

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Washington, DC**

LA FILM SCHOOL, LLC AND ITS BRANCH  
LA RECORDING SCHOOL, LLC,

Respondent,

and

Case Nos. 31-CA-29627  
31-CA-29642  
31-CA-29719  
31-CA-29773  
31-CA-29775  
31-CA-29776

CALIFORNIA FEDERATION OF TEACHERS, and  
BRANDII GRACE, an Individual,

Charging Parties.

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S  
AMENDED ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, Counsel for the Acting General Counsel submits this Answering Brief in opposition to Respondent's Exceptions to the Decision of Administrative Law Judge Robert A. Ringler in the captioned matters. Counsel for the Acting General Counsel hereby respectfully requests that the National Labor Relations Board ("Board") deny all of Respondent's exceptions.

## **I. INTRODUCTION**

This case was tried before the Honorable Robert A. Ringler on January 10 through 13, 2011, in Los Angeles, California, based on a Consolidated Complaint ("Complaint") issued by the Regional Director for Region 31 on September 22, 2010.<sup>1</sup> The Complaint was based on unfair labor practice charges filed between March and June by the California Federation of Teachers ("CFT" or "Union"). The Complaint alleged, inter alia, that LA Film School, LLC and its branch LA Recording School, LLC ("Respondent" or "School") unlawfully suspended and terminated employee Brandii Grace, and that Respondent unlawfully: created the impression of surveillance; threatened employees; promised employees promotions; prohibited employees from engaging in protected activity; imposed reporting requirements on employees; disparately enforced its visitor access policy; promulgated a new visitor policy; and provided employees with assistance to withdraw union authorization cards. On April 6, 2011, the Administrative Law Judge ("ALJ") issued his Decision and Recommended Order finding that

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<sup>1</sup> All dates hereinafter are for the year 2010 unless otherwise indicated.

Respondent violated Section 8(a)(3) and (1) of the Act by suspending and terminating Brandii Grace, in addition to finding the numerous independent 8(a)(1) violations mentioned above and alleged in the Complaint.

On May 23, 2011, Respondent filed 62 exceptions, and a supporting brief, to the ALJ's Decision and Recommended Order. Respondent's supporting brief and the questions presented therein, with the corresponding exceptions, are organized by the violations the ALJ found in the following order: suspending and terminating Brandii Grace (Exception Nos. 1-21, 55-60); promising Game Department faculty reclassification to Department Chair positions (Exception Nos. 26-32); threatening Brandii Grace with retaliation (Exception Nos. 22-25); instructing employees not to attend Union meetings (Exception Nos. 33-40); creating the impression of surveillance (Exception Nos. 41-45); disparately enforcing security policies to eject a Union representative from its premises (Exception Nos. 46-50); promulgating a new security policy on March 11, 2010 (Exception No. 51); and assisting employees to withdraw Union authorization cards (Exception Nos. 52-54, 61). As the following discussion will demonstrate, ALJ Robert A. Ringler's decision rests on solid credibility determinations, the overwhelming weight of the evidence, and well-established Board precedent.

## **II. DISCUSSION**

### **A. Respondent's bare exceptions should be disregarded.**

As a threshold matter, a number of Respondent's exceptions (Exception Nos. 8, 13, 14, 24, 36, 42, 43, 48, and 49) fail to comply with the requirements of Section

102.46(b) of the Board’s Rules and Regulations by failing to state, either in its exceptions or its brief, on what grounds the purportedly erroneous findings or conclusions should be overturned. *Sunshine Piping, Inc.*, 351 NLRB 1371, n.1 (2007) (Board disregarded “bare exceptions” that were unsupported by argument); *New Concept Solutions, LLC*, 349 NLRB 1136, n.2 (2007) (Board disregarded bare unsupported exceptions to judge’s findings of violations). In *Carson Trailer, Inc.*, 352 NLRB 1274, 1274 (2008) (2-member Board), the respondent filed exceptions to the judge’s recommended decision and order arguing that the “evidence [did] not support” the judge’s determination that the respondent had unlawfully laid off two union supporters. In contesting the remedy, respondent argued that there was “insufficient evidence” to support the violations. The Board agreed with the General Counsel that respondent’s exceptions did not meet the minimum requirements of Section 102.46(b) of the Board’s Rules and Regulations, and disregarded the respondent’s exceptions pursuant to Section 102.46(b)(2). *Id.*

Here, Respondent’s Exception Nos. 8, 13, 14, 24, 36, 42, 43, 48, and 49 to some of the ALJ’s findings and conclusions are unsupported by argument. While Respondent’s brief addresses the ALJ’s conclusions of law with respect to each violation that the ALJ found, Respondent’s brief is silent with respect to the exceptions listed above. For these “bare exceptions,” Respondent does not explain how the ALJ erred or the grounds on which his findings or conclusions should be overturned. Therefore, Exception Nos. 8, 13, 14, 24, 36, 42, 43, 48, and 49, devoid of evidentiary support or legal argument, should be disregarded and denied in their entirety.

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**B. The ALJ's credibility determinations are well grounded.**

Twelve of Respondent's exceptions (Exception Nos. 5, 10, 23, 25, 35, 44, 48, 55, 56, 58, 59, and 60) are to the ALJ's credibility findings or to conclusions based solely on credibility determinations. The Board's established policy is not to overrule an ALJ's credibility resolutions unless the clear preponderance of all the relevant evidence establishes that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950). In its brief, Respondent points out that "where credibility determinations are 'based more on [an] analysis of the circumstances than on the demeanor of the witnesses,' they are entitled to no special weight. *J.N. Caezan Company*, 246 NLRB 637, 638 n. 6 (1979)." (Respondent's Brief, 18). Here, the ALJ's credibility resolutions should not be overturned, as they are well supported by the record and based on the demeanor of the witnesses. At the outset of his decision, the ALJ clearly states that his findings of fact are based on the record and his "observation of the demeanor of the witnesses." (ALJD 2:7). Furthermore, the ALJ discussed his credibility determinations thoroughly and with great specificity, detailing the reasons why he credited or discredited various witnesses who appeared before him. (ALJD 5:1-5, 6:28-34, 8:7-16, 10:19-20). After observing demeanor, considering the overall logic of their testimony, and factoring in corroboration or lack thereof, the ALJ consistently credited the testimony of Brandii Grace, Tema Staig, and Peter Nguyen, witnesses for the Acting General Counsel, over those of Respondent, including Brian Walker, Michael Blackledge, William Smith and Diana Derycz-Kessler. Importantly, with respect to Michael Blackledge, Respondent's witness most knowledgeable about Brandii Grace's alleged misconduct and poor work performance as

her supervisor, the ALJ found him lacking in credibility: “I found Blackledge’s demeanor less than candid. His testimony was vastly more helpful on direct than cross, which was marked by pauses, spotty recall, and periodic dismay that his integrity was being questioned.” (ALJD 5:2-5). In addition to the ALJ’s own thorough explanations of his credibility determinations, the following examples in the record support said determinations.

**Human Resources Director Brian Walker.** Respondent’s first witness, Mr. Walker, testified at length about Ms. Grace’s alleged history of insubordinate misconduct and failure to turn in course materials that eventually led to her termination. During his testimony, Mr. Walker denied having any knowledge of what *Weingarten* rights were until after Ms. Grace’s termination meeting, even though he should be familiar with employee rights. Mr. Walker testified as follows:

- Q: Now, as the human resources director, is it your job to be fairly knowledgeable about all things that pertain to employees and terms and conditions of employment?
- A: Yes.
- Q: So that would include what the rights of the institution are as to hiring, firing, and disciplining employees according to the law?
- A: In general, yes.
- Q: And that would also include – you would also have to have some knowledge as to what employees’ rights are as employees of the company, correct?
- A: Right.
- Q: But it is your testimony that you had no knowledge of what *Weingarten* rights were, correct?
- A: That’s correct.
- Q: And it’s also your testimony that you didn’t learn that until much later, correct?
- A: Until March 2nd.

(Tr. 409:13-410:5). This is an important piece of testimony because it goes to both Mr. Walker's and Ms. Grace's credibility. Ms. Grace had previously testified that Mr. Walker denied her a *Weingarten* representative at the termination meeting and explained to her that she was not entitled to *Weingarten* rights because she was a non-union employee. (Tr. 88:25-89:2). If Mr. Walker did not know what *Weingarten* rights were, he would not have known to deny Ms. Grace a representative on that basis. However, Respondent's own witness, Mr. Blackledge, testified that Mr. Walker did in fact know what *Weingarten* rights were before the termination meeting. Mr. Blackledge testified as follows:

Q: Okay. So before the termination, [Mr. Walker] told you that *Weingarten* had something to do with union rights?

A: That's right.

(Tr. 587:24-588:1). Thus, Mr. Blackledge's testimony establishes that Mr. Walker lied under oath, making him not a credible witness, and lends credence to Ms. Grace.

