Yale University *and* Graduate Employees and Students Organization (GESO), a/w Hotel Employees and Restaurant Employees International Union, AFL–CIO. Case 34–CA–7347

November 29, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On August 6, 1997, Administrative Law Judge Michael O. Miller issued the attached decision granting the Respondent's motion to dismiss the complaint at the close of the General Counsel's case-in-chief. The General Counsel and the Charging Party filed exceptions with supporting briefs, the Respondent filed an answering brief, and the General Counsel and the Charging Party filed reply briefs.

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 findings and conclusions that the General Counsel failed to prove the strike at issue in this case was protected under Section 7 of the Act, but, for the reasons set forth below, to remand this case to the judge for further hearing on whether certain statements violated Section 8(a)(1).

Factual Background

As presently developed, the record establishes the following facts. After many years of organizing in an attempt to obtain recognition from and bargain collectively with Yale University, the members of the Graduate Employees and Students Organization (GESO) voted on December 7, 1995, to conduct a "grade strike" at the end of the fall 1995[1] semester. Approximately 200 graduate students who were either teaching their own classes or assisting faculty in teaching classes (teaching fellows or TFs) refused to submit their students' final grades for the semester to the University.[2] The striking TFs hoped that their action would cause the University to begin negotiations toward a labor agreement.

The record establishes that in the period between December 7 and the deadlines for grade submissions,[3] striking TFs were repeatedly told by faculty members and administrators that their future teaching, any requested letters of professional recommendation, and perhaps their careers beyond Yale would suffer if they did not submit final grades in a timely fashion.[4] The TFs ended the strike and submitted their grades on January 15, 1996.

Based on the University's response to the grade strike, the General Counsel alleged that the Respondent violated Section 8(a)(1) of the Act by issuing various oral and written threats of reprisals against a number of graduate students for engaging in protected concerted activity. The General Counsel also alleged that the Respondent discriminated against striking TFs in violation of Section 8(a)(3) by disciplining them, removing them from teaching assignments, demoting them, subjecting them to closer supervision, and/or eliminating their classes.

At the close of the General Counsel's case, the Respondent moved to dismiss the complaint, arguing that the General Counsel had failed to show that the grade strike was protected activity, which is an essential element of the General Counsel's case. The judge agreed with the Respondent. The judge found that the grade strike was unprotected because it was a partial strike and because the strikers had misappropriated university property. The judge also rejected the General Counsel's alternative theory that, even if the grade strike is found to be unprotected, certain statements by the University constituted "overbroad" threats because they could reasonably be understood as broadly directed against participation in protected concerted activity in general. Therefore, the judge granted the Respondent's motion to dismiss, and recommended that the Board dismiss the complaint.[5]

A majority of the Board[6] agrees with the judge's findings that the grade strike was a partial strike and that the strikers misappropriated university property. A different majority[7] finds that it is necessary to remand this proceeding to the judge for further hearing on whether certain statements violated Section 8(a)(1).

Standard of Review

In reviewing the Respondent's motion to dismiss the complaint for failure of proof as to an essential element of the General Counsel's case, we are guided by

[1] All dates refer to 1995 unless otherwise specified.

[2] The judge indicated that approximately 100 graduate students participated in the grade strike. The testimony of Robin Brown indicates that approximately 200 graduate students participated in the grade strike.

[3] The original grade submission deadline was January 2, 1996. This was the date by which all course instructors, whether faculty or graduate students, were to submit final semester grades for their courses to the registrar. In cases in which graduate students assisted course instructors in grading materials but were not themselves responsible for submitting grades to the registrar, the graded materials were to be submitted to the course instructors by a "reasonable" time prior to the registrar's deadline to enable the instructor to submit the final grades in a timely fashion. As a result of the grade strike, the Respondent extended the registrar's deadline to January 15, 1996.

[4] The judge did not make individual findings as to the coercive nature of each separately alleged threat by faculty members or administrators, of which there are many in the complaint. Instead, the judge found that "the statements made by Yale's supervisors and agents to discourage the teaching fellows from engaging in the grade strike [were] undoubtedly coercive."

[5] The judge assumed, for the purposes of resolving Yale's motion to dismiss, that the graduate students are employees within the meaning of the Act. (ALJD at fn. 5.) We agree with the judge that it is not necessary for us to resolve this issue prior to determining the merits of the Respondent's motion to dismiss the complaint.

[6] Chairman Truesdale and Member Hurtgen (Member Liebman dissents).

[7] Members Liebman and Hurtgen (Chairman Truesdale dissents).

Fed.R.Civ.P. 52(c), which permits the trial judge to enter judgment against a party when the evidence shows that that party has not sustained its burden of proof.[8] *Auto Workers Local 122 (Chrysler Corp.),* 239 NLRB 1108, 1112 (1978). In order to overcome a motion to dismiss at the close of his case-in-chief, the General Counsel must satisfy his duty to establish a prima facie case by presenting evidence sufficient to demonstrate the occurrence of an unfair labor practice. Id. at fn. 3.

1. The partial strike and misappropriation of property issues

a. The partial strike issue

A majority of the Board[9] agrees with the judge's conclusion that the General Counsel failed to make a prima facie showing in his case-in-chief that the TFs engaged in a complete work stoppage that is protected by Section 7 of the Act. We agree with the judge that the TFs' strike was partial, and, thus, unprotected by the Act.

The judge found that the grade strike began on December 7, when the GESO membership voted to conduct the strike, or, at the latest, on December 13, when TFs began to refuse directives to turn in grades or materials necessary to compute grades. Between December 7, 1995, and January 2, 1996, most teaching fellows continued to perform job-related duties, including meeting discussion sessions, proctoring exams, and grading student materials. Even after the original January 2, 1996 grade-submission deadline, the date on which the General Counsel contends the strike began and TFs ceased working, some TFs "were prepared to write, and apparently wrote, letters of evaluations and recommendation for their students," which the judge found to be a "regular, if not required, aspect of their work." Clearly, as the judge concluded, from December 7 (or, at the latest, December 13) and continuing beyond January 2, 1996, the TFs were both working and striking. This, the judge found, constituted a classic partial strike, which lies outside the protection of Section 7 of the Act. See *Valley City Furniture Co.*, 110 NLRB 1589, 1594–1595 (1954), enfd. 230 F.2d 947 (6th Cir. 1956).

The judge also based his partial strike conclusion on the testimony of several TFs, as well as a stipulation by the General Counsel, that the intent of the grade strike was solely to withhold grades for the fall 1995 semester and was not to withhold teaching services for the spring 1996 semester. Based on this evidence, the judge concluded that had the grade strike continued into the spring semester, the TFs planned to teach, and probably would have taught, in that semester while still withholding grades for the fall semester. This, too, the judge found, was incompatible with a full strike, and thus constituted conduct outside of the protection of the Act.

We agree with the judge's analysis of the record and his legal conclusion derived therefrom. Based on our review, we believe the judge reasonably determined from the facts developed during the General Counsel's case-in-chief that the grade strike commenced, at the latest, on December 13, when TFs began withholding papers and test materials. Further, the judge correctly found that after December 13 the TFs continued to perform other duties, such as meeting with students, grading materials, writing letters of evaluation, and preparing for the next term's classes. Thus, as the judge found, the TFs "sought to bring about a condition that would be neither strike nor work." *Valley City*, 110 NLRB at 1595. We also agree with the judge that the TFs planned to continue withholding the fall 1995 grades even after the spring 1996 semester bagan. Since the TFs planned to otherwise perform work in the spring of 1996, they were planning to work and strike at the same time.[10] We, therefore, agree with the judge's finding that it was appropriate to grant the Respondent's motion to dismiss because the General Counsel failed to establish that the TFs action was protected by Section 7 of the Act.

Citing testimony of GESO leaders, our dissenting colleague argues that the record does not support the judge's finding that the strike began in December. We disagree. GESO's research director, Gordon Lafer, referred, on January 17, 1996, to the "five weeks of the grade strike," thereby clearly indicating that it commenced in December. And GESO's cochair, Michelle Stephens, testified that the grade strike "was . . . an action that kind of began from December 7." Thus, even GESO officers recognized, as did the University, that the strike began on its announcement on December 7.

Our colleague says that the grade strike began on January 2, 1996, the date on which most grades were due. However, it is clear that, from and after December 7 (or at least from and after December 13), there were directives to submit the grades, and such directives were disobeyed. In addition, in some instances, the grades were due a "reasonable time" before January 2, 1996 (see fn. 3, above). These due dates were not met. Thus, it is clear that the grade strike began before January 2, 1996,

[8] The Federal Rules of Civil Procedure apply to Board proceedings "so far as practicable." 29 U.S.C. § 160(b); see also *Excel DPM of Arkansas*, *Inc.,* 324 NLRB 880 fn. 1 (1997).

Fed.R.Civ.P. 52(c), which replaces that part of Fed.R.Civ.P. 41(b) authorizing dismissal at the close of the plaintiff's case if the plaintiff had failed to carry an essential burden of proof, states:

> Judgment on Partial Findings. If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable ruling on that issue, or the court may decline to render any judgment until the close of all the evidence.

[9] Chairman Truesdale and Member Hurtgen join in this section of the decision. Member Liebman dissents.

[10] *Hotel Holiday Inn de Isla Verde*, 259 NLRB 496 (1981), cited by our colleague, is distinguishable. There, the plan for the unprotected activity was forestalled. By contrast, in the instant case, the activity occurred and was not forestalled.

and that other work was being performed during this period. Further, even after January 2, 1996 (the grade strike commencement date according to our colleague), TFs were performing other work.

b. The misappropriation of property issue

We also agree with the judge's conclusion that the grade strike was unprotected because it involved the withholding of papers and test materials. The papers and test materials were university property that the Respondent needed to attempt continued operations in the absence of the striking TFs. As the judge determined, even if the TFs' strike was not an unprotected partial strike, their conduct was otherwise unprotected because it amounted to misappropriation of university property, analogizing to sit-down strike cases and others where strikers withhold the employer's goods or materials. See, e.g., *NLRB v. Fansteel Metallurgical Corp.,* 306 U.S. 240, 256 (1939); and *Beacon Upholstery Co.*, 226 NLRB 1360, 1366–1367 (1976).

