motives for unions' actions. For example, decisions affecting employees' employment based upon such criteria as employer preference, skill, availability, length of unemployment, and recall rights, all are standards easily ascertainable, reasonable, objective, and related to legitimate union interests, and therefore, are not arbitrary.

PFAC makes no claim that it relied upon such acceptable, non-arbitrary criteria in deciding to exclude the FTST.[13] Instead, PFAC contends that it relied upon a "good faith" belief that it did not represent the FTST which privileged it to take other actions in furtherance of that belief. PFAC's strongest evidence in support of this contention is the letter sent by the College on May 22, 2014, stating its position, at that time, that FTST were not a part of the Unit, and the January 11, 2017, Arbitrator's award finding the FTST excluded from the Unit.

PFAC relies upon this evidence to assert that during different portions of the relevant period it retained a "good faith" basis for its belief that it did not represent the FTST. Because the complaint alleges that PFAC's unlawful conduct started on May 11, 2015, I find that there are three distinct periods with regards to the unit issue: the period between deadline for requesting review of the Region's administrative dismissal of the USCC petition on April 28, 2015, and its subsequent revocation on April 22, 2016; the period between the revocation on April 22, 2016, and the Board's denial of request for review of the Regional Director's decision on February 14, 2017; and the period since the February 14, 2017.

I find that after the Board issued its February 14, 2017 denial of request for review, PFAC has no viable argument that it had a good faith belief that it did not represent the FTST considering the legal precedent discussed above. The evidence supports a finding that PFAC was aware of the primacy of the Board's processing of representational issues. As the District Court found in Case 17-CV-513, PFAC did not ask the Arbitrator to resolve the unit issue, which had already been decided in the Regional Director's decision, but sought clarification as to how to treat the FTST under the CBA in light of that decision. Despite this apparent recognition, PFAC failed to afford the FTST any benefits of representation and sought to prevent them from acquiring any benefits of the CBA. When the Arbitrator came to a conclusion that the FTST were excluded from the Unit in contravention of the Regional Director's decision, PFAC reentrenched in its position that it did not represent the FTST. PFAC insisted on that position even after the Board, which had been informed of the Arbitrator's award, denied PFAC's request for review making the Regional Director's decision final.

With regard to the period between the administrative dismissal of the USCC petition and the revocation of that dismissal, I find that the administrative dismissal had the same legal effect as a regional director's decision on a representational issue for which no timely request for review was filed. The Board's Rules and Regulations Section 102.67 applies to actions taken by Regional Director's in representational proceedings, including the administrative dismissal of a petition. Section 102.67(a) states that "the Regional Director may proceed, either forthwith upon the record or after oral argument, the submission of briefs, or further hearing, as the director may deem proper, to determine whether a question of representation exists in a unit appropriate for purposes of collective bargaining, and to direct an

[13] PFAC made some vague references to non-arbitrary reasons for excluding some FTST from the PFAC Unit, such as the possibility that some FTST may have supervisory status, but presented no evidence to support such assertions. I note that the time to raise these issues was during the representational case, that the two FTST employees who testified did not testify to any duties or authorities that would indicate that they are supervisors within the meaning of Section 2(11) of the Act, and that PFAC failed to meet its burden of affirmatively establishing supervisory authority for any of the FTST. See *NLRB v. Kentucky River Community Care, Inc.*, 532 US 706, 711–712 (2001); *Dean & Deluca*, 338 NLRB 1046, 1047 (2003).

election, dismiss the petition, or make other disposition of the matter. . . .

> (c) *Requests for Board review of Regional Director actions*. Upon the filing of a request therefor with the Board by any interested person, the Board may review any action (*emphasis added*) of a Regional Director delegated to him under Section 3(b) of the Act except as the Board's Rules provide otherwise, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action by the Regional Director. The request for review may be filed at any time following the action until 14 days after a final disposition of the proceeding by the Regional Director. . . .
>
> (g) *Finality; waiver; denial of request*. The Regional Director's actions (*emphasis added*) are final unless a request for review is granted. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. 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.

These provisions of the Board's Rules and Regulations refer to actions taken by regional directors in representational proceedings not just regional directors decisions issued pursuant to a hearing. The Board frequently defers to administrative dismissals in representational proceedings with the result of making the regional director's action of administratively dismissing the petition the resolution of the representation issue. See 1650 *Broadway Associates, Inc.,* 2017 WL 2472848 (June 7, 2017); *Top Grade Excavating, Inc.,* 2015 WL 682272 (Feb. 18, 2015); *Rapera, Inc.,* 333 NLRB 1287 (2001) (upholding the regional director's administrative dismissal as the decision on the representational issue because the Board split 2 to 2 could not agree to affirm or overturn the regional director's action on the representational issue). Therefore, I find that the Regional Director's administrative dismissal of the USCC petition which was not timely appealed decided the representational issue and absent changed circumstances had a preclusive effect on raising the issue without asserting changes in circumstances.

I note that it was PFAC's equivocal statements concerning whether it represented the FTST that caused the Regional Director to revoke the administrative dismissal. The Region had relied upon PFAC's own insistence that it was the sole representative of all part-time faculty employed by the College in administratively dismissing the petition.[14] After successfully asserting that it represented all of the part-time faculty at the College, which includes the FTST, precluding this group of employees from representation by any other union such as the USCC, it refused to afford them any benefits of that representation. Based upon its own assertions that it is the exclusive bargaining-representative of the part-time faculty and the various Board actions/ decisions affirming this position, I find that PFAC had no valid "good faith" belief that it did not represent the FTST, even during the period when no Board action was in effect precluding this position.