**Games Department Program Director Michael Blackledge.** Mr. Blackledge, however, was himself guilty of exaggerating his testimony to conceal the truth. On direct examination, like Mr. Walker, Mr. Blackledge testified at length about Ms. Grace's alleged insubordinate misconduct, his repeated requests to Ms. Grace to turn in course materials, and Ms. Grace's failure to provide those materials. In support of these allegations, Respondent introduced a September 3, 2009, email from Mr. Blackledge to Ms. Grace. (Resp. Exh. 5). Regarding this email, Mr. Blackledge testified as follows:

Q: Do you recall you followed up with Ms. Grace regarding the course materials in the beginning of September in particular?

A: So it would have been because I hadn't received the materials yet.

(Tr. 454:15-18). However, Mr. Blackledge's testimony in this regard was misleading. Ms. Grace had just been hired three days before, on August 31, 2009. (Tr. 22:16-17). Furthermore, at the time of her hiring, Ms. Grace was only supposed to teach the courses Game Design 1 and 2 as a sequence, and she was not expected to teach Game Design 1 until about June 2010. (Tr. 451:5-11, 451:21-23). Although Ms. Grace did volunteer to teach the course Business of Games, assuming that she volunteered to teach the course on her first day of work, three days to complete materials for an entire course is not a reasonable amount of time. Ms. Blackledge's testimony regarding Ms. Grace's failure to submit course materials and incidents of insubordination was filled with similar exaggerations or mischaracterizations that were unsupported by Respondent's own documentary evidence.

**Vice President of Education William Smith.** Similarly, Mr. Smith was also deceptive and concealed the truth about material facts. For example, during his examination, Mr. Smith testified at length and in great detail about the March 9 incident during which Respondent ejected CFT Field Representative Peter Nguyen from its facility. Although Mr. Smith recalled details such as Mr. Nguyen allegedly making threats to him about filing charges and recalled talking to security about Mr. Nguyen, Mr. Smith did not recall Mr. Nguyen identifying himself as a Union representative. (Tr. 647:11-15). However, the incident report drafted by the security guard involved in Mr. Nguyen's removal not only reveals Mr. Smith's knowledge of Mr. Nguyen's identity but also that Mr. Smith ordered security to remove him: "On arrival Lt. Huling met Mr. Smith in the hallway of the business office. Mr. Smith informed Lt. Huling that a field

representative for the California Federation of Teachers Peter Nguyen was invited by some teacher/instructors ... Mr. Smith informed Lt. Huling that if [he] should find Mr. Nguyen on the premises of Building 1 (one) or Building 2 (two), to escort Mr. Nguyen off the premises.” (G.C. Exh. 22, p.2-3). As shown by the documentary evidence, Mr. Smith’s testimony was not fully forthcoming.

**Acting General Counsel’s Witnesses.** On the other hand, Brandii Grace, Peter Nguyen and Tema Staig gave credible testimony. Ms. Grace gave detailed testimony that was corroborated by the documentary evidence as well as, at times, by Respondent’s own witnesses. Ms. Grace also admitted to some negative facts such as the poorly formatted December 9, 2009, email to Mr. Blackledge. (G.C. Exh. 8). Ms. Grace even admitted that the tone of the email could be misinterpreted. (Tr. 65:18-21). Mr. Nguyen testified in great detail about the March 9 incident and the documentary evidence, as well as Ms. Staig’s testimony, corroborated key facts, such as Mr. Smith having given the order to have him ejected. (G.C. Exh. 22, p.2-3). Ms. Staig equally gave credible testimony, a lot of which Mr. Nguyen corroborated. In addition, even though she is a current employee at Respondent, she still appeared and gave testimony that was adverse to her employer. The Board frequently finds such witnesses to be inherently credible.

*Paramount Farms, Inc.*, 334 NLRB 810, 813 (2001); *Flexsteel Industries*, 316 NLRB 745 (1995); *Georgia Rug Mill*, 131 NLRB 1304, 1305 fn. 2 (1961), enfd. as modified 308 F.2d 89 (5th Cir. 1962).

Based on the foregoing, the ALJ’s own thorough explanations, the record as a whole, and Board precedent, the ALJ’s credibility determinations should be upheld and

Exception Nos. 5, 10, 23, 25, 35, 44, 48, 55, 56, 58, 59, and 60 should be denied in their entirety.

**C. The ALJ properly found that Respondent violated Section 8(a)(3) and (1) of the Act by suspending and terminating Brandii Grace.**

In Exception Nos. 1-21 and 55-60, Respondent objects to the ALJ's conclusion that Respondent violated Section 8(a)(3) and (1) of the Act by suspending and terminating Brandii Grace. The legal standard applicable to an unlawful discrimination case, as articulated in *General Trailer, Inc.*, 330 NLRB 1088, 1091-1092 (2000), is as follows: "The General Counsel has the initial burden of establishing a prima facie case sufficient to support an inference that union or other activity which is protected by the Act was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). Once this is established, the burden shifts to Respondent to demonstrate that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. If Respondent goes forward with such evidence, the General Counsel 'is further required to rebut the employer's asserted defense by demonstrating that the [alleged discrimination] would not have taken place in the absence of the employee['s] protected activities.' *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See also *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), and *Manno Electric*, 321 NLRB 278, 280 *fn.* 12 (1996). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*. 271 NLRB 1302 *fn.* 2 (1984). '[A] finding of pretext

necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel.’ *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).”

**1. The Acting General Counsel established a strong prima facie case.**

The General Counsel is required to prove the following four elements to establish a prima facie case of unlawful discrimination: 1) the alleged discriminatee engaged in union or other protected concerted activities; 2) the employer knew about such activities; 3) the employer took an adverse employment action against the alleged discriminatee; and 4) there is a causal link or nexus between the protected activity and the adverse employment action. *Pacific Design Center*, 339 NLRB 415, 418 (2003).

**a. The ALJ properly found that Ms. Grace engaged in Union activity.**

The ALJ properly found, as the record demonstrates, that Ms. Grace engaged in Union or other protected activity from late January until she was terminated in March. Ms. Grace led meetings with the faculty members to discuss changes that were affecting their terms and conditions of employment on January 29 and February 1. (Tr. 33:12-25, 34:19-35:6). Ms. Grace organized a meeting for the faculty to meet with CFT Field Representative Mr. Nguyen on February 2. (Tr. 37:20-38:2). After the faculty decided to seek Union representation, Ms. Grace put together and became part of the organizing committee that led the organizing drive. (Tr. 39:19-22, 40:1-6). Ms. Grace attended a Union meeting and signed a Union authorization card on February 20, and she asked approximately seven faculty members to sign Union authorization cards in her office on

February 22. (Tr. 57:7-9, 57:19-58:12). She then turned in her co-workers' signed Union authorization cards on February 24, which the CFT used in filing its representation petition that same day. (Tr. 84:23-85:9, G.C. Exh. 19).

**b. The ALJ properly found that Respondent had knowledge of Ms. Grace's Union activity.**

In Exception Nos. 4, 11, 12, 55-56, and 58-60, Respondent objects to the ALJ's conclusion that Respondent and the various supervisors and/or agents involved in Ms. Grace's suspension and termination had knowledge of Ms. Grace's Union activity and the Union's representation petition. The ALJ's conclusions and findings with respect to Respondent's knowledge of Ms. Grace's Union activity, however, are well supported by the record.

Although Respondent denies having knowledge of Ms. Grace's Union activity prior to her suspension or termination, the record demonstrates that at least three admitted supervisors had knowledge of Ms. Grace's protected activity. First, Mr. Blackledge, Ms. Grace's immediate supervisor, made several statements to Ms. Grace, which prove that he was well aware of Ms. Grace's Union activity. For example, on February 11, Mr. Blackledge told Ms. Grace that he knew what was going on and that he knew she was the "leader of the revolt." (Tr. 48:8-18). During the suspension meeting on February 22, Mr. Blackledge again made reference to Ms. Grace's Union activity when he accused her of being the leader who was turning the Game Production Department faculty against him and the School. (Tr. 61:17-20). These statements clearly demonstrate that Mr. Blackledge not only knew about the organizing efforts but also that Ms. Grace was a leader in the organizing drive.

Second, Head of Production Ariel Levy was initially involved in the organizing drive. Mr. Levy in fact helped Ms. Grace procure the Ivar Theater for the faculty's February 2 meeting with Mr. Nguyen, the CFT representative. (Tr. 38:5-9, 38:21-22, and 39:23-25). Mr. Levy attended the meeting and was present when Ms. Grace took the lead in putting together the organizing committee. (Tr. 39:23-25). Although Respondent's Exception Nos. 55 and 56 challenge the ALJ's finding that Mr. Levy participated in the February 2 meeting and therefore had knowledge of Ms. Grace's Union activity, Respondent did not present Mr. Levy at the hearing to deny these facts. In its brief, Respondent merely questions Ms. Grace's credibility as to Mr. Levy's presence in the meeting because it would be "implausibl[e]" for Ms. Grace and the rest of the faculty to allow Mr. Levy, a supervisor within the meaning of the Act, to participate in the meeting. However, Ms. Grace's credited testimony regarding Mr. Levy is uncontroverted in the record. Furthermore, Respondent, both at the hearing and in its brief in support of its exceptions, failed to establish that Ms. Grace or any of the faculty who participated in the initial Union meeting understood that Mr. Levy was a supervisor within the meaning of the Act who should be excluded from the organizing drive.

