

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

.....
In the matter of:

BERKLEE COLLEGE OF MUSIC,

Employer,
and

BERKLEE FACULTY UNION, AFT,
LOCAL 4412, AFT-MA, AFL-CIO,

Petitioner.

Case No. 01-CA-089878

.....
EMPLOYER'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE

Respectfully submitted by:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
Introduction.....	1
Facts	2
The Faculty Union and Collective Bargaining Agreement.....	2
Course Offerings and the Academic Schedule.....	9
Class Size	12
The 2011 Curriculum Committee	15
The Impact of Changing Course Minimums.....	17
The Budget and Elective Initiative.....	19
Bargaining	21
Exceptions.....	23
Exception: The Union Waived All Mid-Term Bargaining	24
Exception: The Union Waived Mid-term Bargaining Over the Specific Matters At Issue Here.	31
Exception: Decisions Related to Course Content and Academic Schedules Are Not Subject To Bargaining And It Is Past Practice That The College Controls These Decisions	41
Exception: The Judge Erred in Finding a Change in Berklee’s Terms and Conditions of Employment	45
Exception: The Judge Erred In Finding The Change to Minimums Had A Material Substantial and Significant Effect.....	50
Exception: The Judge Erred in Finding that Berklee Refused to Bargain	58
Exception: The Judge Erred By Not Deferring This Dispute To Arbitration	65
Exception: The Judge Erred in Not Dismissing This Case In Accordance With The Contract Coverage Doctrine.....	71
CONCLUSION.....	72

TABLE OF AUTHORITIES

CASES

<u>Airo Die Casting, Inc.</u> , 354 N.L.R.B. No. 7 (2009).....	33
<u>Alan Ritchey, Inc.</u> , 359 N.L.R.B. No. 40 (2012).....	50, 62, 63, 64, 65
<u>Altorfer Mach. Co.</u> , 332 N.L.R.B. 130 (2000).....	59
<u>Amalgamated Clothing & Textile Workers Union</u> , 246 N.L.R.B. 747 (1979).....	29
<u>American Benefit Corp.</u> , 354 N.L.R.B. 1039 (2010).....	27
<u>Am. Diamond Tool, Inc.</u> , 306 N.L.R.B. 570 (1992).....	25
<u>American Trucking Associations v. Atchison Topeka & Santa Fe Railway Co.</u> , 387 U.S. 397 (1967).....	62, 63
<u>Atlanta Hilton & Tower</u> , 271 N.L.R.B. 1600 (1984).....	59
<u>Atwood & Morrill Co.</u> , 289 N.L.R.B. 794 (1988).....	71
<u>Bath Iron Works Corp.</u> , 345 N.L.R.B. 499 (2005).....	71
<u>Berkshire Nursing Home</u> , 345 N.L.R.B. 201 (2005).....	50, 52, 53, 55
<u>Billings Clinic</u> , Case 27-CA-21211, Advice Memorandum dated August 7, 2009.....	33
<u>Bonnell/Tredager Industries, Inc.</u> , 313 N.L.R.B. 789 (1994).....	53, 55
<u>Bridon Cordage, Inc.</u> , 329 N.L.R.B. No. 258 (1998).....	58, 62
<u>Brooklyn Hosp. Ctr.</u> , 344 N.L.R.B. 404 (2004).....	25
<u>Brown University</u> , 342 N.L.R.B. 483 (2004).....	41, 42, 62
<u>Butera Finer Food</u> , 343 N.L.R.B. 197 (2004).....	40
<u>California Portland Cement Co.</u> , 330 N.L.R.B. 144 (1999).....	65

<u>Carpenters Local 1031</u> , 321 N.L.R.B. 30 (1996).....	54
<u>Chesapeake & Potomac Tel. Co. v. NLRB</u> , 687 F.2d 633 (2d Cir. 1982).....	25
<u>Chippewa Motor Freight, Inc.</u> , 261 N.L.R.B. 455 (1982)	64, 65
<u>Collyer Insulated Wire</u> , 192 N.L.R.B. 837 (1971).....	passim
<u>Columbia School District</u> , 100 LA 227 (1992).....	35
<u>Consolidated Aircraft Corp.</u> , 47 N.L.R.B. 694 (1943)	66
<u>Creasey Co.</u> , 268 N.L.R.B. 1425 (1984).....	64
<u>Crittenton</u> , 342 N.L.R.B. No. 67 (2004)	55, 56
<u>Daily News of L.A.</u> , 315 N.L.R.B. 1236 (1994).....	46
<u>E.I. du Pont de Nemours & Co.</u> , 2011 N.L.R.B. LEXIS 452 (2011).....	39
<u>Earthgrains Co.</u> , 112 LA 170 (1999)	35
<u>First Nat’l Maintenance Corp. v. NLRB</u> , 452 U.S. 666 (1981).....	59, 63
<u>H. K. Porter Co. v. N.L.R.B.</u> , 397 U.S. 99 (1970).....	28, 29, 59
<u>House of Good Samaritan</u> , 268 N.L.R.B. 236 (1983).....	46
<u>Hussman Corp.</u> , 84 LA 137 (Robert, 1983).....	69
<u>International Asso. of Machinists & Aerospace Workers v. Northeast Airlines, Inc.</u> , 473 F.2d 549 (1st Cir. 1972)	56
<u>Kansas National Education Assn.</u> , 275 N.L.R.B. 638 (1985).....	28
<u>Kendall College</u> , 228 N.L.R.B. 1083 (1977)	52
<u>Kentron of Haw.</u> , 214 N.L.R.B. 834 (1974)	59
<u>Kentucky Fried Chicken</u> , 341 N.L.R.B. 69 (2004).....	53, 54

<u>Kerry, Inc.</u> , 358 N.L.R.B. No. 113 (2011).....	41
<u>Luther Manor Nursing Home</u> , 270 N.L.R.B. 949 (1984)	48
<u>Martin Marietta</u> , 270 N.L.R.B. 114 (1984).....	56
<u>Medicenter, Mid-South Hosp.</u> , 221 N.L.R.B. 670 (1975)	59, 61
<u>Metropolitan Edison Co. v. NLRB</u> , 460 U.S. 693 (1983)	24
<u>Metropolitan Edison Co.</u> , 330 N.L.R.B. 107 (1999).....	30
<u>NCR Corp.</u> , 271 N.L.R.B. 1212 (1984).....	71, 72
<u>Ohio Power Company</u> , 317 N.L.R.B. 135 (1995)	28
<u>Pease Co.</u> , 237 N.L.R.B. 1069 (1978)	58
<u>Peerless Food Prods.</u> , 236 N.L.R.B. 161 (1978).....	51
<u>Post Tribune Co.</u> , 337 N.L.R.B. 826 (2002).....	40
<u>Post Tribune Co.</u> , 337 N.L.R.B. 1279 (2002).....	46, 48
<u>Progress-Bulletin Publishing Co.</u> , 47 LA 1075 (1966).....	69
<u>Provena St. Joseph Med. Ctr.</u> , 350 N.L.R.B. 808 (2007)	32, 33
<u>Providence Hospital v. NLRB</u> , 93 F. 3d 1012 (1st Cir. 1996).....	56
<u>Public Service Company of Okla.</u> , 319 N.L.R.B. 984 (1995)	66
<u>Reynolds Metal Company</u> , 310 N.L.R.B. 995 (1993)	59
<u>Richmond Times-Dispatch</u> , 345 N.L.R.B. 195 (2005).....	60
<u>St. Clare Hospital</u> , 229 N.L.R.B. 1000 (1997).....	42, 44

<u>St. Francis Reg'l Med. Ctr.</u> , 2013 N.L.R.B. LEXIS (N.L.R.B. Div. of Judges June 12, 2013).....	67
<u>Show Indus., Inc.</u> , 326 N.L.R.B. No. 76 (1998)	64
<u>Spectator Mangement Group</u> , 109 LA 1147 (1997)	35
<u>Sweezy v. State of New Hampshire</u> , 354 U.S. 234 (1957).....	42
<u>Teamsters Local No. 70</u> , 198 N.L.R.B. 552 (1972).....	66
<u>Tex-Tan Welhausen Co.</u> , 172 N.L.R.B. 851 (1968).....	29
<u>United Cable Television Corp.</u> , 296 N.L.R.B. 163 (1989).....	32
<u>Vickers Inc.</u> , 153 N.L.R.B. 561 (1965).....	71, 72
<u>Yellow Freight Sys., Inc.</u> , 337 N.L.R.B. 568 (2002).....	28

STATUTES

National Labor Relations Act § 8(d), 29 U.S.C. § 158.....	31
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OTHER AUTHORITIES

<u>American Heritage College Dictionary</u> (3rd ed. 2006).....	51
Elkouri & Elkouri, <u>How Arbitration Works</u> (6th ed. 2003).....	35, 69, 70
Merriam-Webster Online Dictionary, 2013, http://www.merriam-webster.com (8 Nov. 2013).....	51

Introduction

This is an effects bargaining case involving Berklee College of Music and the Berklee Faculty Union. The lone claim in the Complaint is that when Berklee changed some minimum class sizes at the College for pedagogical reasons, it was required to (but did not) bargain with the Union over the effects of that decision. The Board's well-established standard is that for bargaining to be required, there must be a "material, substantial and significant" change in the terms and conditions of employment of bargaining unit employees. Here, the Judge found that the change in minimums was one of several factors in the College's decision to cancel **one course out of the 5200 courses** offered at Berklee during the 2012-2013 academic year. One course out of 5200, or .000192 of Berklee courses in the academic year - if that meets the Board's standard of being significant and material and substantial, then those terms have no meaning and there is really no standard at all.

Regardless, there was no duty to bargain. The 78-page, single space collective bargaining agreement extensively governs the issues of course content and scheduling, and leaves the gaps to Berklee's academic judgment. By the Judge's decision, the gaps would be filled by returning to the bargaining table. Given how miniscule the "effects" in this case were, there is no limit to how much mid-term bargaining Berklee would be required to endure as it attempted to run the College. This is not what Berklee bargained for—the Union winning some things at the bargaining table and losing others, but then having a "do over" every time Berklee tried to exercise the rights it won at the same table. At a minimum, the dispute ought to be arbitrated under Collyer.

In any event, Berklee did bargain. The Judge found that while Berklee met with the Union and "conferred" over the effects issue, it refused to "bargain." Of course, the Act defines

bargaining as meeting and conferring, two things the Judge said Berklee did right before she said Berklee refused to bargain. At the parties' meeting the Union made no proposals, and then never asked for another meeting. So bargaining went nowhere not because Berklee refused to participate but because the Union preferred to file the instant charge rather than resolve the dispute directly with the College.

For all of these reasons, as more fully explained in this brief, the Judge erred. Berklee did not violate the Act and the Complaint should be dismissed.

Facts

For the most part, the basic facts in the case were undisputed and the Judge's factual findings were essentially correct. The problems are the material facts the Judge ignored; those areas where the Judge improperly relied on testimony from Union witnesses which was self-serving, speculative, lay opinion and/or conclusory; and the many times the Judge misapplied, and otherwise reached unsupported conclusions from, the facts she had found.