We agree with this conclusion. In refusing to turn over student work that had already been performed during the semester, the striking TFs withheld from their employer essential materials that would have permitted the employer to reassign the struck work—final evaluations—to nonstriking employees.[11] Such conduct prevented the Respondent from effectively maintaining its business, and therefore lies outside of the protection of the Act. *Beacon Upholstery,* 226 NLRB at 1366–1367.

Our dissenting colleague says that only a few TFs refused to turn over papers and materials. Thus, it is argued that others should not be tainted by this misconduct. However, this misconduct was part and parcel of the grade strike. Indeed, the Union was the repository for some of these papers and materials. Thus, the grade strike, including all of its manifestations, was unprotected, and all who participated therein were unprotected. Our colleague argues that the Union was divided on the issue of whether the TFs should refuse to turn over papers and materials. The matter was not resolved, and the individual TFs were thus left free to decide for themselves whether to do so. Significantly, as noted above, the Union was the repository for those who chose to withhold papers and materials.[12]

c. Conclusion

Because the TFs' grade strike was unprotected, any discrimination that the TFs may have suffered as a result of their participation in the grade strike could not constitute a violation of the Act. Accordingly, we affirm the judge's dismissal of the 8(a)(3) allegations of the complaint.

2. The alleged 8(a)(1) conduct

A majority of the Board[13] disagrees with the judge's conclusion that the General Counsel failed to make a prima facie showing that a violation of Section 8(a)(1) occurred. The General Counsel alleges that the University directed five specific threats—two written and three oral statements made by faculty and administrators—at protected concerted activity that went beyond the scope of the grade strike itself, and that such "overbroad" threats that address otherwise protected activity violate Section 8(a)(1). The judge rejected this contention, finding that each one of the five alleged threats was derived from, and thus directed solely to, the TFs' conduct during the unprotected grade strike. Therefore, the judge found that none of the five statements constitutes a violation of the Act. The judge further found that even if any of the five statements was technically overbroad, i.e., directed to more generalized protected conduct, they were nevertheless de minimis, and therefore not violative of the Act.[14]

The General Counsel and the Charging Party except, arguing that Yale violated the Act by issuing broad warnings to the TFs about engaging in protected activity in general.[15] They also argue that the statements them-

[11] The Respondent concedes that it has a property interest only "in the grades actually provided during the semester, not the teaching assistants' (TAs) mental impressions," and acknowledges that outside the strike context, "teachers are replaced for countless reasons, including maternity leave, illness or even death, at times subsequent to the start of the semester." Respondent's answering brief at 39. We therefore find it unnecessary to pass on the judge's conclusion (sec. IV,C,2) that the TFs would nevertheless have engaged in the misappropriation of university property had they complied with all directives to turn over graded materials to their superiors before final grades were due, and had refused only to submit the final grades themselves.

Member Hurtgen finds that there is a property interest in the papers and materials on which a grade is based, as well as in the document that contains the final grade. He finds it unnecessary to reach the hypothetical issue of whether there is a property interest in the mental impressions of the TFs.

[12] Although the Union allegedly had a policy to return the materials if requested to do so by a faculty member, there is no showing that faculty members were told of this policy.

[13] Members Liebman and Hurtgen join in this section of the decision. Chairman Truesdale dissents.

[14] Chairman Truesdale would adopt the judge's finding that the statements were not overbroad threats. Here, the entire campaign consisted of the grade strike, conduct which we are finding is unprotected. As fully explained by the judge, each of the statements referred to or was derived from the grade strike. Thus, Chairman Truesdale agrees with the judge that there are no "overbroad" threats directed against the exercise of protected activity. Chairman Truesdale also agrees with the judge that even if one or two of the statements were to be deemed technically overborad they should be considered isolated and de minimis in the context of this litigation and hardly worth returning for many days of hearing, briefs, and a decision on many other issues raised by the complaint.

[15] The Charging Party argues that only three of the disputed statements (1, 4, and 5, below) are overbroad and therefore violate the Act. The Respondent contends that the General Counsel and the Charging Party should be precluded from relying on the "overbroad threats" theory because it was not specifically alleged in the complaint and was raised only in posthearing briefs to the judge. The General Counsel responds that he is not required to plead legal theories in the complaint, but in an abundance of caution, moves to amend the complaint to re-

selves were not de minimis, but were strategically timed, widely disseminated threats that warned about grievous consequences to all graduate students for engaging in protected conduct beyond the grade strike.

The five statements at issue are as follows:

> 1. Statements made in the December 12, 1995 letter from Deans Applequist and Brodhead to graduate students with teaching responsibilities, including the comment that the "failure to perform the tasks of evaluating student work and reporting grades in a timely fashion is a serious breach of academic responsibility [which] should be expected to bear on the evaluation of the graduate student instructor's performance as a teacher and on the assessment of his or her suitability for teaching appointments during the spring semester."
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> 2. Statements by members of the French Department faculty, on or about December 12, 1995, concerning the inappropriateness of the union model in the academic setting, and the loss of teaching appointments in the Spring semester.
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> 3. Statements by French Department Director of Graduate Studies Edwin Duvall made at a December 14, 1995, meeting concerning the grade strike and the inappropriateness of unions in the academic setting.
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> 4. Statements made in the December 15, 1995 memo from members of the French Department to graduate students with present or future teaching assignments, including the comment that the "[f]ailure to perform any aspect of a graduate teaching assignment—e.g. meeting all classes, grading and returning all papers, holding regular office hours, submitting final grades, etc.—would (1) be a *de facto* dereliction of professional duties to our students . . . and (2) constitute behavior unacceptable anywhere in the profession" that could negatively affect evaluations and jeopardize future teaching assignments.
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> 5. Statements made by Professor Brad Westerfield during a December 18, 1995 meeting concerning the imprudence of a graduate student work stoppage and the negative consequences that could flow from it.

We agree with the judge that the first statement listed above was limited to the grade strike, and thus not violative of the Act. However, contrary to the judge, we conclude that the General Counsel has made a prima facie case on the record before us that the remaining four statements refer to protected conduct other than the grade strike.

flect that threats were made against activity other than the grade strike. The Respondent opposes the motion to amend.

By their very nature, statements 2, 3, 4, and 5 encompassed more than just the grade strike. Thus, both the second and third statements broadly declared that a union is not appropriate in academe. The fourth statement is not limited to the grade strike because it referred to the "[f]ailure to perform *any* aspect of a graduate teaching assignment" as providing grounds for negative evaluations and loss of teaching opportunities. (Emphasis added.) The final statement condemned strike activity by graduate students "under any circumstances."

In finding that these statements were not unlawful threats, the judge distinguished the instant case from *New Fairview Hall Convalescent Home*, 206 NLRB 688 (1973), enfd. sub nom. *Donovan v. NLRB*, 520 F.2d 1316 (2d Cir. 1975), a case in which the employees engaged in a series of unprotected work stoppages during the course of an organizational campaign. The Board in *New Fairview* adopted the judge's findings that although the employer lawfully warned employees against participating in the unprotected activity, it violated Section 8(a)(1) when it broadly prohibited employees from engaging in "any strike, work stoppage, slow down, or withholding of any good or services." 206 NLRB at 747.

The judge attempted to distinguish *New Fairview* on two grounds. First, he stated that in *New Fairview* there was an "otherwise protected" union campaign for recognition, while in this case GESO's "entire campaign" consisted of the unprotected grade strike. Second, the judge stated that, unlike in *New Fairview*, each statement alleged by the General Counsel to be "overbroad" in this case "referred to or was derived from the grade strike."

We disagree with the judge that the instant case can fairly be distinguished from *New Fairview*. First, the record does not support the purported distinction that GESO's entire organizational campaign consisted of an unprotected grade strike. As the judge himself found, GESO has for many years been engaged in organizational activities among the teaching fellows that are unrelated to the grade strike.[16] Second, the facts of *New*

[16] GESO's activities apart from the grade strike extend back to at least 1989. Gordon Lafer, a 1995 graduate of Yale with a Ph.D. in political science and research director for the Federation of University Employees, an affiliation of GESO and the two recognized unions at Yale, testified that he first got involved with GESO in 1989. In the 1990–1991 academic year, Lafer was a staff organizer for GESO, during which time GESO began a formal membership campaign, soliciting graduate student signatures on membership cards that designated GESO as a collective-bargaining representative. In 1993, GESO again solicited signatures on membership cards, and this time the cards also called for the University to hold an election among teaching assistants and graduate instructors to ascertain their desire to be represented for the purposes of collective bargaining.

Similarly, Robin Brown, GESO chairperson and a Ph.D. candidate in comparative literature, testified that in the academic year 1993–1994, she also worked on GESO's organizing drives, meeting with people individually or in small groups to talk about the benefits of GESO membership and the activities that GESO was planning. Brown also helped train organizers, participated in meetings with university representatives on issues such as health care, wages, class section sizes, and

Fairview show that the statement found to be overbroad in that case similarly "derived from" the employees' unprotected activity. 206 NLRB at 746–747. Thus, neither of the two grounds given by the judge for distinguishing *New Fairview* is persuasive.

We find that the General Counsel has satisfied his burden to establish a prima facie case that four of these statements enumerated above violated Section 8(a)(1). We shall therefore remand this case for the Respondent to present its defense. Further, we grant the General Counsel's motion to amend the complaint to specifically allege the alternative theory that, even though the grade strike itself is unprotected by the Act, at least some of the above statements are "overbroad threats" because they could reasonably be understood to be directed against participation in protected concerted activity in general. The Respondent is not prejudiced by our granting of the General Counsel's motion because it will have the opportunity at the reopened hearing to fully present its defense to the issues raised by the complaint amendment. See Section 102.17 of the Board's Rules.

In his supplemental decision, we direct that the judge provide the Board with findings of fact and conclusions of law on the issue of the employee status of the TFs under Section 2(3) of the Act, regardless of his ultimate findings on the issue of whether the Respondent violated Section 8(a)(1) of the Act.

In sum, we remand this case to the judge for further hearing consistent with this decision, and direct that the Respondent be given the opportunity to present evidence to refute the General Counsel's prima facie case.

ORDER

It is ordered that the complaint is dismissed insofar as it alleges violations of Section 8(a)(3) of the Act.