Having found that PFAC did not have a "good faith belief that it did not represent the FTST, I further find that PFAC has not asserted a non-arbitrary reason for the total exclusion of the FTST from representation. PFAC's "have its cake and eat it too" stance in this regard totally divests the FTST of their Section 7 rights to a collective-bargaining representative and excludes them from employment in the capacity of part-time faculty for arbitrary and irrelevant reasons. I find that the evidence establishes that for arbitrary and discriminatory reasons PFAC was seeking to exclude the FTST from the Unit in order to prevent them from enjoying the negotiated benefits contained in the CBA, including being assigned Unit work.

Thus, I find that PFAC violated Section 8(b)(1)(A) of the Act by its failure to recognize the FTST as Unit members. I also find that in furtherance of this position PFAC breached its duty of fair representation and violated Section 8(b)(1)(A) of the Act by:

> (1) requesting that the College not treat the FTST as Unit employees or afford
> them the work assignment preferences given to Unit employees under the CBA;
> (2) refusing to process grievances pursuant to the CBA on the behalf of the FTST concerning the assignment of Unit work;
> (3) maintaining grievances which attempted to compel the College to exclude FTST from work assignments under the CBA, along with its filing of a lawsuit seeking to enforce those grievances;
> (4) filing and maintaining a lawsuit seeking to enforce the Arbitrator's award finding the FTST to be excluded from the Unit; and
> (5) informing FTST and the College in writing that the FTST were excluded from the Unit and all matters related to bargaining a successor collective-bargaining agreement for the Unit.

3. Did PFAC violate Section 8(b)(1)(A) and (2) of the Act?

Section 8(b)(2) of the Act states: "It shall be an unfair labor practice for a labor organization or its agents to cause or attempt to cause an employer to discriminate against an employee in violation of subsection 8(a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated 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." "An 8(b)(2) violation can be established by direct evidence that the union sought to have the employer discriminate, or by sufficient circumstantial evidence to support a reasonable inference that the union requested that the employer discriminate." *International Operating Engineers, Local 12 (Kiewit Industrial)*, 337 NLRB 544, 545 (2002). Except in circumstances where there is a valid union-security clause and the employee has not been denied union membership because

[14] This assumes the part-time faculty had taught the contractual minimal credit hours to be included in the PFAC Unit.

of his failure to pay the uniformly required union dues and fees (or their equivalent), a union violates this section of the Act if it makes an efficacious demand that an employer discharge or otherwise discriminate against an employee because of his or her nonmembership. *Letter Carriers Branch 86 (Postal Service*), 315 NLRB 1176, 1177–1178 (1994) (citing, *Mid-States Metal Products*, 156 NLRB 872, 900 (1966); *Mid-Pacific Construction Co.*, 161 NLRB 1351, 1355 (1966)).

The Board has long held that an 8(b)(2) allegation can be established under a *Wright Line*, 251 NLRB 1083(1980) analysis or, as here, a duty-of-fair-representation analysis. See *SSA Pacific Inc.*, 366 NLRB No. 51, slip op. 1 (2018). The duty-of-fair-representation framework establishes "not only that a union may not take action impairing a represented employee's job tenure or prospects based on arbitrary, unfair, irrelevant, or invidious considerations, but also that the union bears the practical affirmative burden of justifying virtually any such 'impairment' action by showing that its action was taken to fulfill its overriding duty to represent the legitimate interests of its constituency." *Operative Plasterers & Cement Masons, Local 299 (Wyoming Contractors Assn.)*, 257 NLRB 1386, 1395 (1981). This presumption may be overcome by evidence that the labor organization was acting "in good faith, based on rational considerations, and were linked in some way to its need effectively to represent its constituency as a whole." Id. See also *Acklin Stamping*, 351 NLRB 1263, 1263 (2007).

In the instant case, the consolidated complaint alleges that PFAC violated Section 8(b)(2) of the Act by its May 11, 2015 email contesting the College's seniority list which including FTST as Unit members with accumulated seniority on the basis of PFAC's position that FTST are excluded from the Unit and by refusing to process grievances in which FTST asserted that they had not been properly assigned courses in violation of the CBA, because of PFAC's position that FTST are excluded from the Unit.[15] PFAC contends that it had a "good faith" belief that it did not represent FTST when making these assertions to the College and eventually to the Charging Parties. For the reasons discussed above, I reject PFAC's defense that it was acting in "good faith" in asserting to the College that it did not represent the FTST and in refusing to process their grievances concern work assignments. These actions constituted Section 8(b)(1)(A) violations of the PFAC's duty of fair representation of the FTST. PFAC also contends that these allegations must be dismissed because of a lack of evidence to support a prima facie case under *Wright Line*. As discussed above, an 8(b)(2) allegation can be established through a duty of fair representation framework, which I apply to this case because PFAC's failure to recognize and represent the FTST breached its duty of fair representation in violation of Section 8(b)(1)(A). See *L. D. Kichler Co.*, 335 NLRB 1427 (2001).

