UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 01

BERKLEE COLLEGE OF MUSIC and BERKLEE FACULTY UNION, AMERICAN FEDERATION OF TEACHERS, LOCAL 4412, AFT-MA, AFL-CIO	CASE 01-CA-089878

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF IN RESPONSE TO RESPONDENT'S EXCEPTIONS AND BRIEF IN SUPPORT THEREOF

Pursuant to Section 102.46(d) of the Board's Rules and Regulations, Counsel for the General Counsel files the following Answering Brief in Response to the Exceptions and Brief in support thereof filed by Respondent.

I. STATEMENT OF THE CASE

On November 18, 2013, Administrative Law Judge Susan Flynn issued her Decision in this case, finding that Berklee College of Music (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing and refusing to give the Union prior notice of, and an opportunity to bargain over, the effects of its decision to increase minimum course population size in about August 2012. Having concluded that Respondent's increase in minimum course populations constituted a change from its past practice, the Judge found that Respondent failed to afford the Union prior notice and an opportunity to bargain before implementing the change, in

violation of Section 8(a)(5) and (1) of the Act. (ALJD 20, lines 36-41; p. 24, lines 4-6)[1] Judge Flynn found that the effects of the change were material, substantial and significant, and that, as of the date of her Decision, one faculty member, Linda Gorham, had been impacted by the change. (ALJD 23, lines 39-42 and p. 17, footnote 28). Finally, Judge Flynn found that the Union did not waive its statutory right to bargain over the effects of the change. (ALJD 23, lines 39-42).

On September 20, 2013, Respondent filed eight Exceptions to the Judge's findings and recommended Order, along with a lengthy supporting brief. For the reasons set forth below, and based upon the record as a whole, Counsel for the General Counsel respectfully urges the National Labor Relations Board to reject all of Respondent's Exceptions and to affirm the Administrative Law Judge's rulings, findings, and conclusions, and to adopt her recommended Order in its entirety, except as modified by the Cross-Exceptions, and Brief in Support thereof filed by Counsel for the General Counsel.

II. SUMMARY OF THE CASE

The sole issue in this case is whether Respondent violated the Act when it unilaterally increased minimum course population size without first bargaining with the Union over the impact of that change on bargaining unit employees. The Judge correctly concluded that Respondent violated the Act because the policy was a change from the past practice, its impact was material, substantial and significant, and the

[1] References to Judge Flynn's decision are cited as "ALJD" followed by the page and line number, where appropriate. References to Respondent's Brief in Support of its Exceptions are designated "R. Br. to Board at _," followed by the page number. References to Counsel for the General Counsel's Brief in Support of Judge Flynn's Decision are cited as "GC Br. to Board at _," followed by the page number. References to the exhibits of Counsel for the Acting General Counsel and Respondent are cited herein as "GCX- __" and "RX- __," respectively, followed by the exhibit number(s). References to joint exhibits are cited herein as JTX-____. References to the official transcript of the hearing are cited as "Tr. __", followed by the page number.

Union never waived its right to bargain over the impact. She found that the Respondent implemented the change without first notifying or bargaining with the Union over the impact of the change. In its Exceptions, Respondent contends that it did not violate the Act because: (a) the Union waived its mid-term bargaining rights; (b) the increase in minimum course populations did not constitute a change in employees' terms and conditions of employment and, even if it did, Respondent was not required to bargain because the change did not have a material, substantial and significant effect on unit employees; (c) Respondent bargained with the Union in good faith about the effects of the change on unit employees prior to implementation; (d) the case should have been deferred pursuant to *Collyer Insulated Wire,* 192 NLRB 837 (1971); and, alternatively, (e) the case should have been dismissed pursuant to the contract coverage doctrine. As discussed herein, there is no merit to Respondent's Exceptions to the Judge's decision; therefore, all of the Exceptions should be dismissed and the Judge's decision should be affirmed, except as modified by the Cross-Exceptions, and Brief in Support thereof filed by Counsel for the General Counsel.