IT IS FURTHER ORDERED that the case is remanded to Administrative Law Judge Michael O. Miller for further proceedings consistent with this Decision and Order, including completion of the hearing.[17] The judge shall thereafter prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and a recommended Order. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall apply.

other workplace issues, and assisted in organizing rallies, demonstrations, marches, and job actions, including two strikes in 1992 and 1995. In April 1995, TFs participated in an election conducted by the League of Women Voters, in which an overwhelming majority of the electorate voted in favor of being represented by GESO for the purposes of collective bargaining.

[17] Because the Board has been advised that Judge Miller has retired from the Agency, the Board requests that the chief administrative law judge ascertain the availability of Judge Miller. In the event that Judge Miller is not available, the case is remanded to the chief administrative law judge who may designate another administrative law judge in accordance with Sec. 102.36 of the Board's Rules.

MEMBER LIEBMAN, dissenting in part.

Contrary to my colleagues, I would find, for the reasons set forth below, that the General Counsel established a prima facie case that the teaching fellows (TFs) were engaged in a strike that was protected by Sections 7 and 13 of the National Labor Relations Act.[1] In my view, the strike did not lose the protections of the Act on either of the grounds asserted by the majority: the strike was not "partial," and it did not involve the widespread withholding of university property. Accordingly, I must dissent from the majority's dismissal of the 8(a)(3) allegations of the complaint that the Respondent unlawfully discriminated against the TFs for engaging in protected strike activity.

With respect to the key issue of when the strike began, I believe the preponderance of the evidence on the record at the close of the General Counsel's case shows the following. The striking TFs established a time certain beyond which no TF work would be performed, i.e., the date on which grades were due (January 2, 1996, in the case of graduate instructors, or a reasonable time before January 2, 1996, in the case of graduate teaching assistants (TAs)). Prior to the grade submission deadline, TFs, as a group, completed all other teaching functions, such as meeting classes and discussion sections, proctoring exams, and grading papers. When the strike began, the TFs refused to perform only the last remaining chore of their assigned tasks—that of evaluating student materials and submitting grades to the designated authority. Thus, the record demonstrates that the grade strike consisted of TFs withholding the final grades assigned to students enrolled in their courses when the grades were due to the registrar, and that TFs, as a group, did not continue to perform other work after that point. In other words, TFs were not working and striking simultaneously.

Testimony of GESO leaders and other TFs clearly supports this conclusion. The strike resolution passed at the December 7, 1995 meeting stated that the TFs are to "withhold [their] grades" until the University begins negotiating a labor agreement, thus indicating that TFs planned to work up until the grade submission deadline and then begin a total strike at that point. Robin Brown, GESO chairperson, testified that the scope of the strike was as stated in the resolution—TFs were to strike by withholding final grades from the University at the end of the term, essentially refusing to perform the labor associated with the last act of the teaching function. Brown testified that, in accordance with the strike resolution, her participation in the strike involved completing her teaching responsibilities and then striking at the time her grades were due by withholding them from the registrar. Brown underscored the timing of the actual cessa-

[1] As indicated in the majority opinion, I am joining Member Hurtgen in the remand of the 8(a)(1) allegations of the complaint.

tion of work in her statement to the press, which affirmed that "grades are not due to the Registrar until January 2nd [1996, and, as a result, the] administration has almost a full month to begin negotiations before the grade strike will affect transcripts and we are confident that the issue can be resolved in a reasonable and cooperative fashion before this date." Similarly, Andrew Rich and Michele Stephens, both graduate students and GESO representatives who spoke to the GESO membership on December 7, 1995, in support of the strike resolution, stated at that meeting that the grade strike entailed completion of the TFs' work for the semester followed by the withholding of final grades. Numerous other graduate students testified that their individual participation in the grade strike began by withholding their final grades, and did not involve withholding of other services prior to the grade submission deadline.

Contrary to the judge's finding, which the majority adopts, the December 7 GESO membership strike resolution did not constitute an "announce[ment]" that the grade strike was to begin that day. Rather, the strike resolution announced GESO's intent to strike at a future time certain—i.e., when grades were due—should their demands for recognition and bargaining not be met by the University. Like many strike resolutions, GESO gave advance notice of a strike deadline, thereby giving the University time to take action to avert a strike.

The majority adopts the judge's finding that "even after the [grade submission] deadline, the [TFs] were prepared to write, and apparently wrote, letters of evaluations and recommendation for their students they taught in the first semester." I can find no testimony to support this finding. Only one student testified that she *may* have written recommendations after January 2, 1996. Even assuming writing letters of recommendation could convert the TFs' activity to a partial strike, such testimony is insufficient to demonstrate that TFs as a group wrote letters of recommendation while on strike.

Similarly, I reject the majority's reliance on the TFs' stated plans to teach in the spring semester to support the conclusion that the grade strike was unprotected conduct. Evidence regarding the TFs' unexecuted future plans cannot be relied on to determine whether actual, transpired conduct is protected. See, e.g., *Hotel Holiday Inn de Isla Verde*, 259 NLRB 496, 500–501 (1981) (employees' conduct protected despite union's plan to stage unprotected sit-down strike, because plan for unprotected activity was forestalled), enfd. sub nom. *Isla Verde Hotel Corp.,* 702 F.2d 268 (1st Cir. 1983). We need not, on this record, address the issue whether withholding one semester's grades while teaching in the subsequent semester would be protected activity.[2] That scenario simply did not occur in this case, as the TFs ended the grade strike before any teaching began in the spring semester.

Nor does the action of a few individual graduate students who refused directives to return papers and test materials to the University in December support a finding that the strike commenced in December. While certain students' refusal to return papers and exams to the University may represent misconduct, I do not believe the actions were coordinated or so widespread as to negate the overwhelming documentary and testimonial evidence that the strike did not commence until grades were due. See, e.g., *City Dodge Center*, 289 NLRB 194 fn. 2 (1988) (misconduct of a few employees does not convert the group's protected concerted activity into unprotected action), enfd. sub nom. *Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355 (8th Cir. 1989).

My colleagues suggest that the misconduct of a few individuals was "part and parcel" of the grade strike, and that such misconduct was sanctioned by GESO, in whose office some of the withheld papers and test materials were stored. I disagree.

The record shows that the grade strike itself was planned over a period of at least several weeks, if not months, but that the guidelines for participating in it were loosely set by GESO's leaders. Robin Brown, GESO's chairperson, testified that GESO's coordinating committee discussed broad parameters of how the grade strike would unfold, but did not reach consensus on what striking TFs should do with the papers and exams on which the final course grades were based, and that they made no formal recommendation on this subject to the membership at the December 7 meeting. Two speakers at that meeting advised the strikers of two different courses of conduct. In her speech to the membership, Michelle Stephens, cochair of GESO, advised against the withholding of tests and papers, arguing that she did not want to get into a "struggle" with the faculty over their physical custody, particularly because the strike would achieve a significant impact if the faculty performed the final grading themselves. Conversely, Andrew Rich, a GESO representative from the political science department, advised students to retain the students' papers and test materials. Brown testified that, as a result, several students turned over tests and papers to the GESO office, but that GESO's policy was to return those materials to the faculty member if such a request was made.

In sum, the record does not show that, as an institution, GESO—which made policy by consensus decisionmak-

[2] The judge based his partial strike conclusion in part on the fact that the TFs *prepared* to teach courses in the spring semester while on strike in the fall semester, thus demonstrating that the TFs must have worked while striking. While we recognize that preparation to teach one or more courses may occur in the previous semester, this fact alone does not convert the TFs' action into a partial strike. Such preparation was necessitated by the possibility that the grade strike would achieve its objective (i.e., Yale would agree to bargain with GESO), in which case the TFs would end the strike and return to work. Thus, there was no inconsistency between preparing to teach spring semester courses and engaging in a total work stoppage during the fall semester.

ing—sanctioned the withholding of student tests and papers. GESO's coordinating committee and its co-chairs recommended against their withholding, and GESO's policy was to return them upon request. Only one GESO representative recommended the course of conduct on which my colleagues rely to find the grade strike unprotected. Considering the record as a whole, this one recommendation, on which there was no consensus among GESO's leaders, does not constitute substantial evidence supporting the majority's finding that the grade strike falls outside the protection of the Act.

Finally, I do not agree with my colleagues that the evidence showing that a few TFs withheld papers and test materials warrants a finding that the grade strike was unprotected. The majority adopts the judge's findings that the grade strike began in December, that the withholding of papers and test materials in December interfered with the work of the course instructors and university administrators (because Yale was unable to substitute others to perform the grading function), and that the withholding of these documents was a misappropriation of university property.

As stated above, I would find that the grade strike began only when final grades were due. Just as I rejected the majority's reliance on the withholding of papers and test materials by a handful of students as showing that the TFs as a group began striking in December, so, too, do I believe that such individual misconduct cannot, without more substantial evidence, be attributed to the strikers as a group and, therefore, cannot transform an otherwise lawful strike into unprotected conduct.

For the reasons set out above, I believe that my colleagues err in finding the grade strike to be unprotected. I, therefore, would remand this case to the judge for further hearing on the issue of whether the Respondent violated Section 8(a)(3) of the Act by discriminating against the TFs for engaging in protected concerted activity.

Darryl Hale, Esq. and *Jennifer F. Creaturo, Esq*., for the General Counsel.

Saul G. Kramer, Esq., Edward A. Brill, Esq., and *Lloyd B. Chinn, Esq. (Proskauer Rose LLP),* and *Dorothy K. Robinson* and *Jonathon E. Clune*, for the Respondent.

Richard G. McCracken, Esq. and *Michael T. Anderson, Esq. (Davis, Cowell & Bowe*), for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. The unfair labor practice charge here was filed by Graduate Employees and Students Organization (GESO), a/w Hotel Employees and Restaurant Employees International Union, AFL–CIO, on January 11, 1996, as thereafter amended. Based thereon, a complaint was issued on January 31, 1997, and amended on March 14, 1997, by the Regional Director for Region 34 of the National Labor Relations Board (the Board). That complaint alleges that Yale University (Yale, the University, or the Employer) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by threatening reprisals against graduate students serving as teaching assistants (TAs) and part-time acting instructors (PTAIs),[1] and discriminatorily denied them future teaching assignments, because of their participation in what was termed a "grade strike." Yale's timely filed answer denies the commission of any unfair labor practices.

On the close of the General Counsel's case-in-chief,[2] Respondent filed a motion to dismiss the complaint.[3] Both the General Counsel and the Charging Party have filed responses to that motion and Respondent has filed a brief in reply to their responses.