The Faculty Union and Collective Bargaining Agreement

Berklee's faculty organized in 1985 and is represented by the American Federation of Teachers, Local 4412. Transcript ("Tr.") 47, 49. The Union represents all full-time and part-time faculty on the Boston campus. Id. at 49. Mike Scott served as President of the Union from its founding until 2011, at which point Jackson Schultz was elected President. Decision, p. 14. Berklee and the Union have historically had a productive and positive relationship. Grievances are rare. During the current Union administration's first year, there was not one grievance. Tr. at 349. The grievances that are filed are usually settled informally. Id. at 348-49. Moreover, the Union and the College routinely discuss faculty issues and concerns informally. Id. at 347.

The current collective bargaining agreement (“CBA”) has been in effect since September 1, 2010, and is effective through November 3, 2013. Joint-Exhibit (“JX”)-2 at 1. The agreement consists of seventy-eight single-spaced pages. Id. Class size, scheduling, and related subjects are covered in detail in the CBA. Id. at 35-46.

Since the formation of the Union in 1985, the parties have negotiated and entered successive collective bargaining agreements. During every set of negotiations, both parties were represented by counsel. Tr. at 97. The parties have memorialized the comprehensive nature of their bargaining and the agreement they created through a robust integration clause:

The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understanding and agreements arrived at by the parties after the exercise of that right and opportunity are fully and exclusively set forth in this Agreement. Therefore, the Employer and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement. All rights and duties of both parties are specifically expressed in this Agreement and such expression is all-inclusive. This Agreement constitutes the entire agreement between the parties and concludes collective bargaining for its terms, subject only to a mutual agreement to amend or supplement this Agreement. This Article applies to both full-time and part-time faculty as described at Article I.

JX-2 at 68 (emphasis added).

The Union and its counsel fully understood that this was not a typical integration clause.

During negotiations, the Union proposed the following:

As to any matter not removed by law from the area of collective bargaining which is not covered by this agreement, the College agrees to continue to given [sic] full force and effect to its existing policies and practices, except as any changes in such policies and practices may be negotiated by the parties. If any new issues arise during the term of this Agreement which are not removed by law from the area of collective bargaining, and which are not dealt with herein, the College agrees to negotiate over such issues upon request by the Union.

Tr. at 352; R-15 (emphasis added). The College did not agree to this provision, and it was not added to the Agreement. Berklee has never agreed, in any collective bargaining agreement, to language that would subject it to mid-term bargaining. Tr. at 363.

The CBA also contains a strong management rights clause to which the he Union tried, but failed, to make a similar change. JX-2 at 64. The current provision states:

All management rights, powers, authority and functions, whether heretofore or hereafter exercised, and regardless of the frequency or infrequency of their exercise, shall remain vested exclusively in the Employer. It is expressly recognized that such rights, powers, authority and functions include, but are by no means whatever limited to, the full and exclusive control, management, and operation of its business and its affairs, including the determination of the extent of its activities, business to be transacted, work to be performed, the location of its offices and places of business and equipment to be utilized. The Employer and the Union agree that the above statement of management rights is for illustrative purpose only and is not to be construed or interpreted so as to exclude those prerogatives not mentioned which are inherent to management, except insofar as expressly and specifically limited by the provisions of this agreement . . . This Article applies to both full-time and part-time faculty

Id.

In 1996, the Union proposed that portions of the management rights clause be deleted and language be added providing that “[s]uch rights or prerogatives are expressly or implicitly limited by the provision of this Agreement, by applicable past practices or established policies, or by state or federal statutes, including the Employer’s duty to bargain pursuant to the National Labor Relations Act.” Tr. at 361; R-15 (emphasis added). Berklee also did not accept this attempt at establishing a requirement of mid-term bargaining. Tr. at 361.

In lieu of mid-term bargaining obligations which the Union proposed and the College rejected, the CBA contains multiple avenues for the parties to discuss and resolve issues and disputes. The Union may, and often does, seek to resolve disputes informally by exercising the right to consultation and communication provided for in the Agreement. JX-2 at 4. It states,

“The Employer and Union may schedule meetings upon mutual agreement to discuss mutually agreed upon matters relating to wages, hours, and working conditions.” Id. Indeed, Berklee and the Union meet at regularly scheduled intervals to discuss such concerns. Tr. at 347. In addition, they meet on an ad hoc basis in order to discuss and resolve whatever issues may come up. Decision, p. 14. Berklee has never refused to meet with the Union pursuant to this provision, and has historically worked out disputes in this manner. Tr. at 348. In particular, Scott testified that during his time as Union President, the parties met frequently to discuss faculty concerns about canceled courses through this informal process. He explained: “[w]e didn’t file grievances because I had hoped for a collegial resolution. And periodically we reached collegial resolution.” Id. at 61.

The CBA also has a formal grievance procedure. JX-2 at 9. The Agreement contains a four-step process culminating in binding arbitration. Id. at 9-10.

The CBA also has a provision concerning past practices: “it is understood that neither party gives up the right to argue to prove the [existence] of a past practice or lack thereof.” Id. at 67. Schultz testified at trial that in his view, the pre-existing course minimums were past practices. Tr. at 118.

The CBA has numerous provisions about course scheduling. Article XXIV explains: “Faculty will teach no more than four (4) consecutive hours . . . teaching hours will be from 8:00 a.m. to 10:00 p.m., Monday through Friday inclusive . . .” JX-2 at 35. Full-time faculty may only teach up to eighteen teaching units per week, the equivalent of fourteen contact hours of lecture teaching. Id. at 41. Similar restrictions apply regarding part-time faculty, who may teach up to one unit less per week than full time faculty. Id. at 38, 44. Certain faculty members cannot be scheduled to teach on weekends without their written consent. Id.

Faculty may make schedule requests, but the CBA dictates that the College can disregard these preferences and set the schedule in its discretion. “[S]cheduling preferences may be submitted to the Department Chair and will be considered in determining faculty schedules but it is not mandatory these preferences be granted.” Id. at 35. The College retains final authority: “[f]aculty must meet each teaching assignment at the scheduled time and place as determined at the beginning of each semester by the Senior Vice President for Academic Affairs or designee.” Id. at 38, 44.

The CBA also covers class size. All classes at Berklee have “a maximum class size that is determined by the Senior Vice President for Academic Affairs with input from Departmental faculty. No class may be assigned more than ten percent (10%) above the maximum size without the prior approval of the affected faculty members.” Id. However, as will be discussed in detail below, the contract does not restrict Berklee’s authority to set course minimums.

The College has a Curriculum Committee which played an important role in the circumstances of this case, and it is discussed in further detail below. The CBA authorizes Berklee to directly involve its faculty in the Committee’s work. Article XXV, labeled “Workload -- Full-Time Faculty,” provides that each full-time faculty member must perform one of eleven listed duties. Id. at 41. One duty is service on College committees, and another is curriculum development. Id. The Curriculum Committee combines these two responsibilities, and faculty also participate in curriculum development by developing new courses. Tr. at 230-31.

In 1989 negotiations, the Union proposed radical changes in the course and curriculum process—attempting to put the Union at the center of curriculum development and changes. Specifically, the Union proposed a faculty curriculum committee that would “be elected by the faculty to monitor curriculum changes and developments and the Employer will inform the

Committee of any proposed changes in curriculum at least one academic year prior to their implementation.” Id. at 357; R-13. This proposal was bargained and rejected. Tr. at 357.

The Union has made numerous proposals over the years to restrict the College’s right to make the academic schedule. The College has consistently rejected these efforts. In 2000, the Union proposed that “[e]ach faculty member shall be given his/her preliminary schedule at least one semester in advance and be allowed five days to review and comment before the schedule is finalized.” Tr. at 357; R-17. The College did not agree to this proposal. Tr. at 367. In 1992, the Union proposed that “assistant Associate Professors . . . be guaranteed two consecutive semesters of employment.” Tr. at 358; R-14. This proposal was also bargained and rejected. Tr. at 358. The Union proposed the establishment of a “Union Management Committee to meet regularly during the year to discuss and make recommendations on things like three-quarter time positions and teaching loads and weighting.” Tr. at 372; R-19. The proposal was not accepted and no such committee exists. Tr. at 373.

The Union has also made many proposals related to class size, all of which the College rejected. The Union proposed in 2000 that a rule be established that “current class sizes may not be increased without the approval of the union.” Tr. at 357; R-17. The College did not agree to this proposal. Tr. at 357. The Union proposed in 2002 that classes with thirty or more students be assigned a teaching assistant. Tr. at 373; R-20. This proposal was not accepted. Id. In 1996, the Union proposed a provision on “class size” that would prohibit classes from running above their posted maximums without prior approval of the affected faculty member. Tr. at 360; R-15. This proposal, too, was not accepted. Tr. at 360.

Most pertinent for this case, several times the Union made specific proposals to address the effects of course cancellations due to low student enrollment. In 2005, the Union proposed:

[i]n the event that scheduled courses to be taught by part-time (hourly) faculty are canceled due to under-enrollment, the affected faculty member whose course is canceled shall be provided 50 percent (50%) of the wage which would have been due had the course run as scheduled. The canceled teaching hours shall count towards the threshold for benefits

Tr. at 374; R-20 (emphasis added). The College did not agree to this proposal. Tr. at 374. In 2009, the Union proposed that “[i]n the event of course cancelation part-time faculty shall be compensated in full.” Tr. at 377; R-21. The College did not agree to this proposal. Tr. at 377. In 2010, the Union proposed: “In the event of course cancellation, part-time faculty shall be compensated in full.” R-24; Tr. at 380. The College did not agree to this proposal either. Tr. 380.

In addition to formal proposals, the Union has historically put out “talking points” for negotiations. These talking points may become formal proposals, or they may result in changes to the CBA without ever being reduced to formal proposals, or they may lead nowhere—but in all cases the parties discuss and resolve the issues identified. Tr. at 363-64. Several of the Union’s talking points involve the effects of course cancelations due to low student populations. In 2005, the Union wished to discuss as one of its talking points “compensation for course cancelations due to under enrollment.” Tr. at 375; R-21. This subject was discussed at bargaining. Tr. at 375. Another talking point in 2009 concerned “compensation for hourly faculty for canceled classes and canceled courses will count towards teaching load.” Tr. at 376; R-21. This topic was also discussed. Tr. at 376. In such instances, Berklee rejected the Union’s efforts to change the CBA. Id.

Course Offerings and the Academic Schedule

Berklee's course offerings are large and diverse. Students pick among twelve (12) majors. Each semester the College offers over 1200 courses and 2600 sections. Decision, p. 5.¹ Each student participates in college-wide as well as major-specific courses. Id. Aside from taking required courses as needed, after the first semester Berklee students are free to set their own schedules and take several elective courses each semester. Tr. at 277. Creating a comprehensive and high-caliber schedule is an important, and elaborate, academic task. It begins ten months in advance. For example, setting the Fall schedule begins the November prior. At that time, the Curriculum Committee meets to determine what courses are available to be scheduled and makes adjustments to the course catalogue. Decision, p. 5. This process may include modifications to courses, suggestions of new courses, or requests for courses to be deleted. Id. Faculty, chairs, deans, and the Office of Academic Affairs propose course catalogue changes. Id.