The CBA contains a union security clause. (GC Exh. 3, pg. 3.) In June 2015, a few months after the Region administratively dismissed the USCC petition, numerous FTST submitted letters to PFAC requesting information on how to become members of PFAC in accordance with the union security clause, but their requests were ignored, as were their subsequent similar requests. PFAC noted that the FTST had not "paid the necessary union dues or agency fees to accrue or maintain seniority" in the Unit in support of its opposition to the grievances filed by FTST contending they were wrongfully denied Unit work and in defense of its grievances filed against the College alleging that FTST were improperly assigned Unit work. Yet, it was PFAC's own unlawful refusal to recognize the FTST as part of the Unit and its refusal to respond to their requests to become PFAC members that prevented the FTST from complying with the union security clause. Thus, I find no merit to any argument that the FTST were properly excluded for failing to comply with the union security clause in the CBA.

In light of the Regional Director's decision and PFAC's own assertion pre-dating that decision that it represents all part-time faculty, who have taught the requisite credit hours at the College, I find nothing in the record that meets PFAC's affirmative burden to show that its actions to preclude the FTST's from securing teaching assignments from the College was taken to fulfill its overriding duty to represent the legitimate interests of its whole constituency.

PFAC contends that it was only attempting to preserve work for Unit employees by maintaining this position and demanding that the College not recognize the FTST, refrain from assigning Unit work to the FTST, and from processing grievances concerning their work assignments. In actuality, PFAC by this conduct was attempting to preserve the work for a subset of the Unit while preventing another subset of the Unit from engaging in any part-time teaching. To reach this goal, PFAC demanded that the College not recognize the FTST as included in the Unit and refrain from assigning them Unit work. Thus, there is no rational argument that it was effectively representing its whole constituency by totally excluding a portion of the Unit, which is in direct contradiction of the Regional Director's decision and its own assertions that it is the exclusive bargaining representative for all part-time faculty at the College.

Accordingly, I find that PFAC violated Section 8(b)(2) of the Act by breaching its duty-of-fair representation of the FTST by refusing to represent them and by causing or attempting to cause the College to discriminate against them in making work assignments.

[15] I note that the consolidated complaint par. VIII(b) alleges that only PFAC's conduct discussed here and listed in pars. VI(a)(ii) and (b) of the consolidated complaint violated Sec. 8(b)(2) of the Act. General Counsel's brief does not specifically analyze the 8(b)(2) allegation outside of its discussion of alleged violations of Sec. 8(b)(3) of the Act. I further note that consolidated complaint paragraph VIII(c) alleging 8(b)(3) violations relies upon different conduct, alleged in pars. VI(e) through (j) and VI(l), than that of the 8(b)(2) allegations. Thus, it is unclear as to which analysis General Counsel is asserting establishes the 8(b)(2) allegation. Since the complaint alleges and I have found that the conduct arising out of its refusal to recognize and represent the FTST described in paragraphs VI(a)(ii) and (b) violated Sec. 8(b)(1)(A) of the Act, I analyze the 8(b)(2) allegation under a duty-of-fair-representation framework. I further note that an argument could be made that the conduct alleged to have violated Sec. 8(b)(3) in the consolidated complaint also violated Sec. 8(b)(2). I decline to address the merits of such an argument here because it was not alleged in the consolidated complaint or by General Counsel at the hearing or specifically in General Counsel's brief.

4. Did PFAC violated Section 8(b)(1)(A) and (3) of the Act by seeking to enforce the Arbitrator's award and by maintaining and seeking to compel arbitration of certain grievances?

General Counsel and Charging Parties allege that PFAC violated Section 8(b)(1)(A) and (3) of the Act by filing and maintaining Case 17-CV-513 in United States District Court seeking to enforce the Arbitrator's award and by maintaining grievances and filing and maintaining Case 17-CV- 4203 in the United States District seeking to force arbitration those grievances which, sought, at least in part, to preclude the College from recognizing the FTST as members of the Unit and from applying the CBA to them. General Counsel cites the Board's decision in *General Truck Drivers Local 952*, 305 NLRB 263, 263 (1991), holding that a union violates Section 8(b)(1)(A), (2), and (3) by filing grievances "seeking to undermine the Board's prior decisions in the representation cases, had objectives that were illegal as a matter of Federal law."

PFAC contends that it had a good faith belief that it did not represent the FTST which was bolstered by the Arbitrator's award, and therefore, was privileged to file and maintain these lawsuits. PFAC cites *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), in support of its contention that its actions are constitutionally protected, absent a showing of "bad faith" motive in filing and maintaining these District Court cases and underlying grievances. Contrary to PFAC's assertion, I find it is unnecessary to determine whether PFAC had a bad faith motive in excluding the FTST in this context, because PFAC's filing and maintenance of grievances and lawsuits seeking to exclude the FTST from the Unit and the benefits of its collective-bargaining agreement with the College were preempted by the Board's denial of review of the Regional Director's decision.