Based on my careful consideration of the evidence presented thus far, and of the parties' briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Connecticut corporation, with its offices and other facilities located in New Haven, Connecticut, is engaged in the operation of a private nonprofit university. In the 12-month period ending October 31, 1996, it derived gross revenues (excluding contributions which were not available for operating expenses) in excess of $1 million and, in conducting its educational operations, it purchased and received at its New Haven, Connecticut facility goods valued in excess of $50,000 directly from points located outside the State of Connecticut. While the employee status of the teaching fellows is an issue raised by the pleadings, Yale acknowledges that it is the employer of other individuals who are employees within the meaning of the Act.[4] The Respondent admits and I find and conclude

[1] The term "teaching fellow" will be used to refer to both the teaching assistants and the part-time acting instructors.

[2] The General Counsel's case was heard over 15 days between April 14 and May 29, 1997; the 2400-page record includes the testimony of 31 individuals, past and present teaching fellows, and approximately 400 exhibits.

[3] On review of the relevant precedent, I am satisfied that the granting of such a motion is appropriate where the General Counsel has failed, at that stage, to establish a prima facie violation of the Act. *Goodyear Tire & Rubber Co.,* 312 NLRB 674 (1993); *Sun Electric Corp.,* 266 NLRB 37 (1983); and *Electrical Workers Local 613 (M.H.E. Contracting),* 227 NLRB 1954 (1977).

[4] The Charging Party raised a novel issue, contending that I must resolve the issue of the employee status of the teaching fellows, as a jurisdictional matter, prior to any resolution of the merits, citing *Murray v. City of Pocatello,* 226 U.S. 318, 324 (1912); *Barnett v. Brown,* 83 F.3d 1380, 1383 (Fed. Cir. 1996), and other cases. Analysis of this issue requires its rejection. Jurisdiction is based on the involvement of an employer who is engaged in commerce or in operations affecting commerce, as those terms are defined in the Act; that employer need not stand as an employer of those who are allegedly subject to the unfair labor practices set out in the complaint. See Secs. 2(6), (7), and (9) of the Act. See also *St. Clare's Hospital & Health Center,* 229 NLRB 1000, 1003–1004 (1977), wherein the Board, while finding that "housestaff," i.e., residents, interns and fellows, were "primarily students rather than employees," expressly disclaimed any intention to renounce its jurisdiction over such classifications, stating instead that it had determined that extending bargaining privileges to them would be contrary to "the best interest of national labor policy." Its disposition with respect to such individuals, it stated, was an exercise of its "discretionary authority," not a matter of its statutory jurisdiction. See also *Hafadai Beach Hotel,* 320 NLRB 192 fn. 2 (1995), citing *Management Training Corp.,* 317 NLRB 1355, 1358 (1995), where the Board stated that it "will only consider whether the employer meets the definition of

that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[5]

II. BACKGROUND

Yale University is one of the nation's oldest and most renowned educational institutions. Encompassed within the University are 12 schools, including Yale College, providing undergraduate education, and the Yale Graduate School of Arts and Sciences, where study leads to the award of masters degrees in philosophy, the arts and the sciences, and doctorates in philosophy, the Ph.D. degree. The graduate school community includes approximately 2500 students and 750 faculty.

The road to the coveted Ph.D. is long and arduous. Doctoral candidates typically spend 6 or 7 years in its pursuit. During the first 3 years, they are principally engaged in required course work, the satisfactory completion of preliminary examinations and the selection and approval of their dissertation topics. Thereafter, they research their chosen topics (not infrequently changing directions or subjects), write and then submit their dissertations.

The road to the Ph.D. is also expensive. Tuition exceeds $16,000 per year, exclusive of living expenses. The rigors of the educational program, however, leave little opportunity for remunerative employment outside of the University. Indeed, outside employment is discouraged. To help defray their expenses, Yale provides or makes available to graduate students substantial financial assistance, with fellowships covering all or part of the tuition and loans and stipends for subsistence.

Additionally, Yale provides opportunities for the graduate students to serve as teaching assistants and part-time acting instructors, primarily in their third and fourth years, but also both earlier and later in their student careers. The compensation for these services, based at least in part on the approximate amount of time (generally between 5 and 20 hours) and effort required, supplants (and sometimes supplements) the stipends and fellowships awarded upon admission to the graduate schools. With a few limited exceptions, service as a teaching fellow is not a degree requirement in any educational discipline. The amount of time a student may spend in teaching is expressly limited by the University's policies and students may be discouraged by their faculty advisors from spending too much time in teaching.

As teaching assistants, the graduate students assist faculty in the undergraduate programs. They sit in on the professors' lectures, conduct sections with smaller groups of undergraduates where they lead discussions of the course material, they help prepare quizzes, problem sets and examinations, they assign, correct, and grade course work, including midterm and final papers, exams and themes, they work closely with undergraduates to improve their writing skills, they conduct preexamination reviews of the course work and proctor examinations and they meet individually with students to assist them in their work or answer their questions. The teaching assistants report the students' grades to the instructors, generally at the end of the semester in the form of a compilation of the final grade; some instructors require that the student work and grades be turned in as it is completed. PTAIs independently develop and teach their own courses and turn the final grades in to the Registrar.

The teaching fellows write letters of evaluation or recommendation when requested by their students. Whether or not the writing of recommendations and evaluations is a required function of a teaching fellow, it is a function regularly performed by, and expected of, them. They are better acquainted with the students through their 15–20 student sections than are the professors who address large numbers of students in lecture format. References to, and guidance for, the writing of such recommendations are set forth in at least two publications for teaching fellows, "The Teaching Fellows Handbook" and the student published "Becoming Teachers" handbook. In the 1995–1996 edition of the former, at page 45, it states: "Although you need not feel compelled to write a recommendation when asked (especially if you cannot give the student unqualified support), it is entirely appropriate to agree to such requests, and most Teaching Fellows do so. Indeed, this is yet another introduction to a standard and intrinsic part of the teaching profession."

Perhaps as many as 75 percent of the graduate students will seek teaching positions upon completion of their courses of study. A somewhat smaller percentage will succeed in securing teaching positions at the college or university level. It is clear, and acknowledged by some of the teaching fellows, that they gain valuable teaching experience as TAs and PTAIs. However, the material they teach is generally more basic than the work they are doing toward their doctorate and, for the most part, the teaching they do contributes little toward the body of knowledge they must acquire for that degree. Not infrequently, the courses in which they serve as teaching fellows are courses chosen by them to teach and may be similar to the courses they will be expected to teach if they are successful in securing teaching positions upon graduation. However, the record also reveals instances of students serving as teaching fellows in schools other than those in which they are enrolled. For example, law students with undergraduate concentrations in history teach in the history department, divinity students teach in the philosophy department and students from the architecture school teach in the art department. Law and Architecture are professional schools leading generally to careers in those professions rather than careers in academe. However significant their teaching functions may be to their own educational progress and career plans, it is abundantly clear that the the teaching fellows are a major resource for the University in providing undergraduate education.

Without exception, the graduate students I observed in these proceedings were bright, intelligent, articulate and sincere. As might be expected, they sought a larger role in the working aspects of their lives than they perceived had accorded been them by the University.[6] Out of this desire arose GESO, an organization of graduate students, at least some of whom are TAs and PTAIs.

GESO first sought Yale's recognition as the representative of the teaching fellows in 1992. In February of that year, it staged

'employer' under Sec. 2(2) of the Act, and whether such employer meets the applicable monetary jurisdictional standards."

[5] The question of GESO's labor organization status is bound up in the issue of whether the TAs and PTAIs are statutory employees. That issue will not be addressed here. For the purpose of this decision, I will assume, arguendo, that they are employees and that GESO is a labor organization within the ambit of Sec. 2(5) of the Act.

[6] Among other things, graduate students presently participate with faculty on committees which seek out junior faculty, develop guidelines for teaching fellowships, select and allocate teaching fellowships and hear student grievances against faculty.

a 3-day strike wherein the teaching fellows refused to teach their classes. The strike was unsuccessful and recognition was not granted. In October 1994, GESO sought an election among Yale's teaching fellows in the humanities and social sciences. This request was similarly denied. A second conventional strike, lasting a week, was conducted in April 1995. During that time, an election among the graduate students in the humanities and social sciences was conducted by the League of Women Voters. Although a majority of those students voted for representation, Yale continued to reject GESO's call for recognition.

In denying GESO's October 1994 request for an election, Yale's president, Richard Levin, set forth the University's position:

> The request that some of our graduate students be polled to determine whether they wish to be represented by an exclusive bargaining agent is based on the flawed premise that the primary relationship between the University and graduate students is that of employer to employee. Yale has consistently and correctly viewed study, research, and teaching as integral to the educational program of each graduate student. Acquiring teaching experience is, for most students, an important part of the Ph.D. program, and the faculty plays a major role in this aspect of a student's education and training. Moreover, there is and should be a direct educational relationship between a student and faculty member who serves as his or her teacher, research advisor, or supervisor in teaching. The effect of mandating the interposition of a third party, whether GESO or any other, into such a relationship would be to chill, rigidify and diminish it. Beyond these reasons, asking students to assume time-consuming tasks of negotiating and administering labor agreements would only divert their energies away from their primary responsibilities.
>
> In that letter, dated November 14, 1994, President Levin went on to point out that the NLRB considered "graduate students, even when teaching, *primarily* as students and not employees for the purposes of the National Labor Relations Act," excluding them from inclusion in bargaining units.[7]

His rejection of GESO's 1995 demand was more succinctly stated:

> It is my firm belief that relationships between teachers and students who will become professional colleagues could be profoundly damaged by the insertion of formal collective bargaining into the process of graduate education. The University's position on this issue has not changed and will not change.

The record is devoid of any evidence that the University's response to the prior, conventional, strikes resulted any unfair labor practice charges against it.

[7] In so stating, President Levin was apparently referencing the Board's decision in *St. Clare's Hospital & Health Center,* supra. I note that his reference to "teaching as integral to the educational program of each graduate student," which phrase is found in virtually every letter to the students concerning teaching fellowships and financial aid, as well as throughout the University's other literature, also appears to be derived from this decision (at p. 1002).

III. THE GRADE STRIKE

The GESO leadership began planning for the grade strike in mid-November, 1995.[8] At that time, a decision was made to recommend to the membership that they vote to withhold final grades until the Yale administration agreed to negotiate toward a written and binding agreement with GESO's elected representatives.