Third, on February 20, Program Director Bobby Milly admitted to Ms. Grace that he knew what was going on at the faculty's meetings. (Tr. 54:21-23). Mr. Milly's admission came after Ms. Grace confronted him about instructing his staff not to attend the faculty's meetings. (Tr. 53:4-13). Ms. Grace even tried to convince Mr. Milly to allow his staff to attend the meetings. (Tr. 54:3-4). By confronting Mr. Milly about the faculty meetings, Ms. Grace disclosed that she participated in those meetings. Therefore,

if Mr. Milly did not already know that Ms. Grace was part of the faculty who were meeting and part of the organizing drive, given that he told Ms. Grace he knew what was going on at their meetings, he learned that Ms. Grace was engaged in protected activity during that conversation.

Furthermore, knowledge can be inferred from the timing of the alleged discriminatory acts. *See Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992) (discriminatory acts within days of union organizing meeting). Here, knowledge can be inferred from the timing because Ms. Grace was suspended on February 22, only two days after she signed a union authorization card and on the same day that she had faculty members sign Union authorization cards in her office. Knowledge can further be inferred based on the fact that Ms. Grace was terminated on March 2, three business days after Respondent first received a facsimile copy of the CFT's representation petition (February 25) and only one day after a second facsimile from Region 31 of the National Labor Relations Board regarding the CFT's petition (March 1). (Joint Exh. 1, p.1, Attach. A and B). Therefore, Exception Nos. 4, 11, 12, 55-56, and 58-60 should be denied in their entirety.

**c. It is undisputed that Respondent took adverse actions against Ms. Grace.**

Respondent took two adverse actions against Ms. Grace. On February 22, Respondent suspended Ms. Grace for two days. (G.C. Exh. 7). Then on March 2, Respondent terminated Ms. Grace. (Joint Exh. 1, Attach. C).

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**d. The ALJ properly found that Respondent suspended and terminated Ms. Grace because of her Union activity.**

Contrary to Respondent's Exception Nos. 3, 6, 7, 9, 13, 14, 15, 16, 17, and 18, the ALJ properly found that Respondent suspended and terminated Ms. Grace because of her Union activity. Motive or causal nexus is a question of fact and may be inferred from either direct or indirect evidence. The following factors give rise to an inference that the employer acted with anti-union motivation: expressed hostility toward the protected activity, *Mercedes Benz of Orland Park*, 333 NLRB 1017 (2001); hasty action, *Embassy Vacation Resorts*, 340 NLRB 846, 849 (2003); suspicious timing, *Bethlehem Temple Learning Center*, 330 NLRB 1177 (2000); and a pretextual reason given for the adverse employment action, *Fluor Daniel, Inc.*, 311 NLRB 498 (1993).

**Expressed Hostility.** Here, contrary to Respondent's Exception No. 13, the record shows that Respondent had in fact expressed hostility towards Ms. Grace's protected activity. The same statements cited above that establish Mr. Blackledge's knowledge of Ms. Grace's protected activity also demonstrate Respondent's hostility toward said activity. At the suspension meeting on February 22, Mr. Blackledge referred to Ms. Grace's activity in the organizing drive as Ms. Grace being the leader who was turning the faculty against him and the School. In addition, Mr. Blackledge had previously referred to the faculty's organizing efforts as a "revolt" and accused Ms. Grace of being the leader of that revolt. Moreover, Mr. Blackledge blatantly expressed his hostility when, after making reference to the "revolt," he threatened Ms. Grace to accept the new position of Department Chair and move on, otherwise things might happen that she would not like. (Tr. 49:16-18).

**Hasty Action.** “An employer’s failure to permit an employee to defend himself before imposing discipline supports an inference that the employer’s motive was unlawful.” *Embassy Vacation Resorts*, 340 NLRB 846, 849 (2003). Such is the case here. At the February 22 meeting where Respondent suspended Ms. Grace, she tried to address the allegations contained in the suspension memo but was unable to do so. (Tr. 62:12-18). Furthermore, Mr. Walker admitted that although they did offer Ms. Grace the opportunity to write a response to the allegations contained in the memo, her written rebuttal would not have changed her suspension. (Tr. 400:19-401:10).

**Suspicious Timing.** The record here clearly establishes that the timing of Respondent’s suspension and termination of Ms. Grace was very suspicious. Respondent suspended Ms. Grace on February 22, the very same day that Ms. Grace had about seven faculty members sign Union authorization cards in her office, just two doors down from Mr. Blackledge. Furthermore, the suspension came only two days – and in fact on the first business day after February 20 – after Ms. Grace herself signed a Union authorization card and confronted Mr. Milly about him prohibiting his staff from participating in the faculty’s meetings.

Equally suspicious, Respondent terminated Ms. Grace only five days after the CFT filed its representation petition. In fact, Ms. Grace’s March 2 termination came only two business days after Region 31 initially sent Respondent a copy of the CFT’s representation petition on February 25. (Joint Exh. 1, p.1, ¶ 1 and Attach. A). Moreover, Respondent decided to terminate Ms. Grace on March 1, the very same day that Region

31 sent Respondent a reminder about the CFT's petition and the upcoming representation hearing. (Tr. 646:4-7; Joint Exh. 1, p.1, ¶ 2 and Attach. B).

**Pretext.** Respondent asserts that it suspended Ms. Grace for insubordination and for failing to provide requested course materials in a timely manner. (G.C. Exh. 7).

Respondent asserts that it relied on these same reasons and, ultimately, on Ms. Grace's alleged refusal to provide course materials on March 1 to terminate her on March 2. (Resp. Exh. 21 and 22; Tr. 404:10-14). Contrary to Respondent's Exception Nos. 15 and 18, the ALJ properly found these alleged reasons pretextual.

First, contrary to Exception Nos. 6, 7, and 9, the ALJ properly found that Ms. Grace did not engage in insubordinate conduct. With respect to the alleged incidents of insubordination, Ms. Grace denied acting insubordinately towards Mr. Blackledge on December 9, 2009, or February 15, 2010, testimony which the ALJ credited. Ms. Grace denied making any insubordinate statements to Mr. Blackledge or using a combative tone with him on December 9, 2009, or February 15, 2010. (Tr. 67:11-68:19, 71:20-72:14, 83:18-25). Furthermore, although Mr. Blackledge testified that Ms. Grace acted insubordinately towards him, he made no mention of Ms. Grace's alleged conduct in the December 10, 2009, email he sent Ms. Grace asking her not to send emails with questionable tones to the entire department again. (Resp. Exh. 10). Mr. Blackledge in fact did not address the December 9, 2009, alleged incident with Ms. Grace until the suspension memo two months later. (Tr. 72:18-21). It is at least odd that Mr. Blackledge would take the time to email Ms. Grace about having sent an email with questionable

formatting but not address her questioning his work and knowledge in a combative and aggressive tone if it actually occurred.

Second, contrary to Exception Nos. 3, 16, and 17, the ALJ properly found that Ms. Grace's course materials were not deficient and that she did not refuse to provide course materials at any time during her employment. As to this issue, Respondent presented several emails which allegedly establish Ms. Grace's failure to complete the materials in a timely manner. Mr. Blackledge testified that he emailed Ms. Grace on September 3, 2009, as a follow-up because he had not received the materials yet. (Resp. Exh. 5; Tr. 454:17-18). However, Ms. Grace had just been hired on August 31, 2009. (Tr. 22:16-17). Furthermore, at the time of her hiring, Ms. Grace was only supposed to teach Game Design 1 and 2 as a sequence, and she was not expected to teach Game Design 1 until about June 2010. (Tr. 451:5-11, 451:21-23). Although Ms. Grace did volunteer to teach Business of Games, assuming that she volunteered to teach the course on her first day of work, three days to complete materials for an entire course is not a reasonable amount of time. Thus, contrary to Mr. Blackledge's testimony, his September 3, 2009, email is not evidence that Ms. Grace had failed to timely provide course materials.

Mr. Blackledge also testified that a September 30, 2009, email to Ms. Grace was also evidence of Ms. Grace being late in turning in the Business of Games materials. (Resp. Exh. 7; Tr. 458:2-19). However, Mr. Blackledge testified that he expected these materials three weeks before the course started. (Tr. 12-14). Given that Mr. Blackledge himself admitted that Business of Games did not start until November 2009, approximately one month after his September 30, 2009, email, there was still enough

time for Ms. Grace to turn in the materials in accordance with Mr. Blackledge's three-week rule. (Tr. 458:24-25). Thus, this email too and Mr. Blackledge's testimony do not demonstrate that Ms. Grace failed to turn in materials in a timely manner.