The Board recently addressed the issue of preempted lawsuits in *Ashford TRS Nickel, LLC a subsidiary of Ashford Hospitality Trust, Inc.*, 366 NLRB No. 6, slip op. 4–5 (2018), stating:

> The Supreme Court addressed the status of preempted lawsuits in connection with Labor disputes in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983). There, the Court held that the Board could enjoin baseless litigation, but, in light of the First Amendment, could not enjoin a reasonably based ongoing lawsuit even if the lawsuit interfered with employees' Section 7 rights. The Court, however, was careful to delineate the limited scope of its holding, making clear that preempted lawsuits were a different matter altogether. . . . The continued vitality of the *Bill Johnson's* exemption for preempted lawsuits was later recognized by the Court of Appeals for the District of Columbia Circuit in *Can-Am Plumbing v. NLRB*, 321 F.3d 145 (D.C. Cir. 2003). In that case, the court considered whether a state court lawsuit challenging a job targeting program under California's prevailing wage statute violated Section 8(a)(1). Like the Respondent, the employer argued that the Supreme Court in *BE & K* had extended the baseless-and-retaliatory standard to the analysis of preempted lawsuits. The court rejected that argument. First, the court observed that the Board had consistently declined to apply the *Bill Johnson's* analysis to lawsuits that were preempted by the Act. Second, the court endorsed the Board's interpretation that *BE & K* was "not relevant" because it did not affect the *Bill Johnson's* exemption for preempted lawsuits. Id. at 151. See also *Small v. Plasterers Local 200*, 611 F.3d 483, 492 (9th Cir. 2010) (quoting *Can-Am,* "*BE & K* did not affect the footnote 5 exemption in *Bill Johnson's*")…. we reaffirm the Board's consistently held view that a preempted lawsuit enjoys no special protection under the First Amendment and may be found to violate the Act if it is unlawful under traditional NLRA principles; that is, it may be found unlawful if it has a tendency to interfere with the free exercise of a Section 7 right. [Footnote omitted.]

The Board has repeatedly held that Board determinations in representational proceedings preempt lawsuits filed in other jurisdictions. See *New York New Jersey Regional Joint Board (Brooks Brothers)*, 365 NLRB No. 61 (2017); *Allied Trades Council (Duane Reade, Inc.)*, 342 NLRB 1010, 1013 fn. 4 (2004); *Rite Aid*, 305 NLRB 832, 834 (1991). The Board in *Rite Aid* held 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 Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), and therefore lacked constitutional protection. 305 NLRB 834-835. The Board held that the arbitrator's decision was superseded by the superior authority of the Board's subsequent unit clarification decision. Citing *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 272 (1964). The Board found that the union in *Rite Aid* was "seeking to apply the collective-bargaining agreement to employees whom the Board had determined to be outside of the bargaining unit, and by doing so, the union was insisting on a change in the scope of the existing bargaining unit in violation of Section 8(b)(3) of the Act." 305 NLRB 834–835. The union's attempt to apply the union's security clause to these employees constituted a violation of Section 8(b)(2) of the Act.

Similarly, in *Brooks Brothers*, the Board concluded that the union violated Section 8(b)(1)(A), (2), and (3) of the Act by continuing its lawsuit and insisting that the employer recognize and apply the parties' collective-bargaining agreement's union security clause to the employees that the Board had found excluded from the union beyond the date that the Board issued its denial of the request for review of the regional director's decision in the representational proceedings. 365 NLRB No. 61, slip op. 1. In *Duane Reade*, the Board found that the violations of the Act started on the date of the regional director's decision and direction of election in that case because no request for review was filed making the decision a final Board ruling. 342 NLRB 1010, 1011–1013.

Accordingly, I find as alleged in the complaint that PFAC violated Section 8(b)(1)(A) and (3) by filing and/or maintaining Case 17-CV-513 and in Case 17-CV- 4203, to the extent it asserted that the College improperly assigned courses to FTST based upon PFAC's assertion that they were excluded from the Unit, after the Board denied its request for review of the Regional Director's decision on February 14, 2017.

5. Did PFAC violate Section 8(b)(1)(A) and (3) of the Act by refusing to bargain with the College concerning the FTST interests in negotiations for a successor contract?

General Counsel also alleges that PFAC violated Section 8(b)(1)(A) and (3) by stating in writing to Vaupel and Smith that FTST were not in the Unit and their interests were excluded from all matters relating to bargaining a successor agreement to the CBA. As discussed above, the FTST are in the Unit; therefore, their wages, hours, and other terms and conditions of employment are mandatory subjects of bargaining about which PFAC has a duty to bargain. See *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 5 (2017); *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958), PFAC expressed its flat refusal to bargain with the College concerning these mandatory subjects of bargaining. I find that PFAC violated Section 8(b)(1)(A) and (3) by refusing to negotiate on behalf of the FTST in their capacity as part-time faculty in negotiations for a successor collective-bargaining agreement.

6. PFAC's affirmative defense that the allegations are time barred by the Section 10(b) of the Act.

PFAC contends that the "charges are time barred" under Section 10(b) of the Act. (RU Brief, pg. 4.) The record is unclear as to which charge(s) PFAC is referring to by this language. It appears that PFAC is referring to the initial charge Case 13–CB–165873 filed by the individual Charging Parties, because the evidence discussed by PFAC to support this contention focuses solely on when the individual Charging Parties first became aware that PFAC's position was that it did not represent the FTST.[16] Thus, PFAC is apparently contending that the initial charge filed by the Charging Parties on December 9, 2015, is time barred, because at least Vaupel and some other FTST had heard rumors as early as November 2013 that PFAC did not recognize the FTST as part of the Unit. In addition, Vaupel and some of the other Charging Parties had seen a letter from the College stating its position, at that time, that the FTST were not in the Unit.