On December 7, GESO held a membership meeting. Following a description of the efforts, over five years, to secure recognition and bargaining from the Yale administration, and a review of their concerns,[9] the following motion was presented:

> Motion: We call upon the Yale Administration to sit down with our elected negotiating committee and to commit to signing a written and binding agreement. If I am a TA or PTAI, I will withhold my grades until the Yale Administration does so. If I am neither a TA nor a PTAI, I will not do the work of any striking TA or PTAI, nor will I take the job of any TA or PTAI who is denied work because he or she is striking.

In speeches by Michelle Stephens, GESO cochair, and Andrew Rich, a member of GESO's organizing committee, it was explained that the strike participants would complete their work for the semester, holding both the grades for the exams and papers assigned during the semester and the grades for the final papers and exams until the demand for recognition and bargaining was met. It was suggested that they turn in their class materials and grade sheets to the GESO office. The speakers recognized that this would substantially burden the faculty, who would have to grade their own final exams and papers, and might particularly distress graduating seniors awaiting grades for employment or graduate school applications.

The GESO members voted to engage in the grade strike. The resolution was announced to, and publicized in, the press. In its press release, GESO stated, "Grades are not due to the Registrar until January 2. The administration has almost a full month to begin negotiations." The TAs were also asked to discuss the grade strike with the faculty members with whom they worked. At least one TA, Sarah Rich, testified that she told her department chairperson, Professor Mary Miller, that the students had voted "*that as of January 2, 1996*, they were going on strike and would not be turning in grades." (Emphasis supplied.) There is no question but that the Yale administration was aware of the intended grade strike by, or even before, December 7.

In the December 7 meeting, Andrew Rich suggested that the teaching fellows offer to write recommendations for the seniors to any of the institutions, which would otherwise be receiving their grades. As late as December 28, Robin Brown, a GESO cochair, wrote the parents of Yale's undergraduates, explaining that "the graduate teachers voted to withhold fall-semester grades until the Administration agrees to negotiate a binding agreement." "On behalf of the teaching fellows, she acknowledged the problem the absence of grades might pose for those who were applying to graduate schools and other similar programs; she offered to have "instructors . . . write detailed letters

[8] All dates are between November 1995 and January 1996 unless otherwise specified.

[9] Among the issues of concern to the graduate students were recognition of the contribution they made to undergraduate education, appropriate compensation for the hours actually required to perform their teaching fellow duties, increased funding for teacher training and affordable health care.

of evaluation for any student whose course grade is late or missing." She also noted that the final grades assigned by the professors in the absence of the teaching fellows' reporting of grades would not accurately reflect "mid-term and paper grades" which some professors were having students self-report, or would entirely fail to reflect such grades and be based upon the final exam alone.

Classes and exams ended about December 18; final grades were due to be submitted to the Registrar by January 2. According to the Teaching Fellows Handbook, the authority and responsibility for grades resides in the course instructors who are required to sign the grade sheets. The TAs are expected to turn in their grades to their course instructors in time for them to meet the deadline. PTAIs, as the course instructors, turn the grades in directly to the Registrar.

Following the December 7 vote and prior to January 2, the TAs continued to conduct their sections and/or review sessions. They also proctored exams, corrected and graded those exams when the faculty permitted them to do so, graded the papers students had turned in, calculated final grades and recorded those grades on to grade sheets. In some cases, they turned in the papers, exam books and grade sheets to the GESO office prior to January 2, where they were retained in a file cabinet with nominal security. Some of them were requested by their students to write letters of recommendation and apparently did so during this period and even after January 2. Those who participated in the grade strike did not turn their final grades (i.e., the compilation of the various grades earned during the semester) to either their professors or the Registrar before the due date.

In many cases, the assignments for teaching positions for both the fall and spring semesters are made in the prior spring (subject to changes due to class enrollments and other exigencies). Some TAs receive assignments to serve as the TA for successive portions of the same course over the two semesters. In other cases, they are assigned to distinct courses or do not receive their teaching assignments for the spring semester until some time in the fall. The teaching fellows prepared to teach the courses they had been assigned for the spring semester and fully expected to teach those courses even in the highly probable event that the grade strike was still continuing. That was stipulated to in this hearing[10] and abundantly clear from the record. Thus, the strike resolution, itself, calls upon graduate students without teaching responsibilities to refrain from "tak[ing] the job of any TA or PTAI *who is denied work because he or she is striking."* (Emphasis added.) And, the questions teaching fellows asked various administrators and faculty members, concerning what the impact of the grade strike might be upon their teaching assignments for the next semester, demonstrated their intention to teach in that semester even if the strike was ongoing.

At least some GESO members and officers believed, as did the University, that the grade strike began upon its announcement on December 7. Thus, Gordon Lafer, GESO's research director (and a former Yale graduate student) referred, on January 17, to the "five weeks of the grade strike. "Michelle Stephens, GESO cochair, testified that the grade strike "was . . . an action that kind of began from December 7." And, Nilanjana Dasgupta, in a note to her students on December 8, wrote that the "graduate student teachers *are* participating in a grade strike this semester." (Emphasis added.)

Shortly after the announcement of the grade strike, Dean of the Graduate School Thomas Appelquist and Dean of Yale College Richard Brodhead wrote to all of the graduate students with teaching responsibilities in Yale College. Their letter argued against the propriety of such a tactic and warned of "the risk of serious consequences." It urged the TAs and PTAIs "to submit [their] grades in the usual manner." On January 4, the PTAIs were given a deadline of January 9 to turn in their grades.

On January 10, Dean Appelquist issued letters to the striking TAs, stating:

> If you are deliberately withholding grades. . . . I urge you to reconsider this course of action. . . . If the instructor can still incorporate your grades into the grade for the course, please deliver them to the instructor by noon on Monday 15 January, 1996. If you have not performed your grading tasks, or it is too late to incorporate your grades, or if you fail to hand them in as requested in this letter, then your teaching assignment for the coming term, which was premised upon your acceptance of the duties associated with teaching at Yale, will be withdrawn.

On January 12, the PTAIs in the English department received a letter from Linda Peterson, departmental chair. In it, she reviewed the fact that they had chosen not to turn in their grades for the courses taught in the prior semester and urged them to "reconsider" and do so. She went on:

> For those sections for which grades remain missing, the faculty of the English department has decided to complete grading. In order to do so, we ask that you return *all papers and exams,* graded or ungraded, now in your possession. We also ask that you return any grade records that might help us in assigning final grades . . . by Tuesday, January 16. [Emphasis added.]

Nilanjana Dasgupta, an international student in her fifth year in the psychology department, participated in the teaching fellowship program during four semesters.[11] In the fall of 1995, she was a teaching assistant in Psych 317 under Professor Diana Cordova. During the semester, she lectured twice, graded biweekly assignments, created part of the final research papers, and met individually with students. She submitted the grades for the biweekly assignments to Professor Cordova as she would grade them, before the next class. The professor returned those assignments to the students at class.

The final paper for Psych 317 was due on December 1, purposely timed with the understanding that Dasgupta would grade and return them to Professor Cordova before she left for India in December 8.[12] By agreement with the professor, Dasgupta took half of those papers for grading. On December 8, she informed Professor Cordova of her participation in the grade

[10] The language of that stipulation, that "the intent was, if permitted, [that the teaching fellows] would continue to teach even if the grade strike was still ongoing" and that the the grade strike "was solely to withhold grades and not to withhold teaching services in the second semester," is clear. The context of that stipulation, questions to a witness as to her intent to teach in the spring semester notwithstanding the grade strike and her concern that she might not be allowed to do so, remove any possible ambiguity.

[11] The psychology department was one of the few which required teaching as a degree requirement.

[12] There was also a final exam; however, because of her travel plans, Dasgupta was not asked to grade it.

strike, stating that she had completed grading the papers and would place the papers, together with her comments and grades, in the Union's office for safekeeping while she was out of the country. She gave Professor Cordova the phone number where she could be reached in India as well as the numbers for the GESO representative who would serve as her primary contact. She also left a memo for the students, informing them of her actions, and she departed for India on that same day. According to Dasgupta and fellow graduate student Wendi Walsh, the professor did not ask her to return the papers.

About December 11, Professor Cordova attempted, unsuccessfully, to have GESO return the papers which she understood Dasgupta to have placed with it for safekeeping. In fact, Wendi Walsh had the papers at her home and those papers were not returned in response to Cordova's request.[13] On December 13, Professor Carew, the departmental chair, called Dasgupta at her family's home in India. Professor Carew directed that she turn in both the papers and the grades by December 15, threatening adverse effects upon her career if she refused. She replied that she would contact her colleagues in New Haven to determine what she could do. She did not arrange for the papers and grades to be turned in, as Professor Carew had demanded.

About December 24, Dasgupta received a letter from Dean Appelquist, dated December 18. It recited that she had refused repeated requests to turn in the grade records and papers and threatened her with disciplinary sanctions under the University's disciplinary procedures. It also informed her that a disciplinary hearing would be held on January 10.[14] On December 29, she directed that the papers be handed in. They were, absent the grades. Professor Cordova completed the grading and turned the grades in to the Registrar by January 2.

On December 13, another TA, Chris Dumler, was requested by a visiting professor, Tracy, to turn in the grades for midterm exams and homework in his section. Tracy asserted that such information was university property. Dumler refused, noting that the "vote was to withhold our grades and evaluations of students for the term, not just the final grades for the class." On December 18, after they had completed the grading of a final exam in the German department, TAs Nesheim and Knight were similarly requested to turn in copies of their grade sheets by Professor Hubrey. Each of these TAs refused to comply.

Over 100 teaching fellows participated in the grade strike. At least one, Jennifer Phillips,[15] withheld the grades with respect to one course, Art History, in which she was a TA, while declining to participate in the strike with respect to another course in which she was serving as a PTAI, French 130.

The grade strike ended with GESO's capitulation on January 14. The grade sheets for all of the TAs and PTAIs were turned over to the Registrar on that day or on January 15.

[13] Both GESO officers and Dasgupta were aware that Walsh had, through simple procrastination, failed to turn the papers in to the union office.

[14] Dasgupta returned early and at extra expense from her vacation, in order to attend the hearing. That hearing was postponed several times and ultimately canceled. She was never disciplined. At her own choosing, she did not participate in the teaching fellowship program in the spring of 1996.