In fact, Ms. Grace did turn in her course materials for Business of Games in a timely manner on October 16, 2009. (G.C. Exh. 9; Tr. 75:1-5). Mr. Blackledge himself noted that Ms. Grace had put the materials together in "record time." (Resp. Exh. 30). Mr. Blackledge reviewed and approved the materials. (Tr. 76:12-19). Mr. Smith also reviewed and approved the materials. (Tr. 76:13-16).

In his testimony, Mr. Blackledge discussed more emails to Ms. Grace about Business of Games course materials, one dated December 11, 2009, and another dated January 12, 2010. (Resp. Exh. 11 and 12). With regards to the January 12, 2010, email, Mr. Blackledge commented that he was growing concerned about the materials being missing because the course was "rolling around again." (Tr. 473:6-8). However, Mr. Blackledge admitted that these two emails were simply asking Ms. Grace to re-submit the same course materials which she had already completed – which he reviewed and approved – back in October 2009. (Tr. 472:20-21, 473:6-7). Thus, these emails are not evidence of Ms. Grace's continued failure to complete course materials; they are simply emails asking Ms. Grace to re-submit previously completed and approved course materials.

With regards to the re-submission of the Business of Games course materials, Mr. Blackledge testified that he expected faculty to edit materials after a course was taught and prior to the course being taught again. (Tr. 462:12-463:3). However, Mr.

Blackledge admitted that Ms. Grace was not supposed to teach Business of Games again after having taught it in October 2009 because it was only a temporary assignment. (Tr. 452:14-18). Mr. Blackledge also admitted that he did not tell Ms. Grace that she was going to teach the course again until February 2010, after the emails discussed above. (Tr. 453:15-19). Thus, Ms. Grace appropriately worked on updating the course materials after Mr. Blackledge told her that she would be teaching the course again and submitted an updated course outline on February 15. (G.C. Exh. 10; Resp. Exh. 14; Tr. 76:24-77:3). That Ms. Grace's course materials may not have been in the proper format is only because Mr. Blackledge admittedly "let it slide" back in October 2009 and did not bring it to Ms. Grace's attention until February 15. (G.C. Exh. 10).

As for the timeliness of course materials for Game Design 1 and 2, Mr. Blackledge did not recall ever giving Ms. Grace a deadline for these materials. (Tr. 543:11-13). Thus, because the record does not support finding that Ms. Grace was actually late in submitting course materials in the proper format, Respondent's contention that it suspended and terminated Ms. Grace for that reason is pretextual.

However, even assuming that Ms. Grace was in fact insubordinate and did fail to submit course materials in a timely manner, these reasons would nonetheless be pretextual. In *Gravure Packaging, Inc.*, the Board affirmed an ALJ's finding that the employer had violated Section 8(a)(3) of the Act by discharging an employee. *Gravure Packaging, Inc.*, 32 NLRB 1296 (1996). In that case, the employee had a history of poor performance, of being a "marginal employee." *Id.* at 1306. Nonetheless, the employer retained the employee. *Id.* The ALJ found that "the only thing that had changed was the

advent of the Union.” *Id.* In holding that the employer had changed its prior tolerant policy toward the employee because of his union activity and discharged him because of it, the ALJ stated, “an employer may not seize upon union activity to justify a change in policy so as to bring about the discharge of an employee who would otherwise have been retained.” *Id.*

Such is the case here. Because Respondent began requesting course materials since September 2009 and Ms. Grace allegedly failed to provide adequate materials, Respondent was tolerant of Ms. Grace’s shortcomings, like the employer in *Gravure Packaging, Inc.*, for over five months even though, according to Respondent, the course materials were important for the School’s accreditation and being accredited was very important. (Tr. 481:7-10). Furthermore, Respondent was also tolerant of Ms. Grace’s alleged insubordinate conduct, at least tolerant enough to ignore what Respondent claims to be a very serious incident from December 2009 for over two months. In fact, even though Mr. Blackledge, Mr. Walker, and Mr. Smith all knew about the December 9, 2009, incident since at least mid-December, they did nothing about it until the suspension in February; notwithstanding the fact that Respondent’s Inappropriate Conduct Policy states that even one act of insubordination can lead to termination. (Resp. Exh. 4, p.1). In addition, even the February 15 incident was ignored for an entire week before Respondent disciplined Ms. Grace. Like in *Gravure Packaging, Inc.*, the only thing that appears to have changed is the “advent of the Union.” Therefore, like the employer in *Gravure Packaging, Inc.*, Respondent’s reliance on previously tolerated conduct to suspend and terminate Ms. Grace is pretextual.

Insofar as Respondent asserts that it ultimately terminated Ms. Grace because she declined to provide course materials on March 1, that reason is also pretextual. The fact is that Respondent had given Ms. Grace 30 days to complete course materials after her suspension. (G.C. Exh. 7, p.2). When Mr. Blackledge emailed Ms. Grace on March 1 about the course materials, he did not state that the materials had to be turned in that same day. (G.C. Exh. 13). In fact, Mr. Blackledge simply asked Ms. Grace to “please start making progress on lesson plans, syllabus, course grid and presentation materials.” (G.C. Exh. 13). Ms. Grace did not tell Mr. Blackledge or anyone else in management that she would not be providing the course materials for these courses between the time of her suspension and her termination, including March 1 and 2. (Tr. 98:25-99:6). Thus, even under Respondent’s plan to fire Ms. Grace if she refused to turn in course materials on March 1, she should not have been terminated because she in fact did not refuse to provide course materials at any point on March 1. Therefore, even Respondent’s ultimate reason for terminating Ms. Grace is pretextual.

The fact that Respondent changed its plan from giving Ms. Grace 30 days to provide course materials in the suspension memo to requiring her to turn in the materials immediately upon her return from suspension is itself evidence of pretext. *Gravure Packaging, Inc.*, 32 NLRB at 1306 (the Board-affirmed ALJ decision relied on Respondent’s failure “to follow its own recommendation” to demote an employee, rather than discharge him, to find that Respondent’s justification for the discharge was pretextual). Thus, Respondent’s failure to follow its own recommendation to allow Ms.

Grace 30 days to provide the course materials and instead discharge her 20 days before the 30-day period expired is itself evidence of pretext.

**2. The ALJ properly found that Respondent could not establish a *Wright Line* defense.**

In Exception No. 18, Respondent objects to the ALJ's failure to find that Respondent would have suspended and terminated Ms. Grace even in the absence of her Union activity. The Board has noted, "A finding of pretext defeats any attempt by the Respondent to show that it would have discharged the discriminatees absent their union activities. This is because where 'evidence establishes that the reasons given for the Respondent's action are pretextual – that is, either false or not in fact relied upon – the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis.'" *Rood Trucking Company, Inc.*, 342 NLRB 895, 898 (2004) (citing *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003)). For the reasons discussed at length above, the ALJ properly found that Respondent's purported reasons for suspending and terminating Ms. Grace were pretextual and thus insufficient to establish a *Wright Line* defense.

In addition to the discussion above, Respondent's defense of its termination of Ms. Grace as being consistent with how it treated other employees in the past is not supported by the record. At the hearing, Respondent presented the termination notices of five former employees. (Resp. Exh. 26 through 29). However, these termination notices are bare summaries of the grounds for the respective terminations. In conjunction with these terminations, Respondent did not present detailed testimony about any of these

terminations. Without more, these five summary termination notices are insufficient to compare those terminations with Ms. Grace's and to establish that Respondent did not treat Ms. Grace disparately because of her protected activity.

Based on the foregoing and the record as a whole, the ALJ properly found that Respondent violated Section 8(a)(3) and (1) of the Act by suspending and terminating Ms. Grace on February 22 and March 2 respectively. Accordingly, the ALJ's findings and conclusions with respect to these violations should be upheld and Respondent's Exception Nos. 1-18 and 55-60 should be denied in their entirety.

**3. The ALJ properly found that Ms. Grace did not engage in conduct barring her from reinstatement and back pay.**

In Exception Nos. 19-21, Respondent objects to the ALJ's finding that Respondent failed to meet its burden of proving that Ms. Grace tampered with her laptop before returning it. Furthermore, Respondent challenges the ALJ's conclusion that even if Ms. Grace had tampered with the laptop, the alleged misconduct is not of the character to render her unfit for further service. The standard remedy for Section 8(a)(3) and (1) terminations is reinstatement with back pay, and the Board will deny this remedy only where an employer demonstrates that "the misconduct was so violent or of such a serious character as to render the employee unfit for future service." *Flatiron Materials Co.*, 250 NLRB 554, 560 (1980) (citing *MP Industries, Inc., et al.*, 227 NLRB 1709, 1710 (1977)).

Here, the ALJ properly found that Respondent failed to demonstrate that Ms. Grace engaged in misconduct of such a serious character as to render her unfit for future services. Respondent alleges that Ms. Grace deleted a partition from her laptop prior to returning it on March 3, which caused it to lose all of Ms. Grace's course materials. In

support of this allegation, Respondent presented IT employee Denny Trujillo who testified that he and co-worker Jason Enzer worked on Ms. Grace's laptop after her termination. (Tr. 667:9-14). Mr. Trujillo testified that upon opening the laptop, they discovered that a partition had been deleted, that there was no operating system on the laptop, and that they were unable to recover files from the laptop. (Tr. 667:21-22).