III. RESPONDENT'S EXCEPTIONS ARE WITHOUT MERIT

A. Background

Respondent, a college of contemporary music located in Boston, Massachusetts, employs approximately 580 part-time and full-time faculty members who are represented by the Berklee Faculty Union, American Federation of Teachers, Local 4412, AFT-MA, AFL-CIO (the Union). This case originated when Respondent's curriculum committee adopted a proposal to increase the minimum course population in most courses. Respondent's Provost and Vice President of Academic Affairs, Lawrence

Simpson, adopted the recommendation, which was ultimately implemented during the late Summer/early Fall of 2012. Respondent conceded that it did not notify the Union of the change prior to implementation. (ALJD 8, lines 11-15). Upon learning of the change from unit employees, the Union demanded to bargain over its effects, requesting that the change be rescinded pending the outcome of that bargaining. However, by the time the parties met on September 5, the change was a *fait accompli*, and Respondent refused to rescind the change pending the outcome of bargaining. While multiple unit employees were impacted, many were reassigned to other courses, and suffered no adverse effect from the change. The Judge found that, as of the conclusion of the trial, one employee, Linda Gorham, had been adversely impacted, having not been offered a replacement for her cancelled course.[2]

B. Respondent's Exceptions

Respondent excepts to the Judge's decision on numerous grounds, disregarding and at times misrepresenting, inconvenient facts as determined by Judge Flynn. Considered together, and/or individually, Respondent's Exceptions regarding the Judge's findings and conclusions that it violated Section 8(a)(5) and (1) of the Act are entirely without merit.

1. The Judge correctly determined that the Union never waived its mid-term bargaining rights nor did it waive its right to bargain over the effects of Respondent's increase in minimum course population (Respondent's Exceptions #1 and 2).

Respondent argues that, both the parties' bargaining history, and the language of their collective-bargaining agreement, demonstrate that the Union waived its right to

[2] As argued in her Cross-Exceptions, and the Brief in Support of Cross-Exceptions filed herewith, Counsel for the General Counsel contends that the Judge's finding that only Gorham had been impacted, as of the date of the conclusion of the trial, by Respondent's unilateral increase in minimum course population was in error.

engage in any mid-term bargaining, including bargaining over the effects of unilateral changes such as the one at issue in the instant case. In so arguing, Respondent suggests that the mere fact that the parties reached a collective-bargaining agreement requires the inference that they intended no mid-term bargaining on any mandatory subject. Under established Board law, however, the presumption runs the other way: an obligation to bargain is presumed unless waived according to the Board's stringent standard.

The notion that a waiver of statutory rights will not be readily inferred in the absence of evidence that a party clearly and unmistakably bargained away the right in question is one of the oldest and most familiar of Board doctrines. *Provena St. Joseph Medical Center*, 350 NLRB 808, 810-11 (2007). The clear and unmistakable waiver standard is premised on the long-established proposition that the duty to bargain in good faith as required in Section 8(a)(5) of the Act continues throughout the term of a collective-bargaining agreement. *Id.* at 812. In spite of this well-entrenched standard, Respondent argues that the Judge erred in finding that the Union did not waive its right to bargain over the impact of Respondent's increase in minimum course populations. Thus, Respondent argues that the silence of the collective-bargaining agreement in the instant case with respect to the issue of minimum course population,

> can only be read to mean that the Union ceded to Berklee on those issues – that the matter fell within the college's right to direct faculty to "meet each teaching assignment at the scheduled time and place..."

(R. Br. to Board, p. 35). Respondent's position is unsupported by established Board law, and, and therefore, cannot reasonably be relied upon as a basis for reversing the Judge's decision.

Notably, Respondent does not argue that the Judge's decision with regard to the waiver issue is inconsistent with current Board law. Rather, it describes the Judge's rejection of its waiver arguments as reflecting a "hyper-technical approach that is inconsistent with the logic underpinning the Board's opinions in this area, the spirit of collective bargaining, and the greater goals of the Board." (R Br. to Board, p. 24). Moreover, Respondent incorrectly asserts that the Judge ignored its waiver argument regarding the alleged effect of the change in course minimums. (R. Br. to Board, p. 32). In fact, as indicated below, the Judge addressed this argument directly, correctly finding that there was no evidence that the parties had negotiated over the proposals:

> First, it has not been established that the parties in fact negotiated over any of those proposals as required to show they were "fully discussed and consciously explored." Second, some proposals pertained to changing contract language but it is unclear what the original language was since those contracts were not entered into evidence. And third, none of those proposals concerned setting minimum course populations or bargaining about the effects of a change thereto.