Berklee will occasionally remove a course from the catalogue. Id. It does this for any number of reasons. One consideration is faculty availability. Id. There may be no faculty interest in teaching a course, no faculty qualified to teach a certain course, or no faculty available to teach. Id. The College also considers student interest; a history of low enrollment may prompt the Committee to conclude that a course should no longer be offered. Id. Minimizing redundancy in offerings is another goal. If two courses have significant overlap in their themes, then the elimination of one is often justified. An alternative to course elimination, for all the same reasons, is to run a course less frequently. Id.

¹ A course is a specific subject, like Ear Training I. A section refers to the total number of classes run. For example, there may be three classes of Ear Training I in a particular semester. So in that case there is one course but three sections.

After the Curriculum Committee determines which courses are available to run in the Fall semester, the Academic Scheduling Department creates a rough preliminary schedule the following February. Id. Setting the schedule is a complex process with multiple moving parts. One consideration is meeting the particular needs of the incoming class, such as offering enough classes in a particular major or instrument. Tr. at 278-79. The College also has to account for changes in faculty availability from the time that the course catalogue was first set. Classroom availability is also a major consideration. These components are intertwined. For example, if a class that would normally require a large classroom cannot be run because of faculty availability, another class may be added to the schedule to take its place. Id. at 277-78.

Scheduling is also affected by the CBA, which covers teaching units, hours, class size, and faculty workload, among other things. JX-2. All of these factors influence how and when courses are scheduled. For example, faculty cannot be scheduled to teach more than four consecutive hours, and not all faculty members can be required to teach on weekends. Id. at 35. Also: “No class may be assigned more than ten percent (10%) above the maximum size without the prior approval of the affected faculty members.” Id. Full-time faculty may only teach up to eighteen teaching units per week, the equivalent of fourteen contact hours of lecture teaching. Id. at 38. Similar restrictions apply regarding part-time faculty, who may teach up to one unit less per week than full time faculty. Id. at 44. These restrictions may mean that multiple sections must be run of a given course to balance student interest and class-size concerns.

Beyond these specific contractual restrictions, Berklee reserves control over what, where, and when faculty teach. Articles XXV and XXVI of the Agreement provide that “[f]aculty must meet each teaching assignment at the scheduled time and place as determined at the beginning of each semester by the Senior Vice President for Academic Affairs or designee.” Id. at 38, 44.

In April, the preliminary schedule is released to students who then begin signing up for classes. Decision, p. 5. From April until August, the Chairs and the Academic Scheduling Department engage in a “constant conversation” and assess whether adjustments need to be made. Tr. at 378. During this time, the College makes numerous changes to the schedule based on all the factors described above, with the now added element of specifically-expressed student interest. Among other things, the College may decide to cancel or rebuild courses. Id. This has a domino effect on other courses. Decision, p. 6 n.5.

By August, the College has a good idea of how many students are in the entering class and can determine whether it has scheduled enough classes for its core curriculum. Id. at 6. The College may cancel certain classes to make faculty available to teach a first-year student section. Id. The College may, as a result, offer more or fewer courses in a particular subject area. Id. The College will also have an updated view of course enrollment as a gauge of student interest in the Fall courses. Tr. 283-84.

In the first week of September, students are allowed to view their individual schedules. Id. at 6 n.5. Thereafter, they may add and drop courses as seats become available in other courses that had been full or unavailable. Id. Students also need to readjust their schedules in light of course cancelations. Id. This results in a snowball effect in which students feed into electives they had not originally signed up for, creating new spots that are subsequently filled by other students, which in turn creates still new spots, and so on. Id. Also in September, Berklee runs student placement tests for new students. These include ESL tests and auditions to make sure that students are in courses appropriate for their skill levels. Id. at 6. Depending on the results of these tests, the College may need to add or cancel courses and move faculty among courses. Only after this “add/drop” period does the schedule become finalized. Id.

If courses are canceled, Berklee tries to find replacement courses for affected faculty. Id. at 10 n.8. The College has a strong record of finding replacement opportunities. Id. at 8 n.10. And historically where this has not occurred, the Union and Berklee have resolved the issues informally. Tr. at 62.

Class Size

As part of its mandate to determine course content and structure that achieves the College's pedagogical objectives, the Curriculum Committee establishes (and changes) student population expectations for courses. All Berklee courses have presumptive minimum and maximum populations. Decision, p. 6. In both cases, the goal is to maximize the student experience. While no arbitrary number can achieve that, in general it is accepted that too many students dilute the learning environment, while too few can be limiting. Not surprisingly, then, there is a correlation between the pedagogically ideal minimum and maximum. The ideal minimum is expressed as a percentage of the ideal maximum.² The effect is a "sweet spot" or a range of students considered pedagogically ideal. Id.

Both numbers are flexible. A course may end up having a population above the maximum for a variety of reasons. The CBA contemplates this possibility -- running a course above ten percent of the maximum requires the faculty member's approval. JX-2 at 35.

Likewise for class minimums. Decision, p. 6. Berklee courses are often highly collaborative, and "that requires that students understand different people's opinions and approaches to problems. Having a minimum class size really gets at what the intent and learning outcomes of that class are supposed to provide to a student." Tr. at 262 (testimony of Jeanine

² Course minimums are normally set at thirty-three to thirty-five percent of course maximums. Decision, p. 6. Thus, a course with a maximum of thirty students typically has a minimum of ten, and a course with a maximum of twelve students would have a minimum of four. However, these minimums can vary if there is a pedagogical basis for deviating from this formula. Decision, p. 6.

Cowen). Further, with limited room in the schedule, limited classrooms, and limited faculty, it simply does not make sense to run a course that lacks the level of student interest for the course to be taught effectively. How these factors are balanced is a judgment call. Id.

Cowen explained that minimums are “really just a framework. It’s a bar that makes our administration of courses a bit easier to gauge. It’s something that we look at in relation to a lot of other factors, but it gives us real data as to what the decisions are that we’re making, rather than . . . intuition and anecdote.” Tr. at 295. These minimums function as an administrative tool, allowing the Curriculum Committee and the Academic Affairs team to gauge interest across the “bulk” of course offerings and organize, based on hard data, the 2600 sections that are scheduled every term. Id. at 296; see also id. at 334 (testimony of Provost Larry Simpson) (“It’s about structure, that all of our classes have minimums, as well as maximums. Each course. And it’s important that we have that. There need to be diversity of experience . . . it’s formal but it’s a guide.”).

Berklee routinely runs courses with student enrollments below the minimum. Often a course’s enrollment is best classified as “close enough,” i.e. the enrollment is below the nominal minimum but still sufficient to meet pedagogical objectives when balanced against other factors. Id. at 300. There are more specific reasons as well. One reason is that a student needs a specific course to graduate. Id. at 296. A student may also need to enroll in a course to complete a course series. Id. at 295-296. In many majors, Berklee offers series of courses three or four semesters long, and a student may need to complete such a series in a certain semester in order to graduate on time. See id. at 300 (testimony of Jeanine Cowen) (“It might be such that that course is viable even though it’s below the minimum.”); id. at 74 (testimony of Jackson Schultz) (“[C]lasses were known to run with fewer than three . . . students in them.”). Sometimes the issue

is comparative—it is not the enrollment in a specific course per se, but how overall student need and/or interest in one course compares to that of another. Id. at 280.

The fact that course minimums are merely an administrative tool, and that other factors are equally if not more significant in course cancellations, is evidenced by a review of the recent history of course cancelations at Berklee. Respondent Exhibit (“R”)-8. In the Fall 2012 semester, after the “change” at issue in this case, sixty-four classes were run with populations below the minimum. Decision, p. 21. In fact, there were as many classes canceled with populations over the minimum as there were canceled with populations below the minimum. Id. This has been true historically as well.

The College has repeatedly established and changed course minimums (and maximums) over the years without any notice to or bargaining with the Union. Since 2004, there has been a concerted effort to standardize student population expectations. As Cowen testified, “as early as 2004, when I was on faculty, the College was taking a more standardized view of what the appropriate levels would be.” Id.; Tr. at 261. In 2010, the chair of the Liberal Arts Department undertook an initiative to standardize maximums and minimums, “so that they would be conducive to the program and that . . . similar courses would be the same.” Tr. at 271. This was labeled the “LART sweep.” Id.; R-6; decision at n. 8. Berklee set out to standardize courses so that students would have a similar experience regardless of the specific topics they were taking. Id. at 272. For example, prior to this initiative, the Art History Department had some courses with maximums of twenty and minimums of five while others had maximums of thirty and minimums of seven. Id. Other examples of prior changes to course minimums were entered into evidence. R-3 (“Min. pop increased to 5 (from 3)”); R-4 (“Min. pop increased to 5 (from 4)”);

R-5 (Change Type: Minimum Class Size); R-6 (Change Type: Minimum Class Size). Cowen's testimony was clear that these were just examples, not the universe of changes. Tr. at 273.

Cancellation of classes for low student interest is an uncommon occurrence. The vast majority of courses run with very comfortable student populations semester after semester. Decision, p. 7. Indeed, Union witnesses confirmed just how rare course cancellations due to under-enrollment are. Jeffrey Perry, in the history of his employment with Berklee, had only one class canceled because of low student interest. Id. at 152. Likewise, Dennis Cecere only identified one class he was scheduled to teach that was cancelled in part due to low enrollment. Id. at 184.

Low course population is a factor at various points in the scheduling process, because it does not make sense to run a course with little student interest when an alternative subject may be of more interest and a better use of everyone's time. Low population is a consideration when deciding whether courses should be deleted from the catalogue. Decision, p. 9 n.12. The College also takes into account student interest when setting the initial schedule, and in making adjustments as the year proceeds. A class with a low population might also be canceled during the add/drop period. Tr. at 280.

The 2011 Curriculum Committee

At the Curriculum Committee's May 2011 meeting, one of the topics was course minimums. Decision, p. 7. Up to that point, as Cowen testified, the College had been taking a more standardized view of course populations for years. "Over the course of really a decade . . . as courses came through the Curriculum Committee there was a renewed look at where the minimum class size was set and they were adjusted to . . . the appropriate level." Tr. at 261 (testimony of Jeanine Cowen); decision, p. 7. The Committee was concerned by the fact that

like courses did not have like minimums, and unanimously recommended that minimums be standardized. Decision, p. 7. This is memorialized in the Curriculum Committee notes:

We need to have a more standard level of course minimums across “like” courses. Recommendation: 33%, 35% of max pop. 20/7, 30/10. We want to fix the 999 max pops as well. Up to 5 where possible. 3 makes no sense, only where there is a defined purpose/need... like a piano trio. The committee approves this initiative; just need to figure out a timeline.

General Counsel Exhibit (“GC”)-22. The Committee’s decision to standardize minimums across like courses used the formula it had historically used: a course’s minimum was to be roughly one-third its maximum. Tr. at 234. Because the 2011-2012 course schedule had already been set, the soonest this recommendation could have taken effect was the Fall of 2012. Decision, p. 7.

No Committee member, including faculty members, considered the recommendation to standardize course sizes across like courses controversial. Tr. at 297. There was in fact no disagreement on the subject at all. Id. The suggestion grew out of a discussion of student learning experiences and how courses are run. Decision, p. 7. The decision had nothing to do with the budget or financial condition of the College. Id.