In support of this proposition, PFAC notes that in *Ohio & Vicinity Regional Council of Carpenters,* 344 NLRB 366 (2005), the Board enforced a 6-month statute of limitations for the filing of unfair labor practices. PFAC further contends that "where there is notice of a 'clear and unequivocal repudiation' of an alleged statutory obligation, 'the continuing violation theory no longer applies and a party is required to file its unfair labor practice charge within six months. . . [.]" *NLRB v. Jerry Durham Drywall*, 974 F.2d 1000 (8th Cir. 1992.) I note the inaccuracy in PFAC's assertion by this modified quote that the *Durham Drywall* decision stands for the proposition that clear and unequivocal notice of the repudiation of any statutory right precludes the litigation of all related matters arising more than 6 months after the original repudiation. The *Durham Drywall* case held that a union cannot rely upon a continuing violation theory to skirt the 10(b) statute of limitations for allegations alleging unilateral changes to the contract, when it has been put on notice of an employer's clear and unequivocal repudiation of the contract outside of the 10(b) period. Id.

A more applicable discussion of the application of Section 10(b) is found in *Bryan Manufacturing Co.,* 362 U.S. 411, 416 (1960). In *Bryan Manufacturing,* the Supreme Court distinguished between cases "where occurrences within the 6-month limitations period in and of themselves may constitute as a substantive matter, unfair labor practices . . . [and] . . . earlier events . . . [are] . . . utilized to shed light on the true character of matters occurring within the limitations period"; from cases in which "conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice." Section 10(b) of the Act only precludes the Board from finding a violation of the Act in the latter type of case. Accordingly, the Supreme Court found that the NLRA's statute of limitations only prevents the Board from holding a party liable for conduct "inescapably grounded on events" that fell beyond the statute's horizon. Id. at 422.

In the instant case, I find that PFAC's actions, within the 6-month period, constitute unfair labor practices without any reliance upon actions it may have taken during the years preceding the allegations at issue in this matter. The fact that PFAC may have breached its duty of fair representation to the Charging Parties prior to May 11, 2015, without them filing charges over that conduct, does not forever thereafter relinquish PFAC from its duties as the FTST's collective-bargaining representative. As the Regional Director's decision found, that duty has been ongoing, and the record contains no evidence of any legal cessation of that duty. Since the representational duty is ongoing, each incident where PFAC breaches its duty-of-fair-representation or maintains unlawful actions in light of that duty is a separate violation in and of itself. See, *Teamsters Local 509* (*ABC Studios)*, 357 NLRB 1668 (2011), enfd. *Teamsters Local Union No. 509 v. NLRB*, 803 F.3d 1, 204 (2015) (finding 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 that may or may not have constituted a similar violation). For example, 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. *Register Guard,* 351 NLRB 1110 fn. 2 (2007); *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998); *Control Services,* 305 NLRB 435, 435 fn. 2, 442 (1991), enfd. mem. 961 F.2d 1568 (3d Cir. 1992). See also, *Arvin Industries*, 285 NLRB 753 (1987) (the Board concluded that where a superseniority provision on its face is either unlawful or presumptively unlawful, the violation

[16] Because PFAC raised no argument and presented no evidence at hearing or in its brief as to the timeliness of the charge filed by the College, I find that PFAC has failed its burden to prove any argument that the allegations contained in charge 13–CB–202035 are time barred by Section 10(b) of the Act. I also note that the charges in Cases 13–CB–202023 and 13–CB–202035 filed on July 7 and 10, 2017, respectively, where filed within 6 months of PFAC's filing of District Court Cases 17-CV-513 and 17-CV-4203 on January 23 and June 2, 2017, respectively. Also, these charges were filed within a month of PFAC's refusal to represent the FTST's interests in negotiations for a successor contract. Therefore, the facts do not support a finding that the filings of Cases 13–CB–202023 and 13–CB–202035 alleging that the filing and maintenance of these lawsuits, the maintenance of underlying grievances, and the refusal to bargain about the FTST's interests in negotiations for a successor contract were outside the statute of limitations.

(maintenance of the illegal provision) is not "based upon" or "inescapably grounded on" events outside the 6-month 10(b) period).

The only remaining statute of limitation question is whether the initial charge in this matter was filled within 6 months of the charging parties having notice of the actions of PFAC alleged to be violations in this matter. Established Board precedent holds that notice, whether actual or constructive, must be clear and unequivocal, and that the burden of showing such notice is on the party raising the affirmative defense of Section 10(b). See, *Metropol Restaurant,* 247 NLRB 132 (1980); *Natico, Inc.,* 302 NLRB 668 (1991); *Park Inn Home for Adults,* 293 NLRB 1082 (1989). I agree with General Counsel and the Charging Parties that PFAC has failed to meet its burden of proving that the Charging Parties had clear and unequivocal notice that it refused to represent them before Vaupel received Persoon's email on October 20, 2015, informing Vaupel that it was PFAC's position that it did not represent him and presumably other FTST. The record contains no documentary evidence or testimony of PFAC informing any of the Charging Parties of its unequivocal position that it did not represent them before this date despite ongoing discussions and concerns about this issue.