(ALJD 23, lines 25-30)

Respondent argues that the proposals from past contract negotiations that it put into evidence, themselves, constituted negotiations, and that "[f]or the Board to require anything more than this to establish waiver is just a trap to deny the College the benefit of its bargain." (R. Br. to Board, p. 39). Once again, as correctly noted by the Judge, the proposals do not constitute negotiations. Moreover, as she correctly states, the Board requires more than evidence that proposals were made – it requires evidence that they were "fully discussed and consciously explored." As in *Provena St. Joseph Medical Center,* 350 NLRB at 822, in the instant case there is nothing in the record to show that the subject of

minimum course population was mentioned, much less discussed, during contract negotiations that preceded the parties' current agreement. Thus, in light of the absence of any evidence that the parties discussed minimum course population during negotiations for the instant collective-bargaining agreement, the Board will not infer a waiver by the Union of its right to bargain over that subject. *Ibid.* Based on Respondent's failure to establish on the record that these proposals were fully discussed and consciously explored, the Judge correctly found that they could not be relied upon to establish waiver.

Finally, Respondent argues that it

> ...was not required to prove that the Union's historical proposals dealt with changes to course minimums, as that was not the issue on which the Union had requested to bargain in 2012. The issue was the effects – cancelling classes due to under population – and that is precisely what the Union repeatedly proposed and Berklee repeatedly rejected.

(R. Br. to Board, pp. 40-41.). It contends that the proposals and talking points show that the parties had bargained about the effects of course cancellations multiple times. This argument is flawed. As asserted again and again in the record by Respondent's witnesses, courses are cancelled for many reasons, not just because of low enrollment. Moreover, not all cancellations because of low enrollment are attributable to unilaterally imposed increases in minimum course population. Thus, even if Respondent had established, on the record, that the historical proposals were fully discussed and consciously explored, the Judge correctly found that there was no evidence that any of those proposals concerned minimum course population or the effects of changes thereto. (ALJD 23)

2. The Judge correctly found that, although Respondent was privileged to increase minimum course population size without first bargaining with the Union about the change, it was required to bargain over the effects of the change on unit employees because of its potential impact on unit employees' terms and conditions of employment. (Respondent's Exception #3)

Judge Flynn acknowledged, as did Counsel for the General Counsel, that it was fully within Respondent's managerial discretion to increase the minimum course population for most of its courses, but nevertheless concluded that it was required to bargain over the impact of that decision. As the Judge concluded,

> I find that Respondent had the right to make the management decision to change course population minimums. However, the potential effects of that decision are material, substantial, and significant – cancellation of classes causing loss of income; changed terms and conditions when a different replacement course was taught. Those are mandatory subjects of bargaining, and Respondent had an obligation to bargain with the union over those effects. The Respondent did not notify the union of the changes before implementation and refused to bargain or delay implementation when the union made those requests. (ALJD 20, lines 1-7)

Respondent argues that, nevertheless, it retained the discretion to implement the change without bargaining over its effects because the effects themselves constitute core management rights.[3] Respondent contends that, by requiring Respondent to bargain with the Union over the impact of its decision to increase minimum course population size, the Board impinges on its "right to handle its academic and student-focused operations."

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[3] Respondent's Exception #3 excepts to "the Judge's finding that decisions related to course content and academic schedules are subject to bargaining," As is clear from the Decision itself, the Judge's decision was consistent with Respondent's position, and that of Counsel for the General Counsel, that Respondent was privileged to make the decision to increase minimum course population unilaterally, but that it was still subject to the obligation to bargain with the Union over the effects of its decision.

Respondent acknowledges the Judge's determination that it had the unilateral right to change minimums while finding that it had a duty to engage in effects bargaining over the change. (R. Br. to Board, p. 42) Respondent then goes on to argue that the effects of the change are themselves core management rights and, therefore, not subject to a bargaining obligation, a fact that it contends the Judge ignored. The discussion on page 23 of the Judge's decision (cited in Respondent's Exception #3) concerns its waiver arguments. There is no discussion therein about whether the effects of the change were subject to bargaining. Under these circumstances, the legal or factual finding to which Respondent excepts remains unclear.