Because minimums are simply an administrative tool and not an actual rule or policy for scheduling classes, no public announcement was made regarding the new course minimums. Id.; Tr. at 298. Minimums are not published in the course catalogue since they are not requirements for courses to run. Decision p. 7. Cowen explained that she “send[s] out big notices to chairs frequently about important things, [but] this was not one of those things. It was seen as a tool to help us manage our schedule and nothing more [T]here was no expected impact. There was no material change in the way we were going to do our operations.” Id. at 8.

Just prior to the Fall 2012 semester, the Deans communicated the course minimum changes to Department Chairs, some of whom informed the faculty in their respective departments. Chair Ron Savage emailed the Ensemble group, notifying them that there were changes to minimum populations in a “small number of classes” and “low population classes will be canceled as they have been in the past.” GC-7; Decision, p. 13. Savage’s email reaffirmed the flexible nature of minimums, emphasizing that functionality would be assessed before a decision to cancel a course was made. See id. (“In all cases we will look at what makes the most logical educational sense.”). Chair Allan Chase also mentioned the College’s approach to minimums and explained, “I don’t expect anyone in Ear Training to lose teaching hours due to these higher minimums.” GC-2; Decision p. 13. Chair Suzanne Hanser noted in an email to her department that “minimum class sizes have changed, but aside from Practicum 5, we are not consolidating any other fall classes.” GC-15; Decision p. 11.

One of the chairs, however, Kenn Brass, had an emotional and counter-factual response (similar to his other email in the record - see GC-4): “another bomb has been dropped -- MINIMUM ENROLLMENT HAS BEEN RAISED TO SEVEN FOR NEARLY ALL COURSES.” GC-5; decision p. 11. The basis for this email is unclear. Minimums were not raised to seven for nearly all courses. See GC-22.

The Impact of Changing Course Minimums

The Judge found that the only impact of the change in course minimums for the entire 2012-13 academic year was the cancellation of Linda Gorham’s Investment course. Decision, p. 17 n.28. The Judge also found that Gorham turned down an opportunity to teach a replacement course. Id. at 12.

Before the hearing, Berklee subpoenaed “[a]ll documents and communications sent to the Union by Berklee faculty members regarding the impact in Berklee’s alleged change in course

population minimum policy,” to determine what evidence the Union possessed concerning the alleged impact of the change in minimums. Tr. 8-9. The Union refused to produce the records and filed a specious motion to squash. To resolve Berklee’s subpoena and avoid the Union having to produce the records, the Union and General Counsel (but not Berklee) stipulated to the following:

Counsel for the Acting General Counsel and the Union stipulate that as of April 11, 2013, the sole impact of the unfair practices alleged in the Amended Complaint . . . are the fall 2012 cancelation of Professor Joyce Lucia’s American Diction course . . . course number PSVC-131-001, the fall 2012 cancelation of Professor Linda Gorham’s Investment Principles Pro Musician course, the spring 2013 cancelation of Professor Jack Pezanelli’s Jazz Styles Lab course ILGT-119, and the potential impact on the status of Professor Joyce Lucia’s three-year contract resulting from the cancelation of her American Diction course.

JX-1.

But the Judge correctly found the General Counsel either abandoned or did not prove three of the four alleged impacts. First, at the hearing, Counsel for the General Counsel conceded that Lucia did not have a three-year contract. See Tr. at 145-46; R-8. Second, in her brief, Counsel for the General Counsel conceded that Pezzanelli was not affected, and there was no evidence he was. Brief to the Administrative Law Judge On Behalf of Counsel for the Acting General Counsel, p. 18 n.21. Third, although Lucia’s American Diction course was cancelled, historically this course had a minimum of four and in the Fall of 2012, it increased to five (5), and only two students enrolled. Tr. 307-08; R-10. The course therefore would not have met the minimum regardless of the change.³ The Judge correctly found that the cancellation of Lucia’s course was not an effect of the change to minimums. Decision, p. 17 n.28 (“However, the evidence shows that the only faculty member who may have been affected by the change in

³ When American Diction was canceled, Lucia was offered a replacement which she agreed to teach. Tr. 451.

course population minimums as of the date of the trial was Gorham. Lucia's classes did not even meet the previous minimums.")

The only remaining alleged impact was Linda Gorham. Gorham is employed part-time pursuant to a one-year contract. Decision, p. 12. She had a class, PM-320, Investment Principles, scheduled to run in Fall 2012. Id.; JX-1. The course was canceled initially in April 2012, before any increase in minimums. Decision p. 12 n.17. Three students had enrolled at the time it was originally canceled. Id. The course was thereafter added back to the schedule, at which point three different students enrolled. Id. at 12. However, the students who had enrolled in April did not reenroll when it became available again. Id. Therefore, only three students were enrolled at the time of the course's second cancelation. Id. Gorham's chair, Kenn Brass, spoke to her about replacing the course with LHUM-400. Id. A year earlier, Berklee paid Gorham to attend training on LHUM-400 so that she would be able to teach the course when it was available. Tr. at 437. However, when offered the opportunity to replace her canceled course with LHUM-400, Gorham declined, claiming the course she had been paid to learn to teach was a "bad fit." Id. at 441. Had Gorham accepted Berklee's offer to teach LHUM-400, there would have been no change to her hours or compensation.

It bears noting that in the Fall 2012 semester, there were just as many courses cancelled with populations over the minimum as under the minimum. Tr. at 303. More courses were run with below-minimum populations than in years past. Id. In fact, in the fall of 2012, sixty-four (64) courses were run with populations below minimum. Id.; Decision p. 21.

The Budget and Elective Initiative

The record reveals (and the Judge correctly found) that the Union misinterpreted an email from Kenn Brass that dealt with entirely different subjects, see GC-4, and therefore mistakenly thought that the change in minimums would have a bigger impact than it had. Decision, p. 18.

Thus, the Union jumped to unjustified conclusions about the minimums that were really attributable (if they were true at all) to other initiatives.

Not surprisingly, Berklee was considering other academic improvements around the same time as the Curriculum Committee's initiative to standardize minimum populations. One reform involved the "explosion" in the number of courses being offered at Berklee. Decision, p. 9. Between 2008 and 2012, 200 courses had been added to the course catalogue. Id. Simpson and other administrators grew concerned that the new courses had not been added in an efficient and disciplined manner. Id. Courses were being run unnecessarily frequently and added to the catalogue at too quick a rate. Id. Simpson believed that the proliferation of electives was a major problem. Tr. at 331. His office set a goal of reducing electives by approximately ten percent. Id. These courses would not necessarily be eliminated from the catalogue completely, but might instead be offered less regularly than every semester. Tr. at 332.

Simpson met with the deans and the vice presidents within Academic Affairs to look at course offerings and determine which ones could be cut in the upcoming semester. Id. This initiative to limit electives was completely unrelated to changes in minimum course populations. Id. at 334. This was an initiative coming from the Provost's office and did not involve the Curriculum Committee. Id.

As he did when he learned of the changes in course minimums a few days later, Kenn Brass sent an emotional email to his department. GC-4. The email, with the subject line "IMPORTANT – PLEASE READ," outlined seven supposed changes that might occur as a result of Simpson's initiative. Id. When Schultz saw the email, he mistakenly believed that it was related to the increase in course minimums. Tr. 76. However, the email could not possibly have been related to the increased minimums, because Brass was not aware of those changes

when he drafted this email. Tr. at 461. It was not until four days later that Brass learned class minimums were being raised, at which point he sent the email entitled “ANOTHER BOMB HAS BEEN DROPPED.” GC-5.

Bargaining

Brass’s original email, GC-4, the one Brass sent before he knew minimums were going to be changed and which had nothing to do with the changed minimums, was forwarded to Union President Schultz. Tr. at 78. Schultz mistakenly believed the email concerned changes in minimum populations. Id. at 81. Thereafter, Schultz wrote an email to Simpson demanding that Berklee “cease and desist” with the implementation of new minimums until Berklee and the Union could negotiate over the impact. Decision, p. 14. This demand was made on August 24, 2012, just prior to when schedules would be released to students so they could proceed to the add/drop period. Id.

Immediately after receiving this email, Simpson responded, confirming receipt of the message and suggesting that the parties meet to discuss the matter after Labor Day. Id. Schultz wanted the meeting to happen sooner. Id. at 14-15. Simpson followed up the next day, and he and Schultz had a lengthy phone call. Id. at 15. During the call, Simpson and Schultz had a substantive discussion about the changes in minimums. Id. Simpson explained that he was in Cleveland on vacation and the rest of his team was scattered across the country, so an in-person meeting before Labor Day would be impossible. Id. They ultimately agreed to meet on September 5, the first day back from summer break. Id. at 16.

Simpson reached out to Schultz again before the September 5 meeting, sending him an email asking to speak on the phone. Id. They scheduled a phone call for the evening of September 3. Id. During this second phone call, Simpson and Schultz discussed the effects of

the changes in minimums. Schultz testified that Simpson told him that “no one was going to be getting fired over these changes in minimums.” Tr. 83.

Berklee and the Union met in person as scheduled, on September 5. Attending for the Union were, Schultz; Danny Harrington, the Executive Vice President; Will Silvio, the office manager; and Jeffrey Perry, the Secretary/Treasurer. Decision, p. 16. Berklee was represented by Simpson; Jay Kennedy, the Associate Vice President for Academic Affairs; Mac Hisey, Senior Vice President for Administration and Finance and CFO; and three deans, Darla Hanley, Kari Juusela and Matt Marvuglio. Id. Simpson began by expressing his regret that the meeting could not have happened sooner; explained that Berklee tries to work collaboratively with the Union; and expressed his belief that they could work to address faculty concerns. Tr. at 100.

The parties discussed Schultz’s email to the faculty, GC-8, which was taken almost verbatim from Brass’s August email (the one Schultz thought related to course minimum changes but actually did not relate to course minimum changes). When Berklee asked for clarification on one of the bullet points, Schultz said he could not answer the question because the information had come directly from a chair (Brass). Decision, p. 18.

The Union made no proposals concerning the effects of course minimum changes on September 5. Schultz’s focus was Brass’s list of concerns, which, as the Judge found was related to Simpson’s initiative to curb electives and not course minimums. Decision, p. 17. The Union made no information requests before or during the meeting. Tr. at 344. The Union did not request any specific remedy or relief for any faculty members, before or during the meeting. Id. And, the Union did not request any further meetings. Id. Had the Union asked to talk about any specific concerns it or a particular faculty member had, Simpson would have had this discussion “without a doubt.” Id.

After this meeting, the Union still made no attempt to resolve its concerns over the effects of course cancelations. Historically the parties had been able to resolve concerns over course cancelations once the semester began. As Scott testified, “I handled a number of faculty issues around canceled courses. We didn’t file grievances because I had hoped for a collegial resolution. And periodically we reached collegial resolution. . . . We were seeking a resolution that would help the faculty member’s compensation. Perhaps restore the faculty member’s compensation.” *Id.* at 62. The Union could have but did not pursue this traditional path in the fall of 2012.