In its response to the Regional Director's order to show cause why the USCC petition should not be dismissed, PFAC asserted that it represents all part-time faculty, including FTST in their capacity as part-time faculty, precluding them from being represented by another collective-bargaining representative. It was PFAC's and the College's similar stance on this issue that resulted in the Regional Director's dismissal of the petition. Clearly, PFAC's past assertions concerning this issue have not been that it unequivocally did not represent the FTST. Yet, in its May 11, 2015 communications with the College rejecting the College's inclusion of the FTST in the Unit seniority list, PFAC took the position that the FTST are excluded from the Unit. The record contains no evidence that the Charging Parties were privy to this and other similar communications between PFAC and the College, thus it did not constitute notice to the FTST that PFAC refused to recognize them.

The first evidence that arguably supports that PFAC gave the Charging Parties clear and unequivocal notice that PFAC refused to recognize them as part of the Unit was Persoon's October 20, 2015 email response to Vaupel denying his request for PFAC's assistance in processing a grievance on behalf of the FTST because PFAC did not represent Vaupel, and presumably the other FTST. The Charging Parties filed Case 13–CB–165873 less than 2 months after PFAC's October 20, 2015 unequivocal notice that it refused to recognize or represent them in processing their grievances.

Thus, I find that none of the charges filed in this matter against PFAC were barred by Section 10(b) of the Act's 6-month statute of limitations.

7. PFAC's contention that the case should be dismissed because it asserts that there is no evidence of economic harm to the FTST

PFAC contends that the record contains no evidence that it caused the FTST to suffer any economic harm, and therefore, the complaint should be dismissed for lack of sufficient evidence. This argument is flawed. Evidence of economic harm is not necessary to prove violations of Sections 8(b)(1)(A), (2), or (3) of the Act. Even an unlawful discharge case, in which economic losses are typical, there can be no economic harm if the discriminatee immediately starts work with another employer for equivalent or higher wages. Regardless, the unlawful discharge is still unlawful. The violation is established by the unlawful conduct on the respondent's behalf notwithstanding the economic effects of that conduct. Although the economic liability was rightly not litigated in this unfair labor practice hearing, the evidence suggests that at least some of the FTST experienced some economic harm during the Section 10(b) period and continuing through December 2016. Being relegated to tier C clearly puts applicants at a disadvantage, hence the whole purpose of the tier system and PFAC's attempts to make it applicable to only a subset of the Unit. The extent of this economic harm will be determined in subsequent compliance stage proceedings. See *Stark Electric, Inc*., 324 NLRB 1207, 1212 fn. 3 (1997); *Dean General Contractors*, 285 NLRB 573 (1987). Thus, I find no merit to PFAC's argument that this case should be dismissed due to lack of evidence of economic harm.

CONCLUSIONS OF LAW

1. Columbia College Chicago (the College) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Part-time Faculty Association at Columbia College (PFAC) is a labor organization within the meaning of Section 2(5) of the Act.

3. PFAC violated Section 8(b)(1)(A) of the Act by:

(i) refusing to recognize certain employees, referred to as FTST employees, as bargaining unit members and informing the College of its refusal to recognize those members;

(ii) requesting that the College not treat FTST employees as bargaining-unit members or afford them the work assignment preferences given to bargaining-unit employees under the collective-bargaining agreement;

(iii) refusing to process grievances pursuant to the collective-bargaining agreement on the behalf of FTST employees because of its refusal to recognize them as members of the bargaining-unit;

(iv) maintaining grievances which attempted to compel the College to exclude FTST employees from the bargaining-unit precluding them from work assignments under the collective-bargaining agreement, along with its filing of a lawsuit seeking to enforce those grievances;

(v) filing and maintaining a lawsuit seeking to enforce the Arbitrator's award finding FTST employees to be excluded from the bargaining-unit; and

(vi) informing FTST employees and the College in writing that the those employees were excluded from the bargaining-unit and all matters related to bargaining a successor collective-bargaining agreement for the bargaining-unit.

4. By refusing to recognize the FTST employees as included in the bargaining-unit and informing the College that it did not recognize those employees as being included in the bargaining-unit, thereby insisting that the College not apply the collective-bargaining agreement terms to certain members of the bargaining unit, PFAC has restrained and coerced employees in violation of Section 8(b)(1)(A) of the Act and has attempted to cause the College to discriminate against its employees in violation of Section 8(a)(3) of the Act, in violation of Section 8(b)(2) of the Act.

5. By refusing to process grievances filed by FTST employees concerning job assignments because PFAC refused to recognize those employees as included in the bargaining-unit, thereby insisting that the College not apply the collective-bargaining agreement's terms to certain members of the bargaining-unit, PFAC has restrained and coerced employees in violation of Section 8(b)(1)(A) of the Act and has attempted to cause the College to discriminate against its employees in violation of Section 8(a)(3) of the Act, in violation of Section 8(b)(2) of the Act.

6. By continuing to seek enforcement of an arbitration award that is incompatible with the Board's representational case decision in Case 13–RC–146452 and that precludes the College from applying the parties' collective-bargaining agreement to FTST employees in the bargaining-unit, PFAC has insisted on bargaining for a change in the scope of the existing bargaining unit and has thereby refused to bargain in good faith with the College in violation of Section 8(b)(3) of the Act.

7. By filing and maintaining grievances and by filing a lawsuit seeking to force the arbitration of those grievances, which, in part, sought to preclude the College from applying the collective-bargaining agreement's terms to FTST employees in the bargaining-unit, PFAC has insisted on bargaining for a change in the scope of the existing bargaining-unit and has thereby refused to bargain in good faith with the College in violation of Section 8(b)(3) of the Act.