A similar argument was made to the Board, without success, in *Kendall College of Art,* 288 NLRB 1205 (1988). In that case, the Employer, a private nonprofit college, made a business decision to change the school from a three-year certificate program to a Bachelor and Associate of Fine Arts program. In finding a violation, the Board upheld the Administrative Law Judge's determination that the College had a legal right to make this fundamental business decision. Nevertheless, it agreed with the Judge that the College was required to bargain with the Union over the effects of its business decision. *Id.* at 1210. Similarly, in the instant case, while the Judge correctly found that Respondent had the right to decide to increase minimum course population size, whether for pedagogical, business, or other reasons. It was not, however, excused from its obligation to bargain with the Union over the effects of that decision.

3. The Judge correctly determined that the increase in minimum course population constituted a change in unit employees' terms and conditions of employment, and that it had a material, substantial and significant impact on unit employees. (Respondent's Exceptions #4 and 5)

Respondent contends that the Judge erred in finding that its increase in minimum course populations constituted a change in employees' terms and conditions of employment. First, Respondent argues, the increase did not constitute a "policy change" because the only change "is that now the optimal number is known and doesn't have to be intuited on a case-by-case basis; the only change is in transparency." (R. Br. to Board, p. 47-8). In fact, as the Judge correctly determined, the minimums were not "intuited on a case-by-case basis" prior to the change. As she correctly noted, the prior minimums appear to have been 3-5 for most classes, while the new minimums are identified as 5-7 students. (ALJD 11, lines 8-16).

Respondent's contention that the prior minimums were somehow ethereal, and that the change was merely an institutionalization of these previously ethereal minimums is analogous to an employer arguing that it did not implement a unilateral change when it began for the first time to enforce work rules that were previously in existence but had never been enforced. Such a change, like the effects of the change in the instant case, is subject to the collective-bargaining obligation imposed by Section 8(a)(5) of the Act. *American Medical Response*, 359 NLRB No. 144 at 2 (2013).

Respondent further misrepresents certain factual conclusions relied on by the Judge in reaching her decision. Respondent asserts, for example, that the Judge "recognized that changes to course minimums are a common occurrence...," and that they are "constantly in flux, rendering dynamic minimums the status quo." (R. Br. to Board, p. 48). In fact, the Judge explicitly rejected this notion, stating that "the assertion that minimums were changed on a regular basis is not supported by the evidence," and that "they were changed only occasionally when some change in the class was proposed." (ALJD 21, lines 19-22).

Finally, Respondent contends that it was under no obligation to bargain about the effects of its unilateral change because, it maintains, "the Judge found that 'the evidence shows that the only faculty member who may have been affected by the change in course population minimums as of the date of the trial was [Linda] Gorham.'" Thus, Respondent argues, Counsel for the General Counsel failed to meet her burden of establishing that the effect was material, substantial and significant and, therefore, the Judge misapplied the standard in finding a violation.

In fact, it is Respondent who has misapplied the legal standard. In *Harris-Teeter Super-Markets, Inc.*, 307 NLRB 1075 (1992), the Board upheld an administrative law judge's finding that an employer violated Section 8(a)(5) by assigning work previously performed by bargaining unit refrigeration mechanics to non-unit employees. The decision makes clear that it was inconsequential whether employees lost work as a result of the change, since it was the employer's unilateral conduct that was subject to scrutiny, and not a quantitative analysis of the results of that conduct. *Id.* at 1088. Similarly, in *Bloomsfield Health Care Ctr.*, 352 NLRB 252 (2008), the Board reversed a Judge's dismissal of an allegation that an employer violated Section 8(a)(5) by unilaterally changing the work schedules of two employees without first bargaining with the Union. In dismissing the allegation, the Judge noted that the change had affected only two employees in a much larger unit. The Board explicitly rejected this reasoning. *Id.* at 256. Moreover, in *Carpenters' Local 1031*, 321 NLRB 30, 31-32 (1996), the Board overruled as "erroneous as a matter of law" prior Board decisions dismissing allegations of 8(a)(5) violations involving conduct affecting only one employee. Finally, in *Georgia Power Co.*, 325 NLRB 420 (1998), the Board once again explicitly rejected the employer's argument that the number of employees who might eventually be affected by its unilateral change in retiree benefits was too small to support a finding that the change was substantial and material. *Ibid.* fn. 5.