Exceptions

In sum, Berklee and the Union over the past 30 years have defined their relationship through an 87-page, single-spaced CBA. This agreement carves out certain rights and entitlements for the Union but vests other rights, powers and authority in the College. The CBA states clearly that the Union waives any right to engage in mid-term bargaining. The Union and its lawyer tried in multiple ways to modify this waiver, to no avail.

The CBA also contains specific provisions on scheduling and course content, and then leave the gaps to be filled in the discretion of the Senior Vice President of Academic Affairs. The Union has repeatedly made proposals and submitted talking points related to mitigating the effects of cancelling classes due to low enrollment, but has not secured these benefits. The Union’s loss at the bargaining table does not entitle it to a “do over” mid-term, with or without the unambiguous integration clause. The Contract controls this dispute. It compels dismissal, or at least deferral to the arbitration procedures the parties also negotiated.

Acting within its contractual rights, in 2012 Berklee changed some course minimums as it had in the past for over a decade. These minimums are simply administrative guideposts, not

hard-and-fast rules or policies. Courses routinely run with enrollment below the nominal minimum. The Judge found that only one faculty member *may* have had a class cancelled due to low population, meaning the effect may have been 1 course out of 5200. That cannot be material, substantial or significant (let alone all three) under any rational definition.

Despite all that, Berklee bargained anyway. Simpson participated in two lengthy and substantive phone calls with Schultz, and the parties' bargaining teams met in person. If the Union had been interested in resolving the issue, it could easily have been accomplished before the fall schedule was finalized.

Berklee did not violate the Act.

Exception: The Union Waived All Mid-Term Bargaining.

The Union, through the CBA and its bargaining history, waived its right to engage in mid-term bargaining. The Judge's rejection of this argument as "not supported by established case law," Decision, p. 23, reflects 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.

The first question is whether the Union waived mid-term bargaining generally, and the second question is whether the Union waived it as to the specific issues in this case. The answer to both questions is, yes.

A waiver of statutory bargaining rights must be "clear and unmistakable," and it can be shown in multiple ways. See Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983). Waiver can occur "by express provision in the collective bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a

combination of the two.” Am. Diamond Tool, Inc., 306 N.L.R.B. 570, 570 (1992) (quoting Chesapeake & Potomac Tel. Co. v. NLRB, 687 F.2d 633, 636 (2d Cir. 1982)). Waiver may also be found in “zipper clauses” that waive a Union’s right to engage in mid-term bargaining. See Brooklyn Hosp. Ctr., 344 N.L.R.B. 404, 410 (2004) (“Nor does the contract contain a ‘zipper clause’ which might have operated as such a waiver”).

In this case, all of the factors manifest the Union’s waiver of its right to engage in mid-term bargaining—the contract, the bargaining history, past practice, action and inaction. Individually, each factor proves waiver. Taken together, the evidence of waiver is overwhelming.

The Collective Bargaining Agreement between Berklee and the Union is lengthy, detailed and comprehensive. JX-2. The Agreement is seventy-eight single-spaced pages and covers every aspect of the employment relationship. Id. The Agreement features thirty-eight articles as well as five memoranda of understanding. Id. This Agreement has grown out of almost thirty years of bargaining between Berklee and the Union. Decision, p. 3. Berklee and the Union are sophisticated parties. The faculty are professionals, and highly educated, intelligent people. The American Federation of Teachers is a large union with substantial resources. Both parties have significant experience with bargaining and labor relations. In every single negotiation, the Union was represented by an experienced lawyer at the table. Tr. at 97. This is a sophisticated agreement that was the result of substantial give-and-take between savvy parties.

To memorialize the comprehensive nature and finality of the Agreement, the parties included an explicit and detailed integration clause. Id. at 23. This is not a mere recitation that bargaining ended, but a specific agreement that no mid-term bargaining is required. It reads:

The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect

to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are fully and exclusively set forth in this Agreement. Therefore, the Employer and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered in this Agreement. All rights and duties of both parties are specifically expressed in this Agreement and such expression is all-inclusive. This Agreement constitutes the entire agreement between the parties and concludes collective bargaining for its terms, subject only to a mutual agreement to amend or supplement this Agreement.

JX-2 at 68 (emphasis added).⁴ Through this clause, the Union “unqualifiedly” waived its right to engage in any mid-term bargaining (“for the life of this agreement”). This language is clear and unmistakable. No lawyer could read it and not know what it means. Surely the American Federation of Teacher’s lawyer who negotiated it must have known what it meant.

As if the language alone was not sufficient, the parties’ bargaining history confirms the Union’s understanding that it was waiving all bargaining for the life of the Agreement. Two proposals stand out—both drafted by the Union (and presumably by the AFT’s lawyer). First, the Union proposed that the following be added to the management rights clause: “Such rights or prerogatives are expressly or implicitly limited by the provision of this Agreement, by applicable past practices or established policies, or by state or federal statutes, including the Employer’s duty to bargain pursuant to the National Labor Relations Act.” R-15 (emphasis added). This attempt to open the door to mid-term bargaining under the NLRA was rejected by the College. Second, the Union proposed the following language: “If any new issues arise during the term of this Agreement which are not removed by law from the area of collective bargaining, and which are not dealt with herein, the College agrees to negotiate over such issues upon request by the Union.” Tr. at 361; R-15. (emphasis added). Berklee also rejected this proposal. Tr. at 361.

⁴ This explicit integration clause is complemented by a strong management rights clause, which provides that “[a]ll management rights, powers, authority and functions, whether heretofore or hereafter exercised, and regardless of the frequency or infrequency of their exercise, shall remain vested exclusively in” Berklee. JX-2 at 64.

It is difficult to imagine how a waiver could be any more clear or unmistakable. The Union, with the assistance of its lawyer at the table for every single negotiating session, agreed to a contract which said that “for the life of this Agreement” it “unqualifiedly waives the right . . . to bargain collectively with respect to any subject or matter . . .” The Union, with the assistance of its lawyer, proposed language which the College rejected to limit Berklee’s management rights by, among other things, the “duty to bargain pursuant to the National Labor Relations Act.” And the Union’s lawyer drafted language which the College rejected saying that “[i]f any new issues arise during the term of this Agreement which are not removed by law from the area of collective bargaining . . . the College agrees to negotiate over such issues upon request by the Union.” If this combination of an explicit clause in the CBA waiving mid-term NLRA bargaining along with the history of Berklee’s rejection of Union proposals to require mid-term bargaining is not sufficient to effectuate waiver, then the Board’s “clear and unmistakable waiver” doctrine would be a nullity.

The Judge essentially ignored the specific language in the Agreement here, and instead made the blanket claim that the Board does not recognize general waivers. This is both not true and inconsistent with the Board’s statutory authority.

The Board has never held that a zipper clause cannot establish waiver. Rather, the Board has rejected zipper clauses that are broad and generic, and that do not unambiguously waive mid-term bargaining. In American Benefit Corp. 354 N.L.R.B. 1039 (2010), cited by the Judge, the zipper clause was limited to changing the CBA, not all mid-term bargaining. It said “neither party is under any duty to bargain with respect to any changes, modifications or additions to this agreement to take effect during its term. . .” Id. at 1045. The Board did not discuss this provision beyond saying in a footnote that the “clear and unmistakable waiver” standard was the

correct standard to apply. It did not say that zipper clauses can never effectuate waiver. See also Kansas National Education Assn., 275 N.L.R.B. 638, 639 (1985) (“The provision is at best vague and as such insufficient to meet the standard of a ‘clear and unmistakable waiver.’”); Ohio Power Company, 317 N.L.R.B. 135, 135 (1995) (finding insufficient a zipper clause which stated: “The parties agree that this contract incorporates their full and complete understanding and that any prior written or oral agreements or practices are superseded by the terms of this Agreement. The parties further agree that no such written or oral understandings or practices will be recognized in the future unless committed to writing and signed by the parties as a Supplement to this Agreement.”).

Thus the issue in these cases was not that there was a zipper clause or that it was comprehensive. The issue was what the zipper clause said. In none of these cases did the language explicitly say that mid-term bargaining was not required—rather, they all involved stock integration language saying no more than that bargaining had ended. Nor did these cases have bargaining history reinforcing the parties’ specific intent to forego mid-term bargaining. The zipper clauses rejected by the Board are short, boilerplate “throwaways” tacked on to the end of collective bargaining agreements.

The Board does not have the statutory authority to rule that zipper clauses cannot constitute a waiver of the duty to bargain. H. K. Porter Co. v. N.L.R.B., 397 U.S. 99, 106 (1970). Moreover, such a ruling would seriously undermine the institution of collective bargaining. The principal purpose of bargaining is to try to reach an agreement, and the terms of that agreement must be honored. The Board cannot just ignore terms of an agreement. See Yellow Freight Sys., Inc., 337 N.L.R.B. 568, 570 (2002) (“It would be ... inappropriate for me to ... rewrite a term of the parties' collective bargaining agreement. [This] action would

substantially exceed my authority.”); Amalgamated Clothing & Textile Workers Union, 246 N.L.R.B. 747, 748 n.4 (1979) (“We do not adopt the Administrative Law Judge's recommendation [because it] has the potential of forcing the parties to rewrite the contract in contravention of the principles set forth in H. K. Porter Co. v. N.L.R.B., 397 U.S. 99 (1970).”). This is why the Board asks whether the clause is clear and unmistakable—in order to give effect to the parties agreement. The Board cannot ignore the parties agreement just because it appears in a zipper clause.

There is an important policy at stake here. The language of both the contract and the Union’s proposals must be interpreted to mean what they say because, otherwise, Berklee is denied the benefit of its bargain. The collective bargaining process is complicated and dynamic. Parties prioritize demands and make concessions in return for other benefits. There is a give-and-take until both parties feel that a just and fair agreement has been reached. Tex-Tan Welhausen Co., 172 N.L.R.B. 851, 882 (1968) (“[T]he normal give-and-take of good-faith bargaining [is] so often needed if agreement is to be reached.”). The Board cannot step in and invalidate one part of a complex bargain. Indeed it is often impossible to unbundle a deal and know what you would be left with. Bargaining does not work that way.

What is obvious here is that Berklee valued the waiver of mid-term bargaining, and rejected the Union’s efforts to preserve it. During negotiations, Berklee made concessions and the Union received benefits in other parts of the agreement. The CBA cannot be deconstructed to invalidate specific parts of the bargain. The Union chose to prioritize wage increases, benefit enhancements and other contract improvements. The Board cannot ignore these trade-offs. Bargaining is a complex process and often involves package deals. The parties themselves may not even know how the pieces fit together. If the Board requires mid-term bargaining in this

instance, the Union's agreement to "voluntarily and unqualifiedly waive[] the right. . . to bargain collectively with respect to any subject or matter" during "the life of this Agreement" would be removed from the bargain. The Union would be unjustly enriched—it would reap the benefits of both mid-term bargaining (which it waived and did not expect), and also keep whatever advantage it obtained in return for agreeing to waive its right to mid-term bargaining in the first place.