[15] Phillips was a fourth year graduate student in the French department and a GESO organizer.

IV. ANALYSIS AND CONCLUSIONS

A. The Parties' Contentions

Respondent asserts several bases for concluding that the grade strike was unprotected. First, it argues that it was a partial strike in that it began with its announcement on December 7 and, thereafter, the teaching fellows performed some of their duties while refusing to perform others. Further with respect to the partial strike contention, Yale argues that the partial strike character of the job action is demonstrated by the stipulated fact that the TAs and PTAIs intended to withhold the first semester grades for as long as it took to secure recognition and a commitment to bargain while simultaneously intending to resume or continue their teaching functions in the second semester. Second, Yale argues that that the strike was unprotected because it involved an arrogation of Yale's property. Finally, Yale contends that the particular conduct engaged in was insubordinate.

Counsel for the General Counsel contends that the teaching fellows were engaged in a full strike, protected by the Act. Specifically, he contends that the strike did not commence until January 2, when the grades were due and that the teaching fellows withheld all of the labor required of them at that point, the actual turning in of the grades. He contends further that both the writing of recommendations and evaluations and the reporting of grades before the end of the semester were discretionary functions, such that the performance of, or the refusal to perform, those functions was not inconsistent with striking and that the teaching assignments for the first and second semesters constitute separate jobs such that working in the second semester was not inconsistent with a continued strike as to first semester employment. Counsel for the General Counsel also asserts that the grades and grade sheets were the property of the teaching fellows, not the University, and that the conduct engaged in was not insubordinate.

Additionally, the General Counsel and the Charging Party argue that dismissal upon Respondent's motion would be inappropriate because Respondent's threats were "overbroad," in that they restrained all strike activity and not merely that which was unprotected. Finally, the Charging Party argues that dismissal at this juncture would be inappropriate because Respondent condoned the grade strike, thus rendering any discipline assigned unlawful.

As discussed below, the Board's longstanding precedent compels me to reject the contentions of the General Counsel and the Charging Party and to grant Respondent's motion to dismiss.

B. Strike Activity—The Legal Parameters

That employees possess the right to strike as a means of achieving their lawful concerted goals, free from employer discrimination and retaliation, is undeniable. See *NLRB v. Fansteel Metallurgical Corp.,* 306 U.S. 240, 256 (1939). Strike activity, however, is unprotected when it is "unlawful, violent, in breach of contract, or otherwise indefensible." *Phase Inc.,* 263 NLRB 1168 1169 (1982). Partial strikes and slowdowns are unprotected. *Restaurant Horikawa,* 260 NLRB 197, 198 (1982).

In *Valley City Furniture Co.,* 110 NLRB 1589 (1954), the union engaged in one work stoppage (a refusal to work mandatory overtime hours) and announced its intention to regularly engage in similar refusals. The Board found this to be a plan to

engage in a series of partial strikes and unprotected *from its inception*. It stated, at 1594–1595:

> The vice in such a strike derives from two sources. First, the Union sought to bring about a condition that would be neither strike nor work. And, second, in doing so, the Union in effect was attempting to dictate the terms and conditions of employment. Were we to countenance such a strike, we would be allowing a union to do what we would not allow any employer to do, that is to unilaterally determine conditions of employment. Such a result would be foreign to the policy objectives of the Act.

See also *Highlands Medical Center,* 278 NLRB 1097 (1986) (refusal by guards to clean up nails and glass from picket line and escort nonstriking employees through that picket line); *Audubon Health Care Center,* 268 NLRB 135 (1983) (refusal to cover work station left uncovered by absent employee, work the employees regularly performed); *John S. Swift Co.,* 124 NLRB 394, 396 (1959) (repeated refusals to work mandatory overtime).

Employees do not retain their statutory protection when they perform only part of their job functions while accepting their pay and avoiding the risks and disadvantages of a complete strike action. *Vic Koenig Chevrolet,* 263 NLRB 646, 650 (1982) (refusal to perform struck work). They must choose between working and striking. *Pacific Telephone &Telegraph Co.,* 107 NLRB 1547, 1549 (1954) ("hit and run" work stoppages). When they strike, they must be willing "to assume the status of strikers-a status contemplating a risk of replacement and a loss of pay." *Polytech, Inc.,* supra at 696. They must be willing to engage "in a total strike with the loss of wages and risk of lawful replacement incident thereto." *Phelps Dodge Copper Products Corp.,* 101 NLRB 360, 368 (1952) (slowdown). An employee "may not continue to work and at the same time strike." *Classic Products Corp.,* 226 NLRB 170, 177 (1976).

Where, however, the duties the employees refuse to perform are voluntary or discretionary, the refusal to perform them cannot be deemed a partial strike. Thus, in *Riverside Cement Co.,* 296 NLRB 840 (1989), the employees' refusal to provide their own tools, where the providing of personal tools had always been discretionary, was deemed protected concerted activity and not an unlawful partial strike. Similarly, the refusal to work voluntary overtime is a protected activity, not a partial strike. *Jasta Mfg. Co.,* 246 NLRB 48 (1979); *Dow Chemical Co.,* 152 NLRB 1150 (1965). And, where the refusal occurs but once, so that it cannot be said that the employees intended to engage in recurrent work stoppages, there is no partial strike or loss of statutory protection. *Polytech, Inc.,* 195 NLRB 695, 696 (1972).

Sit-down strikes, where employees occupy the employer's facility and refuse to leave when asked, do not enjoy the Act's protection. The most extreme example is *NLRB v. Fansteel,* supra. Therein, a large group of employees seized and possessed key buildings, holding them for more than a week. During that time, they ousted and excluded representatives of management and perpetrated acts of violence and vandalism. A less extreme example, also resulting in a loss of the Act's protection, is *Waco, Inc.,* 273 NLRB 746 (1984). In that case, the employees remained in the employer's lunchroom for more than 3 hours, mostly subsequent to having been told that the employer would not accede to their demand for a group meeting and after having been ordered to either return to work or leave. Similarly, in *Cambro Mfg. Co.,* 312 NLRB 634 (1993), a group of employees ceased work in midshift (between 2:30 and 3 a.m.) and remained in the lunchroom, demanding an immediate meeting with the employer. They were assured that they could meet with the employer after the end of their shift (7 a.m.) and were ordered to return to work or clock out. They rejected these demands and were discharged. The Board found their protest unprotected. In so doing, it quoted the following language from *Molon Motor & Coil v. NLRB,* 965 F.2d 523 (7th Cir. 1992):

> Not every work stoppage is protected activity, however; at some point, an employer is entitled to assert its private property rights and demand its premises back. The line between a protected work stoppage and an illegal trespass is not clear-cut, and varies from case to case depending on the nature and strength of the competing interests at stake. [Citations omitted.]
>
> Drawing that line requires courts to balance "whether the means utilized by the employee in protesting, when balanced against the employer's property rights, are entitled to the protection of the Act.[16]

See also *Mal Landfill Corp.,* 210 NLRB 167 (1974), in which a work stoppage wherein the employees' closed the gates for a period of 20 minutes, preventing both egress and ingress, was held unprotected.

Similar to the sit-down strike cases, and more apposite here, are those in which the striking employees withhold the employer's goods or materials. In *Beacon Upholstery Co.,* 226 NLRB 1361 (1976), a group of salesmen went on strike, taking with them the employer's essentially irreplaceable sample books as well as order forms and price lists. They retained those items, the importance of which they were well aware, even after repeated demands that they be returned. The Board held, at 1366:

> The employees' action . . . was not protected by the Act, and Respondent would not have violated the Act if it discharged those employees *solely* because they had withheld that material. If in fact the discharge was solely for that reason, it would not matter whether or not Respondent had requested the material or notified the employees that they would be discharged unless they returned it.

The withholding of these materials was found to be the sole reason for the discharges and the complaint's allegations of discriminatory discharges were dismissed. Similarly, in *Phase Inc.,* 263 NLRB 1168, 1169 fn. 9 (1982), the Board, in dicta, noted that the conduct of employees in leaving work while retaining the keys to file cabinets to which the employer needed immediate access, "makes a strong case for a finding that the employees exceeded the bounds of permissible conduct," citing *Beacon Upholstery,* infra.

Other cases, however, establish that not all "sitdown" strikes lose statutory protection. In *Advance Industries,* 220 NLRB

[16] In Member Devaney's dissent in *Cambro*, he likened the facts to *NLRB v. Pepsi-Cola Bottling Co. of Miami,* 449 F.2d 824, 829 (5th Cir. 1971), enfg. 186 NLRB 477 (1970); and *Roseville Dodge, Inc. v. NLRB,* 882 F.2d 1355 (8th Cir. 1989), enfg. sub nom. *City Dodge Center,* 289 NLRB 194 (1988), discussed below, noting particularly that the *Cambro* strikers had not interfered with the work performance of nonstriking employees.

432 (1975), five employees returned to work following a conventional strike. On the day of their return, to what they had been told was their regular shift, they had expected to work until midnight. However, part way into the shift, they were informed that they would be sent home at 10 p.m. In protest, they refused to leave; instead, after their 10 p.m. break, they returned to their machines and resumed work. They were ordered to leave, clocked out by a supervisor and finally arrested and expelled by the police. The Board expressly rejected the analogy to *Fansteel* and found that they had not forfeited the Act's protections. It noted that the employees only occupied the facility for 45 minutes, that during that time they did not bar access to or exclude management, that they continued to seek to discuss their concerns with management, that their actions were entirely nonviolent, and that "[t]hey did not interfere with production." Similarly, in *NLRB v. Pepsi-Cola Bottling Co. of Miami,* supra, and in *Roseville Dodge,* supra, employees engaged in brief work stoppages wherein they refused the employers' orders to leave or return to work. In both of these cases, it was noted that they did not "seize the plant or machinery" in "defiance of the employer's right of possession," they were nonviolent and *they did not interfere with the work performance of nonstriking employees*. In each of those cases, the Board found that the employees had not lost the Act's protections, conclusions enforced by the courts.