Respondent further argues that the Judge erred in finding that unit employee Linda Gorham was impacted by the change. In so arguing, Respondent again misrepresents the Judge's finding, this time with respect to whether Gorham had turned down an opportunity to teach a replacement course after her course was cancelled.

Referencing the Judge's decision at p. 12, Respondent asserts that "[t]he Judge also found that Gorham turned down an opportunity to teach a replacement course." (R. Br. to Board at p. 17). In fact, the Judge found that "Gorham was not offered a replacement class," explaining that, although Gorham and 17 other faculty members were advised via email of the availability of two sections of LHUM-400, a professional development seminar, Gorham withdrew from consideration because she felt that she was not qualified to teach the class. More significantly, though, the Judge found that Respondent failed to establish that Gorham would have been assigned the class in any event, as 17 other instructors received that notice as well. (ALJD 12, note 20).

Respondent attempts to distinguish *Kentucky Fried Chicken,* 341 NLRB 69 (2004), cited by the Judge for the proposition that a change in policy can constitute a violation of Section 8(a)(5) when only one employee is affected, or when the amount of money involved is relatively small, from the instant case. Respondent argues that *Kentucky Fried Chicken* involved decisional bargaining, not effects bargaining, and, therefore, "it tells nothing about the standard for effects bargaining," contending that "the situations are different and the rules are different." (R. Br. to Board, p. 53-4). Respondent cites no cases in support of its suggestion that the standard for establishing a violation in effects bargaining cases differs from the standard in decisional bargaining cases, perhaps because there are no Board cases establishing a different standard with respect to these two kinds of violations of the Act.

Respondent also makes much of the Judge's reference in her decision to "potential effects" of the unilateral change, suggesting that Counsel for the General Counsel has not met her burden of establishing that the changes were "material,

substantial and significant." In so arguing, Respondent analogizes the instant case to *Berkshire Nursing Home, LLC*, 345 NLRB 220 (2005), a case in which the Employer unilaterally changed its parking policy and was found by the Board not to have violated the Act. Unlike the instant case, however, in which the Judge found that the change in employees' terms and conditions of employment warranted the imposition of a bargaining obligation, the Board, in *Berkshire Nursing Home,* found that the minor inconvenience caused by the change did not warrant imposing a bargaining obligation on the Respondent. *Id.* at 220-21.

Similarly, Respondent argues that established case law requires that Counsel for the General Counsel prove real, not merely theoretical, or possible harm, and that she has failed to do so. The record clearly supports the Judge's finding that Counsel for the General Counsel successfully established, on the basis of record evidence, that Respondent's change in minimum class populations affected one part-time faculty member in the fall of 2012, and that "it remains to be seen whether any faculty members are affected in the fall of 2013 or thereafter." (ALJD 21, lines 39-43).[4]

4. The Judge correctly found that Respondent refused to bargain over the effects of its unilateral change, and that the change was a *fait accompli.* (Respondent's Exception #6)

Referring to the parties' September 5 meeting, Respondent argues that it fully satisfied its obligation to bargain. It argues that "[i]f anyone failed to bargain, it was the Union." In support of this position, Respondent notes that the Union made no information requests at the meeting, nor did it make any proposals or request relief for employees impacted by the change or request additional meetings with Respondent. (R

[4] As argued in her cross-Exceptions, and the related Brief in Support of Cross-Exceptions, Counsel for the General Counsel contends that the Judge erred in finding that only one faculty member was adversely impacted by the change.