8. By refusing to negotiate on behalf of FTST employees in the bargaining-unit in negotiations for a successor collective-bargaining agreement, PFAC violated Section 8(b)(1)(A) and (3) of the Act.

9. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A), (2), and (3) of the Act, I shall order that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act. I shall order Respondent, to the extent it has not already done so, to withdraw or if necessary otherwise seek dismissal of the lawsuits in *Part-time Faculty Association at Columbia College Chicago v. Columbia College Chicago* No. 17-CV-513, seeking enforcement of the January 11, 2017 arbitration award, and *Part-time Faculty Association at Columbia College Chicago v. Columbia Chicago* No. 17-CV-4203, seeking to force arbitration of the grievances which, in part, requested the College refrain from assigning the FTST bargaining-unit work because of PFAC's contention that they are excluded from the bargaining unit, and to reimburse the College for all reasonable expenses and legal fees, with interest, that the College incurred after February 14, 2017, the date of issuance of the Board's representational case order, in defending against these two lawsuits. Interest shall be computed as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). See *New York New Jersey Regional Joint Board (Brooks Brothers)*, 365 NLRB No. 61 (2017) and *Teamsters Local 776 (Rite Aid Corp.)*, 305 NLRB 832) (1991).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The National Labor Relations Board orders that the Respondent, Part-time Faculty Association at Columbia, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to recognize certain employees, referred to as FTST employees, as bargaining unit members.

(b) Requesting that the College not treat FTST employees as bargaining-unit members or afford them the work assignment preferences given to bargaining-unit employees under the collective-bargaining agreement.

(c) Refusing to process grievances pursuant to the collective-bargaining agreement on the behalf of FTST employees as members of the bargaining-unit because of its refusal to recognize those members.

(d) Maintaining grievances which attempted to compel the College to exclude FTST employees from the bargaining unit precluding them from work assignments under the collective-bargaining agreement.

(e) Informing FTST employees of the bargaining-unit and the College in writing that the FTST employees were excluded from the bargaining-unit and all matters related to bargaining a successor collective-bargaining agreement for the bargaining-unit.

(f) Refusing to recognize FTST employees as included in the bargaining-unit and informing the College that it did not recognize those employees as being included in the bargaining-unit, thereby insisting that the College not apply the collective-bargaining agreement terms to FTST employees as members of the bargaining-unit thereby insisting on bargaining for a change in the scope of the existing bargaining unit and has thereby refused to bargain in good faith with the College.

(g) Refusing to process grievances filed by FTST employees concerning job assignments because PFAC refused to recognize FTST employees as included in the bargaining-unit, thereby insisting that the College not apply the collective-bargaining agreement's terms to FTST employees as members of the bargaining-unit.

(h) Maintaining a lawsuit seeking enforcement of Arbitrator

[17] If no exceptions are filed as provided by Sec. 102.48 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Robert Perkovich's January 11, 2017 Award, which is incompatible with the Board's representational decision in Case 13–RC–146452 and precludes the College from applying the collective-bargaining agreement to FTST employees in the bargaining-unit.

(i) Filing and maintaining a lawsuit seeking to force the arbitration of grievances, which, in part, seek to preclude the College from applying the collective-bargaining agreement's terms to FTST employees in the bargaining-unit.

(j) Refusing to negotiate on behalf of FTST employees in the bargaining-unit in negotiations for a successor collective-bargaining agreement.

(k) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize FTST employees as bargaining unit members and inform the College of its recognition of those members.

(b) Requesting that the College treat FTST employees as bargaining-unit members and afford them the work assignment preferences given to bargaining-unit employees under the collective-bargaining agreement.

(c) Process grievances pursuant to the collective-bargaining agreement on the behalf of FTST employees as members of the bargaining-unit.

(d) Withdraw grievances, or portions thereof, which attempted to compel the College to exclude FTST employees from the bargaining-unit precluding them from work assignments under the collective-bargaining agreement.

(e) Inform FTST employees of the bargaining-unit and the College in writing that the FTST employees are represented by PFAC in all matters related to bargaining a successor collective-bargaining agreement for the bargaining-unit.

(f) To the extent not already done so, withdraw or if necessary otherwise seek dismissal of any action in Case 17-CV-513 in the United States District Court for the Northern District of Illinois Eastern Division.

(g) Reimburse the College for all reasonable expenses and legal fees incurred since February 14, 2017, in defense of Case 17-CV-513 in the United States District Court for the Northern District of Illinois Eastern Division, with interest as set forth in the remedy section of this decision.

(h) To the extent not already done so, withdraw or if necessary otherwise seek dismissal of any action in Case 17-CV-4203 in the United States District Court for the Northern District of Illinois Eastern Division.

(i) Reimburse the College for all reasonable expenses and legal fees incurred since February 14, 2017, in defense of Case 17-CV-4203 in the United States District Court for the Northern District of Illinois Eastern Division, with interest as set forth in the remedy section of this decision.

(j) Within 14 days from the date of this Order, notify the College and the FTST employees, in writing, that it rescinds its request for the College to exclude FTST employees from the bargaining-unit precluding them from work assignments under the collective-bargaining agreement.

(k) Make the FTST employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision, and to the extent that the College has already made any of the FTST employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision, reimburse the College for half of that amount.

(l) Compensate the FTST employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to the extent that the College has already fully compensated any of the FTST employees for the adverse tax consequences, reimburse the College for half of that amount.