C. Application of the Law to the Facts

1. Partial strike—working while striking

GESO announced the grade strike on December 7 and to at least some of its officers, it began on that date. The expressed intent was to complete the teaching fellows' work for the semester but, on the due date, refuse to turn in the final grades (including grades for exams and papers completed earlier during the term), with the hope that the University would commit to good-faith negotiations by that time. Thereafter, many of the teaching fellows did just that, performing all of their teaching duties until the deadline for grades, at which point they refused to submit the final grades for the semester.[17] Several TAs were given deadlines as early as December 13 or were asked to turn in the students' midterm and final work and grades; those TAs refused to comply, because they were on strike.

I reject the argument that, because the teaching assistants were not generally asked to turn in grades or papers before the end of the semester, they had the discretion to refuse to do so. The discretion in this case rested with the instructors, to ask for grades and papers during the term or not.[18] That instructors did not require that grades and papers be turned in until the strike made it essential that they take possession in order to complete *their* work for the semester (grades were, after all, their responsibility) did not give the TAs the option to refuse. This case is thus distinguishable from such cases as *Riverside Cement, supra, Jasta,* supra, and *Dow,* supra, where overtime or the providing of one's own tools was within the employees' discretion.

Even after the deadline, the TAs were prepared to write, and apparently wrote, letters of evaluation and recommendation for the students they taught in the first semester. The writing of evaluations and letters of recommendation for their students is a job function, which I have found to be a regular, if not required, aspect of their work. The TAs and PTAIs continued to perform this function, even committing to write such letters for concerned seniors after the January 2 deadline for grades (i.e., when GESO contends the strike began). At least one TA, Sarah Rich, acknowledged that she may have written such letters after January 2. Counsel for the General Counsel argues that the writing of such recommendations was voluntary and thus, like the *refusal to perform* a voluntary act, the *performance* of a voluntary act is not inconsistent with fully striking. I must reject this argument. The refusal to perform a discretionary duty is plainly distinguishable from striking while continuing to do it.[19] Moreover, what the teaching fellows were offering to do on behalf of their students was to write letters and evaluations which would take the place of the grades. They were offering to complete their duties, in their own fashion, for Yale's "customers" while refusing to perform those duties for, and in the manner directed by, Yale.

The teaching fellows also prepared to teach the courses they had been assigned for the spring semester and fully expected to teach those courses even in the highly probable event (given Yale's adamant position regarding recognition) that the grade strike was still continuing. I am convinced that one cannot separate each semester's teaching into distinct jobs. I reject the assumption that the teaching assignment in one semester was a discrete period of employment such that the teaching fellows could continue to maintain a strike with respect to it while teaching in the next semester. If the teaching fellows were employees, their employment was to teach, not just to teach one specific course. They frequently received their teaching assignments for both the fall and spring semesters at one time, during the preceding spring semester, and they sometimes taught courses in the spring semester which were continuations of courses begun the preceding fall.[20] Yale argues, and I agree, that they are akin to seasonal employees who work in distinct periods according to the employer's needs. Where such employees have a reasonable expectation of future employment they are included within the bargaining unit, demonstrating a continuing employer-employee relationship. See *L & B Cooling,* 267 NLRB 1, 2 (1983); *Maine Apple Growers, Inc.,* 254 NLRB 501, 502–503 (1981).[21] I also note that all of the graduate students appear to have been eligible to vote for GESO

[17] The TAs and PTAIs accepted their salaries for the full semester, receiving at least one check after January 2. However, I cannot hold this against them as evidencing a partial strike. Respondent could have withheld all or part of that last paycheck but did not do so.

[18] Some TAs, such as Dasgupta, were required to submit the grades as the semester progressed.

[19] To illustrate, a striker could not, consistent with normal strike activity, refuse to work his or her regular shift but insist on working voluntary overtime hours.

[20] In his opposition to Respondent's reply brief, the General Counsel attached a position letter submitted by prior counsel on Yale's behalf during the investigation of this unfair labor practice charge and asked that it be received in evidence as G.C. Exh. 251. It is received. In that position statement, Yale's then counsel asserted, in arguing against a condonation theory, that the fall and spring semesters were distinct periods of employment. While this "admission" may have some probative weight, I find that it is contrary to the evidence established on the record. Moreover, while it may demonstrate that there was a change in legal theory, it does not evidence that Respondent's claim of a partial strike is pretextual.

[21] Applying the factors applicable to seasonal employees as set forth in these cases, I note that Yale draws all of its teaching fellows from within the local graduate student community, has an essentially stable need for teaching fellows, and regularly re-employs the graduate students for successive semesters or "seasons."

representation in the election conduct in April 1995 and to vote for or against the grade strike, whether or not they were currently serving as teaching fellows. This demonstrates that, to the GESO leadership at least, there was a continuing employer-employee relationship throughout the students' years of graduate study.

Moreover, Yale was not required to wait and see whether the teaching fellows would report for work in the second semester while continuing to withhold the first semester grades. They had clearly announced their intention to do so and that is sufficient. *Sawyer of Napa,* 300 NLRB 131, 137 (1990); *Valley City Furniture,* supra at 1595.

Based on the foregoing, I am compelled to conclude that the grade strike was a partial strike, unprotected by the Act. The strike, I find, began with its December 7 announcement or, at the latest, by December 13, when TAs began to refuse directives to turn in the grades, which they had already assigned to the student work. Some of them turned in their grades to GESO, not the Registrar, an act which, I find, further evidences that the strike had begun. After it began, they continued to perform virtually all of their job duties and they accepted their pay for that work. And, they planned and intended to resume teaching in the spring semester while continuing to strike, if they had not achieved their objectives by that time. Thereby, they were engaged in an activity which was "neither strike nor work." *Valley City Furniture,* supra at 1594–1595.

2. Withholding the University's property

Grades evidence student achievement. They are the basis on which students pass from one level to another, receive their degrees and are awarded honors. They are the basis for the credentials awarded by Yale as a credentialing institution. Yale argues, and I agree, that the University has a strong property interest in the students' grades. The General Counsel and GESO argue that the grade sheets, on which they recorded those grades, were the property of the teaching fellows, which they could lawfully withhold. That argument, I find, fails to accord proper significance to the grades themselves as distinguished from the paper on which they were recorded.

The grades, however incorporeal they may be, are separate from the teaching fellows' grade sheets. They are also more than the teaching fellows' mental processes. They are, in certain respects, that which is produced by a semester of teaching.[22] To withhold those grades is essentially to withhold an aspect of the semester's production. The withholding of the goods produced, whether grades or widgets, as distinguished from the refusal to produce additional goods, is not a lawful element of a strike. It is essentially like the conduct condemned in *Fansteel* and other sitdown cases,[23] and such cases as *Beacon Upholstery,* where employees not only refused to work *but also interfered with the performance of the nonstriking employees* by preventing access to the plant or by withholding from the employer materials essential to the performance of the work by others. In this case, by withholding the grades, including grades assigned for mid term examinations, quizzes and papers, the teaching fellows interfered with the work of the course instructors and university administrators whose function it was to assign, issue and ultimately distribute those grades.[24]

Moreover, even assuming that the strike did not begin until January 2, and even assuming further that the first semester was a discrete period of employment, they so timed their action as to totally insulate themselves from "the loss of wages and the risk of lawful replacement" which are incident to a total strike. *Polytech*, supra*; Vic Koenig Chevrolet,* supra*; Phelps-Dodge,* supra. No one else could step in, as their replacements, and assign those grades. This is not a case where, like professional athletes, the striking workers were irreplaceable because of their skill level or popularity. Neither is it a case of employees striking at a critical moment. The teaching fellows could no longer be replaced after January 2 because only they had observed the classroom performance of the undergraduates and only they had read and evaluated their work. They took those observations and evaluations with them when they struck. This case is thus distinguishable from *Leprino Cheese Mfg. Co.,* 170 NLRB 601, 606–607 (1968), where the employees' conduct in striking at a critical point in the production process, causing economic loss to their employer, was deemed protected. If they are comparable to Leprino's cheesemakers, the teaching fellows did not merely leave the cheese unfinished, they took with them the milk and other ingredients from which the cheese is made.

Thus, I must conclude that the teaching fellows were engaged in a partial strike. They could not invoke the Act's protections for striking while continuing to perform some of their duties in the first semester and/or striking with respect to the fall semester while intending, and preparing, to teach in the spring semester. Neither could they claim the Act's protections while withholding the semester's grades, which I find to be university property.

Accordingly, the statements made by Yale's supervisors and agents to discourage the teaching fellows from engaging in the grade strike, while undoubtedly coercive,[25] were not violative of the Act. Similarly, any discipline assigned for participation was not discriminatory.

3. Alleged insubordination

Respondent argues, additionally, that the grade strike constituted insubordination and was therefore unprotected. It is inappropriate, I believe, to apply the concept of insubordination to strike activity. A lawful strike will almost always be conducted contrary to the wishes of the employer. As such, it may be said to be insubordinate but is protected nonetheless. A strike which is violent, in breach of contract, less than complete or a sitdown

[22] To say this is not to denigrate that which is the real "product" of education, learning and growth. An admittedly poor analogy could be drawn between teaching and programming a computer to solve a problem. The semester's learning could thus be equated to the program "learned" by the computer, the final examination to the process by which the computer solves the problem for which the program was intended, and the solution of that problem to the grade assigned for the work. The solution belongs to the employer, regardless of who owns the paper in the printer.

[23] Absent the violence, of course. The grade strike was entirely nonviolent. Violence, however, is not a critical element in the unlawfulness of a sitdown strike. See, for example, *Cambro,* supra*,* and *Waco,* supra*.*

[24] Contrary to the General Counsel's contention, there was no way that Yale could have effectively engaged in self-help and substituted others to compile grades accumulated throughout the semester. Indeed, in those instances of record where instructors sought the underlying materials or midterm grades to attempt to do just that, they were rebuffed.