Given that the misconduct has to be of "such a serious nature as to render an individual unfit for future service," the ALJ properly found that the evidence does not support denying Ms. Grace back pay and reinstatement based on the alleged misconduct. *Id.* First, Ms. Grace denied having deleted any partition on the laptop. (Tr. 96:13-15). Second, Mr. Trujillo was not the best witness to testify about the state of Ms. Grace's laptop because Jason Enzer did most of the work on the laptop, not Mr. Trujillo. (Tr. 699:3-701:7, 707:16-18).

Even crediting Mr. Trujillo's testimony that there was no partition on the laptop, Mr. Trujillo could not tell when the partition or the software on the laptop had been deleted. (Tr. 703:1-8). Mr. Trujillo testified that IT received the laptop four or five days after Ms. Grace's termination and that he had no knowledge of where the laptop was during that time. (Tr. 698:18-23). Ms. Grace returned the laptop one day after she was terminated, on March 3. Based on Mr. Trujillo's testimony, there was a period of three to four days where neither Ms. Grace nor IT had the laptop. Because Mr. Trujillo could not tell when the partition had been deleted, the partition could have been deleted at any point prior to IT looking at the laptop, including the three or four days between when Ms. Grace turned in the laptop and when IT received it.

Although Mr. Trujillo initially testified that a partition cannot be unintentionally deleted, he subsequently admitted: “Sometimes we, ourselves [in IT], accidentally would delete a partition ...” (Tr. 675:2, 702:18-21). Therefore, based on the evidence, the deletion of the partition in Ms. Grace’s laptop could have resulted from an inadvertent act, devoid of any malice or egregious nature so as to make Ms. Grace unfit for reinstatement.

Notwithstanding the deleted partition, Ms. Grace had problems with the laptop throughout her employment. (Tr. 92:7-9). The laptop often crashed on a weekly basis. (Tr. 92:11-18). Mr. Trujillo himself testified that a computer that is constantly crashing is not a stable system. (Tr. 704:6-8). The problems with the laptop led Ms. Grace to use other computers at the School to complete her course materials, which Mr. Blackledge was aware of. (Tr. 94:2-17, 95:10-16; G.C. Exh. 15). Thus, at the time of her termination, Ms. Grace was no longer using her laptop and she had saved work product in other computers at the School, which she did not delete after her termination. (Tr. 98:8-11). Hence, even if the deleted partition caused the laptop’s files to be lost, Respondent had access to her course materials in the Workstation PC and Game Lab computer which she had used, in addition to the emailed copies that Ms. Grace had provided Mr. Blackledge in October 2009 and again in February. Additionally, Respondent could not establish what documents it lost from the laptop because it did not know what files were actually saved on the laptop. (Tr. 649:17-650:2).

In short, not only did Respondent fail to establish that Ms. Grace intentionally deleted a partition on the laptop, Respondent also failed to establish what damages it

suffered as a result of the deleted partition beyond the cost of having to reinstall a Windows 7 license on the laptop. The laptop in fact suffered no permanent damage and was fully functional afterward. (Tr. 705:20-706:9).

Based on these facts, the ALJ properly concluded that Respondent failed to establish that Ms. Grace engaged in “misconduct [that] was so violent or of such a serious character as to render [her] unfit for future service.” *Id.* Accordingly, the ALJ’s conclusion should be upheld and Respondent’s Exception Nos. 19-21 should be denied in their entirety.

**D. The ALJ properly found that Respondent violated Section 8(a)(1) of the Act by promising Course Directors in the Game Production Department reclassification to Department Chair positions.**

Respondent challenges the ALJ’s findings and conclusion that Respondent violated Section 8(a)(1) of the Act by promising Course Directors in the Game Production Department reclassification to Department Chair positions (Exception Nos. 26-32). “An allegation that an employer has violated Section 8(a)(1) by making a promise of benefits in response to union organizational activity is analyzed under *NLRB v. Exchange Parts*, 375 U.S. 405 (1964).” *Network Dynamics Cabling, Inc.*, 351 NLRB 1423, 1424 (2007). In *NLRB v. Exchange Parts*, the Supreme Court held that an employer’s conferral of benefits for the purpose of affecting their support of a union violates the Act. *NLRB v. Exchange Parts*, 375 U.S. at 409-410. Thus, in applying *NLRB v. Exchange Parts*, it is necessary to determine “whether the record as a whole, including any proffered legitimate reason for the [benefit] ... supports an inference that

the offer was motivated by an unlawful purpose to coerce or interfere with ... protected union activity.” *Network Dynamics Cabling, Inc.*, 351 NLRB at 1424.

The Board in *Network Dynamics Cabling, Inc.* heard a case where an employer knew of an employee’s union activity and knew from the employee himself that he wanted a higher wage and the opportunity to advance quickly. *Id.* The employer subsequently offered the employee a promotion and a raise. *Id.* The employer’s purported legitimate reason was retaining the employee because it interpreted the employee’s expression of his wishes as an indication that he would leave the employer for a union shop. *Id.* In overturning the ALJ’s decision, the Board found that the record supported an inference that the employer’s offer was motivated by an unlawful purpose. *Id.* The Board noted that the employer knew what the employee wanted and the offer mirrored those wishes. *Id.* The Board found that the employer’s purported reason for the promised benefits, retaining the employee, was unfounded because the employee never threatened to quit. *Id.* Thus, the Board found that “in sum, the totality of [the employer’s conduct] toward [the employee] suggests a classic carrot-and-stick effort to coerce him to abandon his union activities and sympathies.” *Id.*

Here, the ALJ applied the proper standard and found a violation based on the facts in the record, which are analogous to *Network Dynamics Cabling, Inc.* Like the employer in that case, Respondent here knew the faculty were upset about being switched from salary to hourly and its promise to reclassify the Games Department faculty to Department Chair positions mirrored those wishes. Respondent’s knowledge of the faculty’s dissatisfaction with being switched from salary to hourly is evidenced in Mr.

Milly's April 29 letter. (Joint Exh. 1, Attach. G). The Department Chair position addressed this very issue by exempting the Games Department faculty from that change.

Furthermore, like the employer in *Network Dynamics Cabling, Inc.*, Respondent's purported legitimate reason is unfounded and, contrary to Respondent's Exception Nos. 28 and 29, the ALJ found this reason to be pretextual. Respondent contends that it was concerned about the change's impact on the Games Department faculty and the potential that the faculty would leave because of the need to work full-time. (Tr. 627:12-628:11). Like the employee in *Network Dynamics Cabling, Inc.*, there is no evidence in the record that the Games faculty threatened to quit. In addition, if Respondent were truly concerned with the impact on the Games Department faculty, it could have easily excluded that department from the change when it announced the change only two weeks earlier on January 25. (G.C. Exh. 2). Nothing changed between January 25 and February 11 in Respondent's circumstances that would explain why Respondent included the Games Department faculty in the initial change from salary to hourly, a decision that Respondent considered for several months, and then suddenly changed its mind two weeks later and offered the Games Department faculty Department Chair positions only to exempt them from being switched to hourly pay. (Tr. 638:20-24). The only thing that changed during this time period was the inception of the faculty's organizing drive.

Furthermore, Ms. Grace's conversation with Mr. Blackledge on February 11 is clear evidence of Respondent's motivation for the Department Chair position offer. In his conversation with Ms. Grace, Mr. Blackledge accused Ms. Grace of being the leader of the revolt and threatened her to accept the position and move on, otherwise things

might happen that she would not like. (Tr. 49:16-18). This threat not only referenced protected activity by accusing Ms. Grace of being the leader of the revolt but also linked the promised Department Chair position to the protected activity. If the promised Department Chair position were not linked to the protected activity, there would be no reason for Mr. Blackledge to threaten Ms. Grace to accept the position and move on. Thus, like in *Network Dynamics Cabling, Inc.*, the totality of the circumstances “suggest a classic carrot-and-stick effort” to coerce employees. *Id.* Contrary to Respondent’s allegation in its supporting brief (Respondent’s Brief, 37, n. 11), Respondent did in fact provide employees the carrot by actually implementing the change, as evidenced by the change in title in Ms. Grace’s pay check. (G.C. Exh. 4). When the carrot proved to be insufficient, Respondent suspended and terminated Ms. Grace. Thus, as an effort to coerce employees, Respondent’s promise to promote Games Department faculty to Department Chair positions violated the Act.