Br. to Board, p. 22-23, 60-61). The Judge correctly rejected this argument as "specious," given that the email from the Union President, Schultz, to Simpson, Vice President of Academic Affairs and Provost, specifically references the new course population minimums and the fact that Respondent had already implemented the policy. (ALJD 22, lines 6-7). In reaching this conclusion, the Judge correctly noted that Simpson had rejected Schultz's demand to bargain about the effects of the new policy, merely agreeing to confer and explain Respondent's reasons for taking the action, and had refused to delay implementation. (ALJD 20, lines 30-32).[5]

Respondent further argues that there was no *fait accompli* because the schedule was not finalized at the time the parties met and, therefore, "[t]here was plenty of time for the [September 5] meeting to be productive." (R. Br. to ALJ, p. 64). As correctly concluded by the Judge, however, the Union requested rescission of the change, pending bargaining over the effects, and Simpson rejected that request. Under these circumstances, the Union did not have a further obligation to request bargaining. *The Bohemian Club and UNITE HERE! Local 2,* 351 NLRB 1065, 1067 (2007).

5. The Judge correctly upheld the Region's decision not to defer the dispute at issue in this case to arbitration pursuant to *Collyer Insulated Wire,* 192 NLRB 837 (1971), because the parties' collective-bargaining agreement is silent regarding minimum class size, and because it specifically exempts most disputes that arise concerning the workload of part-time faculty from the grievance procedure. (Respondent's Exception #7)

Respondent argues that the Judge erred in not deferring this dispute to arbitration, and that the issue in this case is arbitrable. In so arguing, it represents that the collective-bargaining agreement between the parties provides for binding arbitration

[5] As noted in Counsel for the General Counsel's Brief in Support of the Judge's decision, no Respondent witness contradicted Schultz's credible testimony that he requested rescission of the change and that Simpson refused to rescind it. (GC. Br. To Board at 33).

for a broad range of disputes. (R. Br. to Board, p. 67, 70 (footnote 11)). What Respondent neglects to acknowledge, however, is that the Agreement explicitly exempts from the grievance procedure the vast majority of issues that arise concerning the workload of part-time faculty. (JTX-2, p. 46). Thus, the Judge correctly found that where only statutory obligations under the Act are at issue, and there is no dispute as to contract interpretation, deferral is inappropriate.

6. The Judge correctly followed Board law by not applying contract coverage analysis to the facts of this case. (Respondent's Exception #8)

There is also no merit to Respondent's exception to the Judge's failure to dismiss the case in accordance with the contract coverage doctrine. In *Provena St. Joseph Medical Center,* 350 NLRB at 810-11, the Board reaffirmed its adherence to the clear and unmistakable waiver standard in determining whether an employer had the right to make unilateral changes in employees' terms and conditions of employment during the life of a collective-bargaining agreement. In so doing, the Board noted that the clear and unmistakable waiver standard is

> firmly grounded in the policy of the National Labor Relations Act promoting collective bargaining...[that it] has been applied consistently by the Board for more than 50 years, and [that] it has been approved by the Supreme Court.

In reaching its decision in *Provena St. Joseph Medical Center,* the Board explicitly rejected the contract coverage approach adopted by various appellate courts, noting that, "[i]n the framework established by Congress...it is the function of the Board, not the courts, to develop Federal labor policy." *Ibid.*

Respondent cited no Board law that would suggest that the Board has signaled an intent to abandon its decades-long adherence to the clear and unmistakable waiver

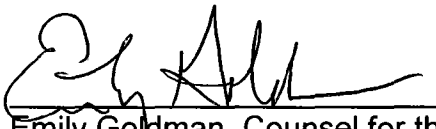
standard in favor of the contract coverage doctrine advocated by Respondent.[6] Thus, the Judge correctly followed current Board law in not applying the contract coverage doctrine in the instant case.

VI. CONCLUSION AND REMEDY

For all of the above reasons, Counsel for the General Counsel submits that Respondent's Exceptions are entirely without merit, and respectfully urges the Board to affirm Judge Flynn's decision in its entirety, except as modified by the Cross-Exceptions, and Brief in Support thereof filed by Counsel for the General Counsel.

Dated at Boston, Massachusetts, this 6th day of January, 2014.

Respectfully submitted,



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[6] Indeed, all of the cases cited by Respondent in support of this exception preceded the *Provena St. Joseph Medical Center* decision.