[25] A number of these statements were in writing and are thus do not require a credibility analysis. I have not, of course, resolved issues of credibility, which would only become apparent if the verbal statements were to be disputed upon presentation of Respondent's case-in-chief.

is unprotected for the reasons discussed supra, without involvement of the concept of insubordination.[26]

4. Overbroad threats

Both the General Counsel and the Charging Party argue that at least some of the threats attributed to Yale's agents were directed at any work stoppage or other protected concerted activity generally, and thus warrant denial of the motion to dismiss and, ultimately, a remedial order even if the grade strike is found to be unprotected. They point to the following evidence, contending that each includes an overbroad threat:

> 1. The December 12, 1995 letter from Deans Appelquist and Brodhead to graduate students with teaching responsibilities, stating that "[t]he failure to perform the tasks of evaluating student work and reporting grades in a timely fashion is a serious breach of academic responsibility [which] should be expected to bear on the evaluation of the graduate student instructor's performance as a teacher and on the assessment of his or her suitability for teaching appointments during the spring semester."
>
> 2. Expressions by the faculty of the French Department, about December 12, 1995 concerning the appropriateness of the union model in the academic setting and the loss of teaching appointments in the spring semester.
>
> 3. December 14 statements by the Director of Graduate studies in the French Department about the grade strike and the place of unions in academe.
>
> 4. The December 15, 1995 letter from the French Department faculty to graduate students with current or eventual teaching assignments, wherein it was stated that "[f]ailure to perform any aspect of a graduate teaching assignment—e.g. meeting all classes, grading and returning all papers . . . would (1) be a *de facto* dereliction of professional duty to our students . . . and (2) constitute behavior unacceptable anywhere in the profession for which graduate teaching is an apprenticeship." That letter went on to suggest that "any failure of this kind . . ." could be considered in faculty evaluations and possibly jeopardize future teaching opportunities.
>
> 5. Professor Westerfield's statements on December 18, 1995 concerning the inappropriateness of the strike weapon in the academic setting and the possibility that such conduct could give rise to negative evaluations and loss of future teaching positions.

They cite *New Fairview Hall Convalescent Home,* 206 NLRB 688, 747 (1973), enfd. 520 F.2d 1316 (2d Cir. 1975), in support of this contention. In that case, employees engaged in unprotected partial strikes in the course of a large and otherwise protected organizing campaign. The employer responded to that campaign with numerous coercive statements unrelated to the partial strikes, including threats to close the plant, interrogations, and solicitations to abandon the union, and with 8(a)(3) violations. The employer's statements and warnings which responded to the partial strikes, however, were held nonviolative except for one statement uttered in that context which could have been understood by employees to prohibit all otherwise protected activities.

I find *New Fairview Hall* distinguishable from the instant case. There, the employees engaged in some unprotected strike activity in the course of an otherwise protected campaign for recognition. Here, the entire campaign consisted of the grade strike, conduct which I have found to be unprotected. Moreover, each of the statements relied on as overbroad referred to or was derived from the grade strike, as was alleged in the General Counsel's complaint.[27]

Thus, the December 12 Appelquist/Brodhead letter begins with the statement, "Certain graduate students have announced plans to withhold grades in undergraduate courses in which they have teaching responsibilities." It goes on to state, "In the name of the educational values we all share, we urge anyone contemplating the non-submission of grades . . . to submit your grades in the usual manner." It is in this context that they then speak of "[t]he failure to perform the tasks of evaluating student work and reporting grades in a timely fashion [as] a serious breach of academic responsibility [which] should be expected to bear on the evaluation . . . as a teacher and on the . . . suitability for teaching appointments during the spring semester."

Similarly, the December 12 meeting in the French department was expressly held to deal with the grade strike. In that meeting, the threatened loss of spring appointments was solely related to participation in the grade strike and the statement concerning the appropriateness of the union model in the academic setting was a distinct expression of opinion, protected by 8(c). There was no threat implied or expressed concerning adverse consequences for supporting a union or seeking representation. The December 14 statements were uttered when students sought clarification of the December 12 meeting; any threats made therein related solely to participation in the grade strike and not to unionization in general. The December 15 letter was, expressly, a further followup to the December 12 meeting.

And, the meeting at which Professor Westerfield spoke on December 18 was also expressly "about the grade strike." In that meeting, he candidly expressed his strongly negative opinion about the use of the strike weapon by teachers. However, his threats of adverse recommendations and redesign of his courses to eliminate teaching fellows were related to the teaching fellows "do[ing] this" or engaging in "this action," i.e., engaging in a grade strike.

[26] The cases cited by Respondent did not involve strike activity and are thus inapposite. *Carolina Freight Carriers Corp.,* 295 NLRB 1080 (1989), involved a single-employee's persistent refusal to obey his supervisor's order to clock out and leave work, not a concerted refusal to work. *Bird Engineering,* 270 NLRB 1415 (1984), involved a group of employees who disobeyed a rule prohibiting them from leaving the plant during their lunch hour. The Board expressly found that they were not engaged "in a strike, withholding of work or other permissible form of protest." They simply chose to ignore the employer's rules. *G & H Products, Inc.,* 261 NLRB 298 (1982), involved deferral to an arbitrator's finding that a union steward had been insubordinate in advising of other employees to engage in the insubordinate act of failing to obey the employer's order that they properly fill out their timecards.

[27] The complaint, par. 9, alleges that "[f]rom about January 2 to January 14. . . . Part-time Acting Instructors and Teaching Fellows . . ceased work concertedly and engaged in a strike." Par. 10 alleges various threats "if [the employees] engaged in the strike described above in paragraph 9" and par. 11 similarly alleges threats directed against the teaching fellows "if they did not cease the strike described above in paragraph 9." Encompassed within these paragraphs are the threats now contended to be overbroad because they could allegedly be understood to restrain conduct beyond the strike "described above in par. 9."

Thus, I find that there were no "overbroad" threats directed against the exercise of protected activity, even assuming that *New Fairview Hall* would mandate that such threats be found violative. I would further find that, even if one or two of these statements were to be deemed technically overbroad, they should be considered isolated and de minimus in the context of this litigation and hardly worth returning for many days of hearing, briefs and a decision on the many other issues raised by this complaint.

5. Condonation

The Charging Party contends that, by extending the deadline for the submission of final grades, Yale condoned the actions of those teaching fellows who met the extended deadline, thus precluding discipline, citing *Asbestos Removal, Inc.,* 293 NLRB 352, 356 (1989), and *Jones & McKnight, Inc.,* 183 NLRB 82 fn. 3, 89–90 (1970). In each of those cases, the employees had engaged in unprotected walkouts. In *Asbestos Removal,* condonation was found where the employer had stated, as they were walking out, that there would be a meeting to discuss their concerns on the following day, that there would probably be work on the day after that and that the employer would get in touch with them. In *Jones & McKnight,* condonation was found upon an express promise to forgive unprotected conduct if the striking employees would cease their picketing and allow other employees to come to work.

As the trial examiner quoted in *Jones & McKnight*:

> Condonation is a question of fact, and a determination of whether an employer has forgiven unprotected activity of its employees requires an evaluation of all the relevant conduct. [Citing and quoting from *M. Eskin & Son,* 135 NLRB 666, 667 (1962).] Also, "condonation requires a demonstrated willingness to forgive the improper aspect of concerted action, to 'wipe the slate clean.' After a condonation the employer may not rely upon prior unprotected activities of employees to deny reinstatement to, or otherwise discriminate against, them." [Citing and quoting from *Confectionery Workers, Local 805,* 312 F.2d 108 (2d Cir. 1963).]

Condonation requires "clear and convincing evidence" of an agreement to "wipe the slate clean" and "is not to be lightly inferred." *International Paper Co.,* 309 NLRB 31, 38 (1992).

Here, the teaching fellows engaged in what I have found to be an unprotected strike. On its conclusion, eight who had been PTAIs in the fall 1995 semester allegedly suffered discriminatory reassignments, dissolution of their courses, and/or greater supervision. One teaching assistant, Dasgupta, was made the subject of disciplinary charges.

The record reflects that, on January 10, Dean Appelquist extended to January 15 the deadline for the TAs to turn in their final grades. He warned that, if they failed to do so, their "eligibility for a teaching assignment for the coming term will be withdrawn." While it is implicit that such eligibility would not be withdrawn if they complied (as they did), he made no other promises or assurances of forgiveness. Neither did he condone any conduct beyond the withholding of final grades. Only one TA, Dasgupta, is alleged to have suffered discriminatory treatment. That discrimination consisted of Yale's instituting of disciplinary proceedings against her. Those proceedings were instituted on December 18, *before* the alleged condonation, and were based on her refusal, on request, to turn over both the grades and the graded papers as well as her delivery of the grades and papers to the union office. Her hearing was postponed from January 10 to 15 and from January 15 to 31. On January 22, Dean Appelquist informed Dasgupta that, with the grade strike behind them, he had decided to "withdraw [her] case from consideration by the Committee on Regulations and Discipline." This record does not support a conclusion of condonation of her actions. Even if it did, the Dean's actions constituted effectuation of the condonation.

All the remaining alleged discriminatees were PTAIs. Their deadline for the submission of final grades had only been extended to January 9, a deadline they did not meet. In the English department, where four of the eight PTAIs were teaching, another "deadline" had issued. On January 12, the departmental chair asked them to "reconsider . . . and assign . . . the grades." Short of that, she asked that they return all papers and exams, and any grade records, so that the English department faculty could complete the grading process, by January 16. There was no promise, express or implied, of forgiveness. All the teaching fellows, including the English department PTAIs, turned in their final grades on January 15.

The foregoing evidence, I find, falls short of establishing condonation, even for those PTAIs in the English department. Unlike the employers' statements in *Asbestos Removal* and *Jones and McKnight,* there were no statements made from which the PTAIs could conclude that their unprotected conduct would be overlooked or forgiven if they complied with their department's request.

6. Conclusion

I find, as a matter of law, that the teaching fellows, whatever their employee status, were not engaged in a protected strike activity, for each of the reasons set forth above, and that the General Counsel has thus failed to establish an essential element to his prima facie case. This hearing has, thus far, occupied 15-trial days, with over 30 witnesses and nearly 400 exhibits. It may well be anticipated that to conclude this hearing with the Respondent's case-in-chief and possible rebuttal will occupy at least as much time and require at least as much effort on the part of all the parties. Given my conclusion that the General Counsel's case must fall as a matter of law, I further find that judicial economy and administrative efficiency warrant that I grant Respondent's motion to dismiss at this stage of the proceeding.[28] Accordingly, I make the following

CONCLUSION OF LAW

The Respondent has not violated the Act in any manner alleged in the complaint.

[28] *Sun Electric Corp.,* 266 NLRB 37, 45 (1983); *Cherry Rivet Co.,* 97 NLRB 1303, 1304 fn. 1 (1951).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[29]

ORDER

The complaint is dismissed in its entirety.

[29] If no exceptions are filed as provided by Sec. 102.46 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.