This result can only undermine the legitimacy of collective bargaining, both with the specific parties and in the bargaining community at large. Parties assume that their agreements will be honored. This motivates parties to meaningfully engage in the bargaining process. It also encourages parties to make concessions, because it allows them to trust that they will receive something in return. If parties cannot trust that explicit agreements will be honored, they will be less willing to engage in the natural give and take of bargaining. See Metropolitan Edison Co., 330 N.L.R.B. 107, 109 n.8 (1999) ("[E]xperience has shown that candid discussion of complex problems by labor and management frequently results in their peaceful resolution with attendant benefits to both sides."). More broadly, the Board does nothing to enhance the institution of bargaining, and indeed can do affirmative harm to its legitimacy, if bargaining is seen as a one way street where explicit agreements negotiated by the Union's lawyers are ignored and the Union benefits both from what the employer agreed to and what the employer did not agree to.

The Union's waiver did not remove it from a meaningful role in dealing with Berklee mid-term. In the absence of mid-term bargaining, the parties negotiated any other provision to protect the interests of the labor-management relationship. The Collective Bargaining Agreement provides: "The Employer and Union may schedule meetings upon mutual agreement

to discuss mutually agreed upon matters relating to wages, hours, and working conditions.” JX-2 at 4. These meetings in fact occur on a regular schedule. In addition, there are ad hoc meetings for when new issues arise. The Union acknowledged that the College has never refused to meet to discuss any issue of concern.

This provision is further proof of the waiver of mid-term bargaining. This contractual provision would be an unnecessary and superfluous process if the parties had not agreed to waive bargaining for the life of the agreement. The subjects—“wages, hours, and working conditions”—are precisely the three subjects for which the Act requires bargaining. National Labor Relations Act § 8(d), 29 U.S.C. § 158. (“to bargain collectively is the performance of the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . .”). This provision clearly proves (yet again) the parties’ intent not to engage in mid-term bargaining. The parties negotiated to “schedule meetings upon mutual agreement to discuss” wages, hours and working conditions. Yet the Union and General Counsel claim that Berklee is also required to bargain those same subjects under the Act. That interpretation makes no sense. It is another instance where the Union wants to have its cake and eat it too. There is no rational way to read this provision other than that it provides a mechanism for issues to be addressed that might otherwise be handled through bargaining.

Exception: The Union Waived Mid-term Bargaining Over the Specific Matters At Issue Here.

In addition to the general waiver of mid-term bargaining discussed in Exception 1 above, the evidence at trial proved that the Union also specifically waived mid-term bargaining over the alleged effects of changes in course minimums.

As an initial matter, it is important to be clear about the specific issues in this case and how they relate to each other. The first issue is the change in minimum course populations, which the Judge correctly found (with neither the Union nor the General Counsel arguing to the contrary) was within the College's management rights and was not subject to bargaining. The second issue, the alleged effect of the change in course minimums, involves the cancellation of courses and rescheduling of faculty.

In her decision, the Judge found that there was no waiver of the duty to bargain over the change in course minimums. Decision, p.23. But since the Judge also found that there was no duty to bargain over the change in course minimums, Decision, p. 20, it is not clear why the Judge made this finding. As discussed below, the finding was also wrong. The Judge ignored the College's waiver argument concerning the alleged effect of the change in course minimums - the cancellation and rescheduling of courses. The evidence is overwhelming that the Union waived any right to bargain over this issue.

The Union, as evidenced by the Collective Bargaining Agreement and rejected bargaining proposals, waived its right to bargain about course cancellations generally, and specifically about the cancellation of courses due to underpopulation. As discussed above, an employer does not have to engage in effects bargaining if the Union makes a "clear and unmistakable" waiver of its right to engage in bargaining on a subject. United Cable Television Corp., 296 N.L.R.B. 163, 167 (1989). When determining if a waiver occurred, the Board considers a variety of factors including the wording of the relevant portions of the agreement, the parties' past practices, the relevant bargaining history, and any other provisions of the agreement that may shed light on the parties' intent. See Provena St. Joseph Med. Ctr., 350 N.L.R.B. 808,

815 (2007). The crux of this inquiry is whether the Union “consciously yielded its interest in the matter.” Airo Die Casting, Inc., 354 N.L.R.B. No. 7, at 2 (2009).

In determining whether waiver exists, the Board must apply common sense, consider the way bargaining actually works, and apply a reasonable interpretation to events. This should not be an exercise where hyper-technical barriers are erected to avoid rational conclusions. The Agreement does not need to say, “we the Union give up any and all right to engage in effects bargaining on class cancellations for underpopulation.” Bargaining doesn’t work that way. The waiver doctrine does not “require that the action be authorized in *haec verba* in the contract.” Advice Memorandum, Billings Clinic, Case 27-CA-21211, dated August 7, 2009. A waiver may be found if the contract either “expressly or by necessary implication” provides management with the right to unilaterally take the action in question. Provena St. Joseph Med. Ctr., 350 N.L.R.B. at 815. In performing this analysis, the Board may read several portions of a collective bargaining agreement together to find waiver. Id.

Here, the CBA has extensive provisions concerning the scheduling and assignment of courses. These include:

- Article XXIV(A): “Faculty will teach no more than four (4) consecutive hours . . . teaching hours will be from 8:00 a.m. to 10:00 p.m., Monday through Friday inclusive . . .” JX-2 at 35.
- Article XXIV (B): “Full-time faculty may only teach up to eighteen teaching units per week, the equivalent of fourteen contact hours of lecture teaching” Id. at 38.
- Article XXIV (A): Part-time faculty may teach up to one unit less per week than full-time faculty. Id. at 38.
- Article XXIV (B): Certain faculty members cannot be scheduled to teach on weekends without their written consent. Id.

- Article XXIV(A) “scheduling preferences may be submitted to the Department Chair and will be considered in determining faculty schedules but it is not mandatory these preferences be granted.” Id.

Thus the Union was able to achieve in bargaining discrete restrictions on the College’s authority to schedule and assign courses. However, the Union conceded that other than these specific restrictions, the College retained control over the schedule at Berklee. Ultimately, although the College must consider faculty preferences, in the end the CBA gives control to the College. “Faculty must meet each teaching assignment at the scheduled time and place as determined at the beginning of each semester by the Senior Vice President for Academic Affairs or designee.” JX-2 at 38, 44. In doing so the Union expressly granted Berklee control over the schedule.

The past practices and bargaining history further prove this point. The College has long managed its courses through the Curriculum Committee, which has robust faculty participation as authorized by the CBA. See JX-2 at 41 (“Each full-time faculty member must perform one (1) or more of the duties listed . . . (a) Service on College Committees . . . (c) Curriculum development.”). The Curriculum Committee is responsible for deciding what courses to offer and course content, including setting and changing course minimums. Decision, p. 5. It has done this for more than a decade and the Curriculum Committee was behind the changed minimums at issue in this case. Id. During bargaining the Union attempted to assert more control over course content, including course minimums, by proposing a new committee in 1989. Tr. at 357; R-15. Under the Union’s proposal, a different curriculum committee would “be elected by the faculty to monitor curriculum changes and developments and the Employer will inform the Committee of any proposed changes in curriculum at least one academic year prior to their implementation.” (emphasis added) Tr. at 357. Thus the Union proposed to create a faculty-only committee through which all curriculum changes, including course minimums,

would need to be channeled. Berklee rejected this proposal. Thus the Curriculum Committee retained its control over course content and course minimums.

It bears repeating that the Union and Berklee are sophisticated parties who were always represented by lawyers at the table. Their agreement must be respected. Whatever is included in the Agreement is included for a reason, and whatever is omitted is omitted for a reason. The Agreement's silence concerning specific scheduling issues 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”

A perfect case in point is the issue of class size and its effect on course cancellations. The CBA regulates class maximums but not class minimums. Any competent arbitrator would reach the logical conclusion that this dichotomy proves the Union ceded to the College the management right to set and change class minimums. See Elkouri & Elkouri, *How Arbitration Works* 467 (6th ed. 2003) (when interpreting contracts “arbitrators apply the principle that ‘when parties list specific items . . . they intend to exclude unlisted items. . . .’”); Earthgrains Co. 112 LA 170, 174 (1999) (“When certain . . . things are specified in a . . . contract . . . an intention to exclude all others from its operation may be inferred”); Spectator Management Group 109 LA 1147, 1152 (1997) (“Frequently arbitrators apply the principle that to expressly include one or more of a class in a written instrument must be taken as an exclusion of all others.”); Columbia School District 100 LA 227, 231 (1992) (“One of the rules of contract interpretation is that the expression of one or more subjects excludes all others”). The Judge reaches precisely the opposite conclusion: that Berklee cannot change minimums without bargaining. An arbitrator should decide this question.

Under the Agreement, “maximum class size . . . is determined by the Senior Vice President for Academic Affairs with input from Departmental faculty. No class may be assigned more than ten percent (10%) above the maximum size without the prior approval of the affected faculty members.” Tr. at 360; R-15. The inclusion of this language in the Agreement demonstrates that the parties discussed course populations during bargaining, and Berklee agreed to a specific limitation on its authority. As with course schedules, faculty have input only, with Berklee retaining ultimate control over class size—and this limitation only applies to class minimums, not class maximums. Berklee has had course minimums for the past 29 years. Scott testified that he dealt with Berklee Provosts, past and present, going back to the Union’s formation in 1985 on the subject. Tr. at 52. Yet the Agreement limits maximum class size, not minimum. This is certainly a rational distinction—class maximums are correlated with workload, whereas course minimums concern pedagogical and administrative viability. But whatever the logic, the Union and its lawyer surely knew when they bargained this contract that they were regulating class maximums but not class minimums. The Board cannot ignore that obvious conclusion.

In any event, as described above, the issue in this case is not whether Berklee failed to bargain over changes to course minimums—it is whether Berklee failed to bargain over the effects of those changes, namely the cancellation of classes. In this respect, the silence of the CBA on the subject is striking. There are extensive scheduling provisions that limit Berklee’s authority, and a provision that permits faculty to express their preferences, but otherwise faculty must meet the teaching assignments at the scheduled time and place as determined by the College at the beginning of each semester. Particularly when read in conjunction with the

integration clause and the management rights clauses, the only rational conclusion is that the Union and its lawyers ceded control over this issue to Berklee.

The bargaining history removes any doubt. In 2005, the Union proposed that: “In the event that . . . courses to be taught by part-time (hourly) faculty are cancelled due to under-enrollment, the affected faculty member whose course is cancelled shall be provided 50 percent (50%) of the wage which would have been due had the course run as scheduled. The cancelled teaching hours shall count towards the threshold for benefits...” (emphasis added) Tr. at 374; R-20. This is the precise issue in this case—the effects on a faculty member when a course is cancelled due to under-enrolment. The Union proposed two specific ways to mitigate the impact of courses cancelled for under-population: pay the faculty member half the wage s/he would have been paid if the course had run, and count those hours toward the benefit threshold. The College rejected these proposals, and they are not part of the current Agreement. Tr. 374.⁵

In 2009, the Union tried again. This time it proposed full compensation rather than half; proposed that all cancelled courses, not just those cancelled due to low population, be covered; and removed the benefit threshold language. Specifically, the Union proposed that “In the event of course cancelation part-time faculty shall be compensated in full.” Tr. at 377; R-21. The College also rejected this proposal, and it too is not part of the Agreement.

The Union made the same proposal in 2010: “In the event of course cancelation, part-time faculty shall be compensated in full.” Tr. at 380; R-24. Again the College said no and again the language did not find its way into the CBA.