(m) Within 14 days from the date of this Order, remove from its files any reference to not recognizing any FTST employee as a bargaining unit member, and within 3 days thereafter, notify the FTST employees in writing that this has been done and that any prior refusal to recognized the FTST employees as bargaining-unit members will not be used against them in any way.

(n) Within 14 days after service by the Region, post at its offices and meeting halls and all other places where notices to its members are customarily posted, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(o) Within 14 days after service by the Region, deliver to the Regional Director for Region 13 signed copies of the notice in sufficient number for posting by the College at its Chicago, Illinois facilities, if it wishes, in all places where notices to employees are customarily posted.

(p) Within 21 days after service by the Region, file with the Regional Director for Region 13 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 24, 2018

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize certain employees, referred to as FTST employees, as bargaining unit members.

WE WILL NOT request that the College refuse to treat FTST employees as bargaining-unit members or afford them the work assignment preferences given to bargaining-unit employees under the collective-bargaining agreement.

WE WILL NOT refuse to process grievances pursuant to the collective-bargaining agreement on the behalf of FTST employees as members of the bargaining-unit because of our refusal to recognize those members.

WE WILL NOT maintain grievances which attempted to compel the College to exclude FTST employees from the bargaining-unit precluding them from work assignments under the collective-bargaining agreement.

WE WILL NOT informing FTST employees of the bargaining-unit and the College that the FTST employees were excluded from the bargaining-unit and all matters related to bargaining a successor collective-bargaining agreement for the bargaining-unit.

WE WILL NOT refuse to recognize FTST employees as included in the bargaining-unit and inform the College that we do not recognize those employees as being included in the bargaining-unit, thereby insisting that the College not apply the collective-bargaining agreement terms to FTST employees as members of the bargaining-unit, thereby insisting on bargaining for a change in the scope of the existing bargaining unit, and thereby refusing to bargain in good faith with the College.

WE WILL NOT refuse to process grievances filed by FTST employees concerning job assignments because we refused to recognize FTST employees as included in the bargaining-unit, thereby insisting that the College not apply the collective-bargaining agreement's terms to FTST employees as members of the bargaining-unit, thereby insisting on bargaining for a change in the scope of the existing bargaining unit, and thereby refusing to bargain in good faith with the College.

WE WILL NOT maintain a lawsuit seeking enforcement of Arbitrator Robert Perkovich's January 11, 2017 Award, which is incompatible with the Board's representational decision in Case 13–RC–146452 and precludes the College from applying the collective-bargaining agreement to FTST employees in the bargaining-unit.

WE WILL NOT file and maintain a lawsuit seeking to force the arbitration of grievances, which, in part, seek to preclude the College from applying the collective-bargaining agreement's terms to FTST employees in the bargaining-unit.

WE WILL NOT refuse to negotiate on behalf of FTST employees in the bargaining-unit in negotiations for a successor collective-bargaining agreement.

WE WILL NOT in any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize FTST employees as bargaining unit members and inform the College of our recognition of those members.

WE WILL request that the College treat FTST employees as bargaining-unit members and afford them the work assignment preferences given to bargaining-unit employees under the collective-bargaining agreement.

WE WILL process grievances pursuant to the collective-bargaining agreement on behalf of FTST employees as members of the bargaining-unit.

WE WILL withdraw grievances, or portions thereof, which attempted to compel the College to exclude FTST employees from the bargaining-unit precluding them from work assignments under the collective-bargaining agreement.

WE WILL inform FTST employees of the bargaining-unit and the College in writing that the FTST employees are represented by PFAC in all matters related to bargaining a successor collective-bargaining agreement for the bargaining-unit.

WE WILL to the extent not already done so, withdraw or if necessary otherwise seek dismissal of any action in Case 17-CV-513 in the United States District Court for the Northern District of Illinois Eastern Division.

WE WILL reimburse the College for all reasonable expenses and legal fees incurred since February 14, 2017, in defense of Case 17-CV-513 in the United States District Court for the Northern District of Illinois Eastern Division, with interest as set forth in the remedy section of this decision.

WE WILL to the extent not already done so, withdraw or if necessary otherwise seek dismissal of any action in Case 17-CV-4203 in the United States District Court for the Northern District of Illinois Eastern Division.

WE WILL reimburse the College for all reasonable expenses and legal fees incurred since February 14, 2017, in defense of Case 17-CV-4203 in the United States District Court for the Northern District of Illinois Eastern Division, with interest as set forth in the remedy section of this decision.

WE WILL within 14 days from the date of this Order, notify the College and the FTST employees, in writing, that we rescind our request for the College to exclude FTST employees from the bargaining-unit precluding them from work assignments under the collective-bargaining agreement.

WE WILL make the FTST employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision, and to the extent that the College has already made any of the FTST employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision, WE WILL reimburse the College for half of that amount.

WE WILL compensate the FTST employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to the extent that the College has already fully compensated any of FTST employees for the adverse tax consequences, WE WILL reimburse the College for half of that amount.

WE WILL within 14 days from the date of this Order, remove from its files any reference to not recognizing any FTST employee, and within 3 days thereafter, notify the FTST employees in writing that this has been done and that any prior refusal

to recognize the FTST employees will not be used against them in any way.

PART-TIME FACULTY ASSOCIATION AT COLUMBIA COLLEGE

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/13-CB-165873 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.