In an effort to argue that Respondent’s reasons for offering and implementing the reclassification to Department Chair positions were legitimate, Respondent argues that when it announced its salary restructuring in January, it also announced the creation of Department Chair positions. (Exception No. 31). In announcing the salary restructuring, Respondent did announce that “full time salary exempt Department Chair positions will be created to coordinate and manage the hourly instructional staff” and that “additional full time or part-time salaried positions will be created where it is deemed vital to support educational processes.” (G.C. Exh. 2). Here, in offering the reclassification to the Games Department faculty, Respondent specifically offered them Department Chair

positions. At first glance, it may seem that Respondent's offer is consistent with plans that preceded the Union organizing drive. However, for the reasons discussed above, Respondent's Department Chair position offer to the Games Department faculty was not the product of a pre-established plan. Furthermore, as Respondent's plan itself states, the Department Chair positions were intended to "coordinate and manage the hourly instructional staff." (G.C. Exh. 2). Because Respondent offered the entire faculty in the Games Department the Department Chair position, it follows that there would be no hourly staff for them to manage. Therefore, the purpose of the Department Chair reclassification in the Games Department was not to implement the pre-established plan of having Department Chairs manage hourly staff but to coerce the Games Department faculty, including Ms. Grace whom Respondent knew was the leader of the "revolt," from engaging in further organizing efforts.

Based on the foregoing and the record as a whole, the ALJ properly found that Respondent violated Section 8(a)(1) of the Act by promising Course Directors in the Games Department reclassification to the position of Department Chairs. Accordingly, the ALJ's findings and conclusion as to this violation should be upheld and Respondent's Exception Nos. 26-32 should be denied in their entirety.

**E. The ALJ properly found that Respondent violated Section 8(a)(1) of the Act by threatening Ms. Grace with retaliation.**

Notwithstanding Respondent's Exception Nos. 22-25, the ALJ properly found that Respondent violated Section 8(a)(1) of the Act by threatening Ms. Grace with retaliation. In applying Section 8(a)(1), the Board has held that making veiled threats of possible

repercussions for protected activity violate the Act. *Leather Center, Inc.*, 308 NLRB 16, 27 (1992). As discussed above, on February 11, Mr. Blackledge told Ms. Grace that he knew what was going on, that she was the “leader of the revolt.” (Tr. 48:8-18). Mr. Blackledge also told Ms. Grace to accept the position and move on, otherwise things might happen that she would not like. (Tr. 49:16-18). The Board in *Leather Center, Inc.* found that the employer had violated Section 8(a)(1) of the act based on a statement by the employer to an employee that he knew she was talking to employees about the union and that she should be careful. *Id.* The Board found this statement to be a veiled threat of possible repercussions because of her suspected protected activity. *Id.* Like in *Leather Center, Inc.*, Mr. Blackledge stated having knowledge of Ms. Grace’s protected activity. In *Leather Center, Inc.*, the employer said he knew the employee was talking to employees about the union. Similarly here, Mr. Blackledge accused Ms. Grace of being the leader of the revolt. Furthermore, like in *Leather Center, Inc.*, Mr. Blackledge’s statement to Ms. Grace to move on, otherwise things might happen that she would not like, is a veiled threat of reprisal for her protected activity. It is also worth noting that contrary to Respondent’s argument (Respondent’s Brief, 40), Mr. Blackledge’s veiled threat to Ms. Grace was directly connected to her protected activity in that immediately before making the threat, Mr. Blackledge accused Ms. Grace of being the leader of the “revolt.” Also contrary to Respondent’s argument (Respondent’s Brief, 40), the Department Chair reclassification did in fact take place. (G.C. Exh. 4).

Based on the foregoing and the record as a whole, the ALJ’s conclusions should be upheld because he properly found that Respondent violated Section 8(a)(1) of the Act

by threatening Ms. Grace on February 11 with retaliation for engaging in protected activity. Accordingly, Respondent's Exception Nos. 22-25 should be denied in their entirety.

**F. The ALJ properly found that Respondent violated Section 8(a)(1) of the Act by instructing employees not to attend faculty meetings.**

Contrary to Respondent's Exception Nos. 33-40, the ALJ properly found that Respondent violated Section 8(a)(1) of the Act by instructing employees not to attend faculty meetings. In assessing employer prohibition of employee discussions, the Board has held that rules prohibiting employee discussions of terms and conditions of employment, including wages, violate the Act, absent a business justification for the rule. *Radisson Plaza Minneapolis*, 307 NLRB 94, 94 (1992). The uncontroverted record here establishes that Mr. Milly instructed staff in the Animation Department not to attend faculty meetings where faculty outside of the Animation Department were discussing Respondent's announcement to change faculty from salary to hourly employees. (Tr. 53:4-13, 54:21-23; Joint. Exh. 1, Attach. G). By telling Animation Department faculty not to attend these faculty meetings, Mr. Milly in effect prohibited Animation faculty from discussing the salary to hourly change with other co-workers in other departments. Respondent here did not present any evidence to establish a business justification for the prohibition. Because the prohibition concerns terms and conditions of employment, it clearly violates the Act. *Id.*

In support of its exceptions regarding this violation, Respondent argues that nothing in the record establishes that Mr. Milly actually "once mentioned the union."

(Respondent's Brief, 41-42). Although Mr. Milly may not have actually mentioned the Union, his admission to Ms. Grace on February 20 that he had instructed his staff not to attend the faculty's meetings and that he knew what was going on in their meetings clearly relate to the Union meetings. (Tr. 53:13, 54:21-23). By the time of Mr. Milly's conversation with Ms. Grace, the Union meetings had been going on for about three weeks and Mr. Milly could only have been referring to these Union meetings. Even if Mr. Milly did not specifically mention the Union and even if his prohibition only referred to non-Union faculty meetings, the prohibition still violates the Act because – as argued above – the meetings constitute protected concerted activity because they were held to discuss terms and conditions of employment, a fact which Mr. Milly himself admits in his April 29 letter. *Radisson Plaza Minneapolis*, 307 NLRB at 94 (Joint Exh. 1, Attach. G).

Respondent also argues that adverse inferences should be drawn from the fact that the Acting General Counsel failed to call Mr. Milly or anyone from the Animation Department as a witness. (Respondent's Exception No. 37). However, at the hearing and in its brief, Respondent failed to establish that Mr. Milly or anyone in the Animation Department would be favorably disposed to the Charging Party or the Acting General Counsel. Thus, adverse inferences cannot be drawn from the Acting General Counsel's decision not to call Mr. Milly or any faculty member from the Animation Department because these individuals were not "favorably disposed" to the Acting General Counsel. (ALJD 5:14-18, citing *Douglas Aircraft Co.*, 308 NLRB 1217 (1992)).

Furthermore, contrary to Respondent's Exception Nos. 38-40, the ALJ properly found that Mr. Milly's April 29 letter to the Animation Department faculty is insufficient

to absolve Respondent of the violation. In order for subsequent neutralizing or repudiating statements to relieve liability, “such repudiation must be timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed illegal conduct.” *Passavant Memorial Area Hospital*, 237 NLRB 138, 138 (1978) (internal quotations and citation omitted). In addition, the repudiation “should give assurances to employees that in the future their employer will not interfere with the exercise of Section 7 rights.” *Id.* Here, Mr. Milly’s letter fails in at least three important respects. First, “the attempted disavowal was not timely” because it came on April 29, approximately five to six weeks after mid February when he made the prohibition to his staff. *Id.* at 139 (the Board found a seven-week delay to be untimely). Second, it failed to be sufficiently clear and specific insofar as it did not admit any wrongdoing. *See id.* “And, most importantly, [Mr. Milly’s letter] did not assure employees that in the future [he] would not interfere with the exercise of their Section 7 rights by such coercive conduct.” *Id.* Instead, in his letter, Mr. Milly alleged that he was misinterpreted and that he respected faculty members’ right to participate in organizing activities. However, he failed to provide any assurances for the future. In its supporting brief, Respondent argues that the ALJ’s conclusion as to the repudiation is incorrect because the Board has held that “an employer effectively repudiated a unilateral change although it did not meet all the criteria stated in *Passavant*.” (Respondent’s Brief, 42). Although Respondent may be correct in pointing out that all of the *Passavant* criteria need not be met, the ALJ’s conclusion is nonetheless correct because Respondent did not merely fail to meet one of

*Passavant's* criteria, Respondent failed to meet a majority of the criteria. Therefore, Mr. Milly's repudiation is insufficient and does not relieve Respondent of liability. *Id.* at 138.

Based on the foregoing and the record as a whole, the ALJ properly found that Respondent violated Section 8(a)(1) of the Act by instructing employees in the Animation Department not to attend faculty meetings where employees were discussing among themselves terms and conditions of employment and the Union. Accordingly, the ALJ's conclusions as to this violation should be upheld and Respondent's Exception Nos. 33-40 should be denied in their entirety.

**G. The ALJ properly found that Respondent violated Section 8(a)(1) of the Act by creating the impression of surveillance.**

In Exception Nos. 41-45, Respondent excepts to the ALJ's finding that Respondent violated Section 8(a)(1) of the Act by creating the impression of surveillance. Contrary to Respondent's exceptions and its supporting brief, the ALJ properly found that Respondent violated Section 8(a)(1) of the Act by creating the impression of surveillance. "The Board's test for determining whether an employer has created an unlawful impression of surveillance is whether, 'under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance.'" *Stevens Creek Chrysler Jeep Dodge, Inc.*, 353 NLRB No.132, slip op. at 3 (2009) (citing *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1276 (2005)). In applying this test, the Board "'does not require employees to attempt to keep their activities secret before an employer can be found to have created an unlawful impression of surveillance.'" *Central Valley Meat*

Co., 346 NLRB 1078, 1080 (2006) (citing *United Charter Service*, 306 NLRB 150, 151 (1992)).