⁵ In later negotiations, the College agreed to lower the benefit threshold in all cases - not just when a course was cancelled for under-enrollment. When the parties met in September 2012 to discuss the effects of the changes to the course minimums, Simpson pointed this out. Schultz testified that Simpson stated at the September 2012 meeting that “because they lowered the threshold so much during bargaining it was unlikely that anybody was going to lose their health insurance.” Tr. at 104.

In addition to formal proposals, the Union has historically given the College talking points for negotiations. These are what their name suggests—points that the union will be talking about in negotiations. Tr. 363. In 2005, the Union gave Berklee talking points that involved “compensation for course cancelations due to under enrollment.” Tr. at 377; R-21. The Union also gave the College talking points in 2009, which provide for full compensation rather than half and covering all cancelled courses, not just those cancelled due to low population. Id. at 375; R-21. In 2009, the Union gave another talking point concerning “compensation for hourly faculty for cancelled classes” and proposed that cancelled courses “count towards teaching load.” Tr. at 376; R-22.

It is difficult to conceive of a clearer and more unmistakable failed bargaining history than this. In three separate bargains—2005, 2009 and 2010—the Union specifically proposed and the College rejected contractual language that would have covered the exact issue in this case: dealing with the effects on faculty of cancelled courses due to under-population. In one bargain, the Union proposed mitigating the effects only for courses cancelled for under-population; in the other two, the Union proposed a more general remedy for faculty affected by cancelled courses. The Union also varied the specific remedy—half-pay and benefit credit the first time; full pay the other two times. The Union had a partial success in 2010, when the College lowered the benefit threshold for all faculty, thereby ameliorating the effect of cancelled classes. But all three times the College rejected specific measures in the event of cancelled courses.

The Judge cast aside this considerable history by constructing artificial hoops for Berklee to jump through, based on a cramped reading of Board precedent and the realities of bargaining. The Judge cited three objections: (1) “it was not established that the parties in fact negotiated

over any of these proposals;” (2) it was unclear what change the Union was proposing because the original contracts were not entered into evidence; and (3) the proposals did not specifically deal with changing minimum populations or bargaining about the effects thereof. Decision, p. 23. All these objections are meritless.

First, it is an oxymoron to say that the proposals do not establish that negotiations occurred. The proposals were negotiations. These were written Union proposals. They were unambiguous both as to scope (cancellation of courses, cancellation of courses due to under-population) and mitigation measures (half-pay, full pay, benefit credit). The experienced Union lawyer who wrote the proposals did not fail in any way to convey what the Union wanted. No words at the bargaining table were necessary to make the Union’s intentions clear. Moreover, the proposals were made in three straight negotiations—and reiterated in two separate talking points. It was undisputed that the talking points were Union agendas for points the Union wanted to talk about in negotiations. Thus five times between 2005 and 2010, the Union handed the College writings which proposed these benefits. All five times the College said no. The current Agreement does not contain these benefits. For the Board to require anything more than this to establish waiver is just a trap to deny the College the benefit of its bargain. These are proposals that no one disputes were made while bargaining the Agreement, a process at which both parties were represented by counsel. This is not a situation where Berklee is trying to hold the Union to some offhand remark in bargaining or some secondary implication of an ambiguous proposal.

While not cited in the opinion, the cases where the Board rejects waiver on the grounds that an issue was not sufficiently discussed are fundamentally different than the case at hand. For example, in E. I. du Pont de Nemours & Co., 2011 N.L.R.B. LEXIS 452 (2011), the Board

did not find waiver because the bargaining notes showed that the Union made it affirmatively clear that they were not waiving certain rights by agreeing to the inclusion of certain language in a management rights clause. Neither the Union nor the General Counsel ever attempted to put on such evidence here. Indeed, both at the hearing and in the brief, Counsel for the General Counsel objected that this evidence was irrelevant! Tr. at 367.

Most frequently in the cases where the Board rejects waiver, there is evidence that the topics were not addressed at all. Butera Finer Food 343 N.L.R.B. 197, 199 (2004) (“no evidence even of notification”); Post Tribune Co., 337 N.L.R.B. 826 (2002) (“there was no evidence even of notification to the Union about the changes let alone that the issue was discussed and consciously explored.”) In these cases, the employer’s argument is that a topic was discussed indirectly or impliedly. There was nothing indirect or implied here. Berklee was not trying to slip one past the Union or its lawyer. These were the Union’s own proposals. These were the Union’s own talking points. There were five separate writings, drafted by the Union and given to the College, over three successive bargains. By definition, this was negotiations.

Second, the fact that the original contracts were not entered into evidence is irrelevant. As described above, there is nothing even remotely confusing about what the Union proposed. All that is needed is the rejected proposals and the current CBA, both of which are in evidence. They reveal precisely what the Union wanted, and what the Union failed to achieve.

Finally, the Judge’s last excuse for denying Berklee the benefit of its bargain proves too much, and is otherwise wrong. Berklee 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. In any event, the Judge’s standard is too narrow. One can always devise an artificial or immaterial distinction between what was bargained and what the Union seeks to bargain, but that is not the exercise. The goal is to reach a reasonable, good faith and fair conclusion about what the parties’ bargaining conduct demonstrates. In this case, the only possible conclusion is that the Union in 2012 asked for something it tried but failed to obtain in 2005, 2009 and 2010.

The proposals and talking points demonstrate that the effects of course cancellations were an issue bargained multiple times by the parties, and the Union lost. These were Union proposals; the Union put them forward, knew what they said, and knew the significance of signing a contract without their inclusion. See Kerry, Inc. 358 N.L.R.B. No. 113 at 16 (2011) (“the Union knew, or should have known, that its agreement to certain language would constitute a waiver”) The Union knew that course cancellations due to under-population was an issue, and attempted to address it through their proposals. The Union was unsuccessful in securing these benefits.⁶ The Union and its lawyer knew what this meant and waived its right to bargain.

Exception: Decisions Related to Course Content and Academic Schedules Are Not Subject To Bargaining And It Is Past Practice That The College Controls These Decisions.

The structure and content of the courses students take is a core management right which strikes at the heart of Berklee’s activities as an educational institution, and is therefore exempted from bargaining as a matter of law. The Board has recognized that pedagogical management, including class size, is not an issue well suited for the bargaining process. As the Board explained in Brown University, “Academic freedom includes the right of a university ‘to

⁶ On top of that, the Union signed a comprehensive integration clause “for the life of [the] Agreement voluntarily and unqualifiedly waiv[ing] the right, [to] bargain collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement.”

determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.” 342 N.L.R.B. 483, 490 (2004) (quoting Sweezy v. State of New Hampshire, 354 U.S. 234, 263 (1957)). As such, the Board has been reluctant to permit collective bargaining when it comes to decisions related to students’ academic experience. There is a concern that “imposing collective bargaining would have a deleterious impact on overall educational decisions These decisions would include broad academic issues involving class size, time, length, and location” Id. Brown University in fact reaffirmed the principle established in St. Clare Hospital that to the extent collective bargaining over academic prerogatives “limits the ability of students and faculty to tailor the instruction to their own individualized needs, the quality of the educational process is impeded . . . to the detriment of the public as well. We simply do not view such intrusions into traditional academic freedoms as being in the public interest.” 229 N.L.R.B. 1000, 1003 (1977).

The Judge seemingly agreed that Berklee had the unilateral right to change minimums, but found that Berklee had a duty to engage in effects bargaining over the change. However, this ignores that the effects of the decision to change course minimums are themselves core management rights. Cowen testified at length about the dynamic process by which the academic schedule is set. What courses to run and related determinations are considered for nearly a year before the semester in question begins. Decision, p. 5. Berklee has to decide what courses to include in its catalogue, what courses to schedule, and, once scheduled, what courses to run and which to cancel. Id. Decisions about whether to cancel a course can be made even after the semester has begun, when Berklee finally learns of the results of placement tests and the makeup of the incoming class. Id. at 6. To accommodate student needs, Berklee has to cancel some courses and add others to the schedule.

Class size, may have an impact on the decision to run a course, but it is but one factor considered along with a variety of others. *Decision*, p. 6. As Cowen explained, it is too simplistic to say that a course is cancelled solely because of enrolment (unless it is zero)—there are a myriad of other factors. Scott confirmed that classes have historically run with one student. *Id.* Although not optimal as a matter of pedagogy, pedagogical concerns must be balanced against student need. This includes whether other courses are more important to run at that time. Berklee also considers faculty availability, classroom space, graduation and progression requirements, and the multitude of obligations imposed on the College by the Collective Bargaining Agreement. *Id.* at 6. It is impossible to divorce decisions about course populations from these other factors and impose an effects bargaining requirement without impinging on Berklee’s right to handle its academic and student-focused operations. These decisions and the effects of these decisions both involve management rights and are therefore inextricable. These considerations are not appropriate for bargaining, and calling it “effects” bargaining does not change that.

The Judge’s imposition of a duty to bargain about the effects of course cancellations guts Berklee of key management rights. The Judge made important factual findings about the scheduling process which she then ignored when analyzing the case. She found that Berklee decides what classes are offered or not, those “decisions are constantly reviewed and may be changed throughout the year, as circumstances dictate,” and classes may be canceled any time through the end of the first week of classes. *Id.* at 5. She also recognized that none of that is subject to bargaining but rather it is solely determined by management per the CBA. *Id.* at 20. Berklee decides whether or not to offer a course, who to assign to teach a course, whether to schedule a course, and whether or not to cancel it. These are all core academic decisions that are

part of the continuum of the scheduling process. However, based on the Judge's logic, a duty to bargain arises at the tail end of this process.

The Judge is drawing an artificial line. Throughout the 10-month long scheduling process, Berklee considers low population. This can be by removing a course from the catalog, not scheduling it a particular semester, or canceling based on enrollment from April through early September. There is no principled reason to draw a line in late August, and say course cancellations at that time are decisions Berklee has to bargain over, as though a faculty member's "right" to teach a course "vests" when it is scheduled. This would severely prejudice Berklee's management rights in the 10th month of a 10-month, iterative process.

To illustrate the point, suppose here that Berklee did not cancel Gorham's course in August 2012, but rather removed it from the course catalogue in November 2011. Or suppose Berklee (regardless of minimum populations) cancelled Gorham's course with three students in April (which in fact it did). Berklee makes hundreds, if not thousands, of decisions like that every semester. To say Berklee has to bargain about all of those decisions does not make sense—it would cripple the College's ability to run its academic program. See St. Clare Hospital 229 N.L.R.B. at 1003 (rejecting bargaining obligations that "limit[] the ability of students and faculty to tailor the instruction to their own individualized needs").

Indeed, the past practice is that the parties have never bargained about these decisions. Tr. 298. To be sure, when they are being implemented the College is mindful of the CBA's requirements. Id. at 298-99. But otherwise, the interests of the students and the academic mission predominate.