In *Stevens Creek Chrysler Jeep Dodge, Inc.*, the Board held that the employer had created an unlawful impression of surveillance. 353 NLRB at slip op. 3-4. The employer in that case interrogated two employees about a union meeting which the employer learned about from an employee who volunteered the information. The employees' union meetings were not publicized, open events. In interrogating the employees about the meeting, the employer did not state how it knew about the meetings. In finding that the circumstances would lead employees to reasonably assume that their union activities had been placed under surveillance, the Board stated, "When an employer tells employees that it is aware of their union activities, but fails to tell them the source of that information, the employer violates Section 8(a)(1)." *Id.* at 3.

**February 11.** The ALJ properly found that Mr. Blackledge's statement on February 11 created the impression of surveillance. As discussed above, on that day, Mr. Blackledge told Ms. Grace that he knew what was going on, that Ms. Grace was the leader of the revolt. Mr. Blackledge also told Ms. Grace to accept the position as Department Chair and move on, otherwise thing might happen that she would not like. With these statements, Mr. Blackledge made reference to Ms. Grace's protected activity but, like the employer in *Stevens Creek Chrysler Jeep Dodge, Inc.*, failed to state the source of his knowledge. In addition, Mr. Blackledge's statements included a veiled threat of reprisal, a violation of the Act in and of itself as discussed above. Furthermore, to indentify "leaders" when those leaders in question have not openly demonstrated their

leadership or support leaves the impression of surveillance. *Peter Vitalie Company, Inc.*, 310 NLRB 865, 874 (1993). Here, Ms. Grace had not openly demonstrated her leadership in the organizing drive. Because Mr. Blackledge did not state the source of his knowledge, identified Ms. Grace as a leader when she had not openly shown it, and followed his statement with a veiled threat, Mr. Blackledge's statements on February 11 created the impression of surveillance.

**February 20.** The ALJ also properly found that Mr. Milly's statement on February 20 created the impression of surveillance. On that day, Mr. Milly admitted to Ms. Grace that he had instructed his staff not to attend the faculty's meetings and told her that he knew what was going on in their faculty meetings. (Tr. 53:13, 54:21-23). Like the employer in *Stevens Creek Chrysler Jeep Dodge, Inc.*, Mr. Milly failed to state the source of his knowledge. In addition, like in *Stevens Creek Chrysler Jeep Dodge, Inc.* where the statement was accompanied by or was part of another violation of the Act, Mr. Milly accompanied the statement by admitting another violation of the Act, namely having instructed his staff not to attend the faculty's meetings. Therefore, the statement here too would lead a reasonable employee to assume that their protected activities had been placed under surveillance. *Stevens Creek Chrysler Jeep Dodge, Inc.*, 353 NLRB at slip op. 3.

**February 22.** The ALJ properly found that Mr. Blackledge's statements on February 22 also created the impression of surveillance. On this day, Mr. Blackledge accused Ms. Grace of being the leader who was turning the Games Department and faculty against him and the School. (Tr. 61:17-20). Like in the February 11 incident, Mr.

Blackledge failed to state the source of his knowledge just like the employer in *Stevens Creek Chrysler Jeep Dodge, Inc.* Also, like the employer in *Peter Vitalie Company, Inc.*, Mr. Blackledge identified Ms. Grace as a leader when she had not publicly demonstrated it. Besides identifying Ms. Grace's leadership, later in the same conversation Mr. Blackledge required Ms. Grace to report her whereabouts to him when she returned from her suspension, thereby creating the impression that her activity would be closely monitored in the future. (Tr. 62:24-63:6) Thus, Mr. Blackledge's statements on February 22 also created the impression of surveillance.

Based on the foregoing and the record as a whole, the ALJ properly found that Respondent violated Section 8(a)(1) of the Act by creating the impression of surveillance on February 11, 20, and 22, and the ALJ's findings and conclusions as to this violation should therefore be upheld. Consequently, Respondent's Exception Nos. 41-45 should be denied in their entirety.

**H. The ALJ properly found that Respondent violated Section 8(a)(1) of the Act by disparately enforcing its access policy.**

Contrary to Respondent's Exception Nos. 46-50, the ALJ properly found that Respondent violated Section 8(a)(1) of the Act by disparately enforcing its access policy. Where an employer discriminatorily enforces an access rule to exclude union representatives from its premises, it violates Section 8(a)(1) of the Act. *Chrysler Corporation, Dodge Truck Plant*, 232 NLRB 466 (1977). Here, prior to March 9, Respondent maintained a rule which restricted access to its facility to teachers, staff, and students. However, this rule was not enforced with respect to faculty guests. Prior to

March 9, faculty guests were allowed access to the School without any problem. For example, Tema Staig had guests visit the School to watch movies in the Building 1 theater on at least five occasions. (Tr. 274:4-19, 275:17-20). Even though there were policies in place which required visitors to sign in upon entering the School, Ms. Staig's guests would enter the building with her for the movie showings, security would not ask them to sign in, and her guests were never asked to leave under any circumstances. (Tr. 278:14-19, 279:15-19, 303:15-24). Furthermore, Respondent's Vice President of Operations and Facilities Patrick Olmstead admitted that he would generally defer to the faculty with respect to their guests. (Tr. 776:3-11). Thus, these facts suggest that faculty's guests were permitted to enter and remain in the School, even when they did not follow sign-in policies.

However, on March 9, Respondent ejected CFT Representative Peter Nguyen from its facility, even though he was there as a guest of the faculty to attend a meeting with Celina Reising. (G.C. Exh. 22; Tr. 227:13-229:12, 264:10-21). Like other faculty guests, even though Mr. Nguyen did not sign in – security did not ask him to do so – upon entering the School, he had no trouble entering the Building 1 or 2. (Tr. 239:15-18, 271:15-16). While at the School, Mr. Nguyen identified himself to Mr. Smith as a Field Representative for the CFT. (Tr. 232:2-7; G.C. Exh. 22, p.2). Even though Mr. Nguyen was a guest of the faculty and had not been disruptive (he spoke in a normal tone a voice with faculty members, did not clap, make noise or obstruct foot traffic) while at the School, Mr. Smith ordered security to have Mr. Nguyen removed from the facility. (G.C. Exh. 22, p.2; Tr. 233:10-11, 236:7-25, 243:7-10, 267:14-268:8, 273:4-7). Security

followed Mr. Smith's orders, located Mr. Nguyen and removed him from the facility. (G.C. Exh. 22).

Based on the facts above, the evidence establishes that Mr. Nguyen's ejection on March 9 constituted discriminatory enforcement of Respondent's rules. Although Mr. Nguyen admittedly did not sign in, faculty guests regularly failed to sign in and were nevertheless allowed in the School. In addition, like Ms. Staig's guests who did not identify themselves and who were not asked to sign in, security did not ask Mr. Nguyen to sign in. Respondent argues that Mr. Nguyen's ejection was not discriminatory because Mr. Nguyen's visit can be distinguished from Ms. Staig's examples based on non-Section 7 grounds. (Respondent's Brief, 45). However, based on the facts cited above, no such distinction can be made. Ms. Staig's movie guests were allowed access to the facility solely because they were her guests; they did not sign in, they did not identify themselves, they did not establish the purpose for their visit, and they were not asked to sign in. Similarly, Mr. Nguyen did not sign in, nor was he asked to sign in or to state the purpose for his visit; he was initially allowed to enter the facility simply because he was a guest of faculty. Thus, faculty guest access to the facility was blind of the purpose of the visit. Considering that Mr. Nguyen was not loud or otherwise disruptive, his subsequent ejection was not blind and was solely based on the fact that he was a Union representative, which is the sole reason why Mr. Smith ordered security to remove Mr. Nguyen after Mr. Nguyen identified himself as a CFT Field Representative.

In an attempt to establish that Mr. Nguyen's ejection was not discriminatory, Respondent presented evidence of a couple of incidents where individuals were removed

from the facility. (Resp. Exh. 43). However, in all of those incidents, the individual ejected was not a guest of a faculty member and was causing some sort of disturbance. (Resp. Exh. 43). Aside from presenting these distinguishable incident reports, Respondent failed to represent evidence of other peaceful, non-Union faculty guests being ejected from its facility.

Based on the foregoing, the record supports the ALJ's conclusion that Respondent violated Section 8(a)(1) of the Act by selectively and disparately ejecting Mr. Nguyen from its facility on March 9. Accordingly, the ALJ's findings and conclusion as this violation should be upheld and Respondent's Exception Nos. 46-50 should be denied in their entirety.

**I. The ALJ properly found that Respondent violated Section 8(a)(1) of the Act by promulgating a new visitor policy on March 11.**

In Exception No. 51, Respondent objects to the ALJ's conclusion that Respondent violated Section 8(a)(1) of the Act by promulgating a new visitor policy on March 11. Contrary to Respondent's exception, the ALJ properly found a violation. The Board has held that "an otherwise valid rule violates the Act when it is promulgated to interfere with the employee right to self-organization rather than to maintain production and discipline." *Harry M. Stevens Services, Inc.*, 277 NLRB 276, 276 (1985). Respondent here promulgated a new visitor policy on March 11. (Joint Exh. 1, Attach. D). Among other things, the new policy required employees' visitors to be pre-approved by management. The new visitor policy also specifically prohibited all visitors from the Ivar Theater. On

its face, the new visitor policy is lawful. However, the record establishes that the policy was promulgated to discourage Union activity.

Respondent alleges that the new visitor policy was necessary to address a rash of thefts, including the theft of laptop computers. (Respondent's Brief, 46; Joint Exh. 1, Attach. D). However, the timing of the promulgation of the policy alone suggests an unlawful motivation. *See Cannondale Corp.*, 310 NLRB 845, 846 (1993) (rule found unlawful based in part on timing). Respondent issued the new policy on March 11, only two days after Mr. Smith ordered security to remove Mr. Nguyen from the School after learning that Mr. Nguyen was a Union representative. In fact, Mr. Olmstead, the author of the new policy, admitted that promulgation of the policy was motivated by the March 9 incident with Mr. Nguyen. (Tr. 772:15-19).

In addition, the fact that the new policy specifically prohibited all visitors from the Ivar Theater suggests that the rule was promulgated to interfere with Union activity. At the outset of the Union organizing campaign, the faculty held meetings at the School on several occasions. The first time that the faculty met with Mr. Nguyen on February 2, they met at the Ivar Theater, which Mr. Levy – an admitted supervisor – had procured for the faculty to use. Thus, through Mr. Levy, Respondent knew that the faculty had used the Ivar Theater to engage in protected activity. By using the new visitor policy to specifically prohibit all visitors from the Ivar Theater – note that the new visitor policy did not strictly prohibit access to any other area of the School – Respondent ensured that the faculty would not be able to use the theater for any more Union meetings.

Furthermore, Respondent's reasons for the new visitor policy, as stated in the policy itself, are pretextual. First, Respondent failed to present evidence to establish that it was in fact experiencing a rash of thefts. Respondent presented evidence of only two theft incidents in February. (Resp. Exh. 43). Two incidents more than a month prior to Respondent's promulgation of its new visitor policy are hardly evidence of a "rash of thefts." Second, requiring faculty to have visitors pre-approved by their Department heads would not address any alleged theft problem. Respondent already maintained security guards at its facility. Requiring faculty to have their visitors pre-approved would not make Respondent's facility any less prone to thefts. If Respondent wanted to address a rash of thefts, it should have increased the number of security personnel, added cameras to the facility, or any number of other options such as it had employed in the past. (*See* G.C. Exh. 29). Requiring faculty to get prior approval of visitors only allowed Respondent to monitor employees' visitors, thereby affording it the information necessary to potentially discriminatorily exclude certain types of individuals such as union organizers, much in the same way it did with Mr. Nguyen when it learned of his presence on campus on March 9. Thus, Respondent's reasons for the new visitor policy are pretextual and its promulgation and maintenance of the March 11 visitor policy is unlawful.

Based on the foregoing and the record as a whole, the Board should uphold the ALJ's conclusion that Respondent violated Section 8(a)(1) of the Act by promulgating a new visitor policy on March 11 to interfere with the Union's organizing campaign. Consequently, Respondent's Exception No. 51 should be denied.

**J. The ALJ properly found that Respondent violated Section 8(a)(1) of the Act by providing sample revocation letters to employees on March 12 and 22.**

Contrary to Respondent's Exception Nos. 52-54 and 61, the ALJ properly found that Respondent violated Section 8(a)(1) of the Act by providing sample revocation letters to employees on March 12 and 22. The Board has held that "an employer may lawfully inform employees of their right to revoke their authorization cards, even where employees have not solicited such information, as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance, or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation." *R. L. White Co.*, 262 NLRB 575, 576 (1982).

However, an employer may not "exceed the permissible bounds of providing ministerial or passive aid in withdrawing from union membership." *Chelsea Homes, Inc.*, 298 NLRB 813, 834 (1990), *enfd. mem.* 962 F.2d 2 (2d Cir. 1992). Furthermore, an employer may not offer assistance to employees in revoking authorization cards in the context of other contemporaneous unfair labor practices. *Escada (USA), Inc.*, 304 NLRB 845, 849 (1991).

The Board in *Register Guard* applied *R. L. White Co.* and found that the employer had violated the Act. *Register Guard*, 344 NLRB 1142, 1143-1144 (2005). In *Register Guard*, the employer had sent employees two letters, dated nine days apart, advising "employees of their right to have their signatures withdrawn from the petitions they had signed authorizing the Union to represent them." *Id.* at 1143. In the second letter, the employer provided employees a form addressed to the union that employees could fill out to revoke their prior authorizations. *Id.* In finding that the employer had violated Section

8(a)(1) of the Act through its second letter which included the sample form, the Board relied on the fact that the employer “did more than inform employees of their right to revoke their cards – it enclosed a sample form.” *Id.* at 1144. Furthermore, the Board relied on the fact that the employer had committed other unfair labor practices within two weeks of its solicitation to employees to revoke their authorization, namely the unlawful solicitation of grievances two weeks prior and wage increases one week prior. *Id.*

The facts here are analogous to *Register Guard*. Like the employer in *Register Guard*, Respondent here did more than just provide information. Respondent provided employees with sample letters to revoke their Union authorization cards on two separate occasions, March 12 and 22. (Joint Exh. 1, p.2, Attach. E and F). The sample letters were pre-drafted so that an employee simply needed to date the letter, write their mailing address, and sign it. (Joint Exh. 1, Attach. E and F). Like the employer in *Register Guard*, Respondent provided this assistance in the context of other unfair labor practices. In *Register Guard*, the employer’s mere unlawful solicitation of grievances two weeks prior and wage increases one week prior were sufficient to find a violation. Here, on March 11, just a day before the initial sample letter, Respondent unlawfully promulgated the new visitor policy discussed above. Less than two weeks prior to that, Respondent unlawfully terminated Ms. Grace on March 2. In short, within the month prior to March 12, beginning on February 11, Respondent engaged in all the unfair labor practices found by the ALJ. Given this context of even more serious and numerous contemporaneous unfair labor practices, like in *Register Guard*, Respondent’s assistance “exceeded the permissible bounds of providing ministerial or passive aid in withdrawing from union

membership and actively solicited, encouraged, and assisted such withdrawals in violation of its duty to avoid such interference with employee rights under Section 8(a)(1) of the Act.” *Chelsea Homes, Inc.*, 298 NLRB at 834.

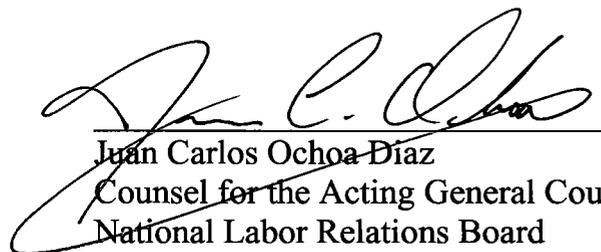
Based on the foregoing and the record as a whole, the ALJ properly found that Respondent violated Section 8(a)(1) of the Act by assisting employees to withdraw their Union authorization cards on March 12 and 22. Accordingly, the ALJ’s conclusion as to this violation should be upheld and Respondent’s Exception Nos. 52-54 and 61 should be denied.

### III. CONCLUSION

Based on the foregoing, Counsel for the Acting General Counsel submits that all of Respondent’s exceptions should be denied.

Dated at Los Angeles, California, this 17th day of June, 2011.

Respectfully submitted,

  
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Re: LA FILM SCHOOL, LLC AND ITS BRANCH LA RECORDING SCHOOL, LLC  
Case Nos: 31-CA-29627, 31-CA-29642, 31-CA-29719, 31-CA-29773  
31-CA-29775, 31-CA-29776

CERTIFICATE OF SERVICE

I hereby certify that I served the attached copy of the **COUNSEL FOR THE ACTING GENERAL COUNSEL'S AMENDED ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** on the parties listed below on the 17th day of June, 2011.

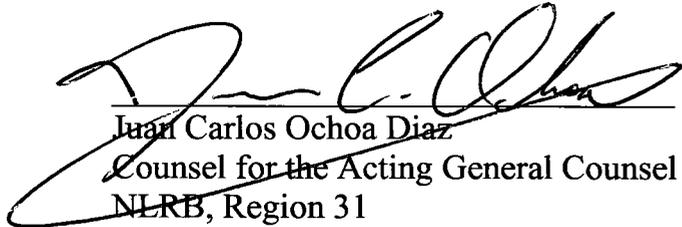
VIA E-FILE

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