Taking the waiver arguments together, it is clear that the parties did not contemplate bargaining over Linda Gorham's class schedule. Berklee and the Union have a 78-page single-space comprehensive CBA, which has grown out of 30 years of bargaining. This contract contains many provisions on scheduling, including the opportunity for faculty to express preferences, but giving the ultimate control over the schedule to Berklee. The parties have also directly bargained over the effects of class cancellations, on multiple occasions. The Union has proposed various compensation models and other similar strategies for dealing with cancellations, but none of these proposals made it into the CBA. The CBA also contains a real integration clause. Far more than a short boilerplate recitation, this clause makes clear that both parties waived any right to engage in midterm bargaining. This is complemented by a strong management rights clause vesting Berklee with the power to control the operations at the College. In short, the CBA does not obligate Berklee to bargain over the scheduling, cancellation and reassignment of courses. Berklee was challenged on this point in bargaining and won. The CBA expressly provides that Berklee does not have to engage in midterm bargaining and has ultimate control over the schedule. This bargaining occurred against a backdrop where course cancellations due to under-population was an issue the Union repeatedly raised with the College, and typically resolved, as Scott testified. If this is not enough to show waiver, nothing is. For bargaining to be respected, it needs to go both ways. Employers are also entitled to the benefit of their bargain. Here, Berklee had the reasonable expectation that it had bargained for the right to set and change course content and course schedules.

Exception: The Judge Erred in Finding a Change in Berklee's Terms and Conditions of Employment.

Berklee's change of some course minimums in August 2012 was not a unilateral change within the meaning of the Act. The Judge's characterization of the change of minimums as a

“policy change” is incorrect, and belied by her own factual findings. Decision, p. 25. By the Judge’s own description, course minimums are merely discretionary administrative guides used by academic scheduling as a tool to make the student schedule.

The Board has long held that in unilateral change cases, “the vice involved is that the employer *changed* the existing conditions of employment. It is this *change* which . . . forms the basis of an unfair labor practice charge.” Id. Post Tribune Co., 337 N.L.R.B. 1279, 1280 (2002); see also Daily News of L.A., 315 N.L.R.B. 1236, 1237 (1994). When an employer’s actions do not change existing conditions, there can be no violation of Section 8(a)(5). See Post Tribune Co., 337 N.L.R.B. at 1280; see also House of Good Samaritan, 268 N.L.R.B. 236, 237 (1983).

The Judge properly credited undisputed evidence of the non-binding nature of course minimums. “Cowen testified that the course population minimums were ‘just a framework. It’s a bar that makes our administration of courses just a little bit easier to gauge . . . [I]t gives us real data as to what the decisions are that we’re making, rather than, you know, intuition and anecdote.’ . . . it’s just an administrative tool We have to be able to make determinations and use this data to do that.” Decision, p. 8. The Judge also credited Simpson’s testimony that “he did not notify the Union of the new course population minimums because he did not consider it a change, but ‘business as usual,’ an ‘administrative detail.’” Id. The Judge found that minimums “were not strictly adhered to when deciding whether to cancel a class; exceptions could be and frequently were made.” Id. at 9. She noted that “they were flexible in application; they were not required to be met in order to run a class, but were presumed optimal numbers.” Id. “Classes were often conducted despite having fewer than the minimum number of students.” Id. The Judge also explained the varied circumstances where this occurs:

Classes were run below the minimums in instances such as when the class was required for graduation, or was a prerequisite for other sequential classes, or the class was only offered periodically and the students may not have another opportunity to take it; or the class may still be viable despite not meeting the minimum; or there were few individuals qualified to take the class; or it was a new prototype class that was being ‘piloted.’

Id. at 6-7.

The Judge recognized that minimums are guideposts and not policy; classes above the minimum are routinely cancelled, and classes below the minimum are routinely run. The decision found that “many classes were cancelled in the fall of 2012, despite having more than the minimum number of students registered,” while “64 classes ran with fewer than the minimum number of students.” Id. at 21.

However, the Judge nonetheless characterized the change in minimums as a “policy change,” despite the fact that her findings prove that there was no policy and no material change. Changing administrative guideposts that may or may not be followed, and routinely are not followed, does not represent a change within the meaning of the Act. A hypothetical illustrates this point. Before the change in minimums, Cowen may have looked at a course, such as Introduction to Latvian Music, that had a minimum of three, although she knew the real ideal minimum was five. If three students had enrolled, the course could very well have been cancelled based on a myriad of factors, including low enrollment. In making that assessment Cowen knew that three was sub-optimal, even though that was the nominal minimum. Now when Cowen does the same analysis, the optimal number is transparent; the old minimum of three is now five. But nothing about the process has changed at all. If three students enroll, the course might be cancelled for low population, as before, or it might run, in both cases based on exactly the same variety of factors as before. The only difference 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. As Cowen explained, “it gives us real data as to what the decisions are that we’re making, rather than . . . intuition and anecdote.” Tr. at 295.

The Judge also erred in rejecting Berklee’s assertion of a dynamic status quo, meaning that regular changes to course minimums are a term and condition of employment at Berklee. The Board explained in Post Tribune Co., 337 N.L.R.B. at 1280, that “[a]n established past practice can become part of the status quo Accordingly, the Board has found no violation of Section 8(a)(5) and (1) where the employer simply followed a well-established past practice.” See also Luther Manor Nursing Home, 270 N.L.R.B. 949, 959 (1984).

At Berklee, minimums are constantly in flux, rendering dynamic minimums the status quo. The Decision attempts to establish a “change” by artificially freezing two moments in time—before 2012 and after. But in reality, the status quo did not change when Berklee altered minimums in Fall 2012—the status quo continued, because minimums change all the time. And because course minimums are consistently in flux, Berklee did not depart from its past practice when it altered the minimums; it continued its past practice.

The Judge recognized that changes to course minimums are a common occurrence, but then discounted this fact by drawing unwarranted distinctions and minimizing key facts. As the Judge found, the Curriculum Committee “in recent years had taken the initiative to review course populations when changes to a class were proposed that did not involve minimums, in order to ensure they were appropriately set.” Id. at 7. She also acknowledged the “LART sweep” in 2010 whereby all course minimums in the Liberal Arts department were reviewed and many were changed. Id. at 17 n.8.

The Judge incorrectly concluded that prior changes were made “only occasionally.” Id. at 21. She did not provide any support for this conclusion, and there is no such support in the record. On the contrary, Berklee introduced documentary evidence into the record and direct testimony from Cowen about the fluidity of minimums. Tr. 254-57. Berklee did not enter into the record every time a course minimum had been changed; it provided examples. Cowen was clear about this, noting that “we went through our records, we found hundreds of examples just like these.” Decision, p. 5. Nonetheless, the Judge chose to treat the examples as though they were the only times changes were made. Likewise, the Judge disregarded the significance of the LART sweep, where the Curriculum Committee changed dozens of minimums as part of a review of the entire department. The Judge said it is not comparable to the recent changes without any explanation. Id. at 21.

After improperly downplaying the frequency and significance of prior changes in minimums over the past decade, the Judge exaggerated the scope of the changes at issue in this case. In fact, the record contains no evidence on this issue because the General Counsel did not put on this evidence. The Judge mentions in a footnote that the General Counsel neglected to subpoena records to establish the scope of the 2012 minimum increases that are in dispute. Id. at p. 7 n.8. But this is not merely a question of neglect. It must be concluded that the General Counsel deliberately chose not to put this evidence in the record. The Region conducted a thorough investigation before issuing the Complaint, with which the College cooperated. The General Counsel also had the benefit of the Union’s cooperation, and the record reveals the Union made several information requests, with which Berklee complied. Tr. at 403. The Board must therefore draw an adverse inference from the fact that the General Counsel did not put on any evidence concerning the scope of the 2012 increases in course minimums. Not only did the

Judge fail to do this; she did the opposite. She filled in the gaps to benefit the Union and General Counsel, asserting that the disputed change was “large” and “broad” whereas the prior changes to minimums were “occasional” and limited. There is no support for these conclusions.

Although the General Counsel had the burden of proof, the Judge bailed her out and found facts that were not in evidence. In fact, Cowen’s testimony and the supporting documents show that prior changes were substantial and constant and go back over ten years. There is no basis to find that the recent change was bigger, broader or more significant.

There was no change in past practice, but rather a continuation of past practice.

Therefore, there was no violation of the Act.

Exception: The Judge Erred In Finding The Change to Minimums Had A Material Substantial and Significant Effect.

The increases in course minimums in 2012 did not have a material, substantial and significant effect, and therefore there was no duty to bargain. Board precedent is clear that the duty to bargain is not triggered by every unilateral change. For the obligation to arise, a change must have “material, substantial, and significant impact on the employee’s terms and conditions of employment.” Alan Ritchey, Inc. 359 N.L.R.B. No. 40 at 5 (2012). As the Board explained in Berkshire Nursing Home, 345 N.L.R.B. 201, 220 (2005), “the test is whether the change is ‘material, substantial and significant.’ The mere fact that an employee is ‘disadvantaged’ by the change, although perhaps relevant to the test, is not alone sufficient to satisfy the test.”

This rule is well justified. It would be inefficient and unreasonable to expect employers to bargain about changes that do not meet this threshold of significance. A lower standard would bog employers down and effectively make it impossible to run their institutions in the modern

world. A place like Berklee could end up paralyzed, unable to cater to student needs, set the academic schedule and otherwise run the college. It would also be irresponsible for the Board to devote “its limited resources and limit its capacity to promptly and effectively provide remedies by concerning itself with issues involving such trivia.” Peerless Food Prods., 236 N.L.R.B. 161, 162 (1978) (Member Penello concurring).

Therefore, for Berklee to have had any duty to engage in bargaining, the General Counsel had to prove that changes in class minimums had a material, substantial, and significant impact on the faculty’s terms and conditions of employment. The Board’s test is in the conjunctive, not the disjunctive. All three standards must be met: materiality, substantiality, and significance. These terms have defined meanings. “Material” means “[b]oth relevant and consequential; crucial.” American Heritage College Dictionary (3rd ed. 2006). “Substantial” means “important, essential.” Merriam-Webster Online Dictionary, 2013, <http://www.merriam-webster.com> (8 Nov. 2013). “Significant” means “having or likely to have influence or effect.” Id.

Here, the Judge’s own findings prove that the effects were not material, not substantial and not significant, let alone all three. 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.” Decision, p. 12 n.17. That includes both the Fall 2012 and Spring 2013 semesters. Id. This means that out of the 5200 sections that Berklee ran, only one section was affected. That is .000192 of courses. Even as to that one course out of 5200, it is interesting that the Judge found it “may” have been affected, not that it “was” affected. This is because the Judge found that “course population was, in most cases, only one of several considerations when determining whether to cancel a class.” Id. at 21. Thus, the Judge’s

conclusion was that the only effect the General Counsel proved was that the change in minimums may have had an effect on one course out of 5200. It is inconceivable that this could meet a standard requiring an effect that is material, substantial and significant. If this case meets the standard, the Board ought to just admit that there is no standard at all and let the issue be decided by the Court of Appeals on that basis.⁷

But the case is actually even worse than that. The evidence reveals that after Gorham discovered her class would be cancelled, she spoke with her Department Chair, Kenn Brass, about a replacement course. Id. at 12. He said that LHUM-400, an upper level class on career planning that Gorham had been paid to learn to teach, was available as a replacement. Id. Gorham declined, claiming the course was a “bad fit.” Id. Thus Gorham herself, not Berklee, is the reason why she did not teach the class. Had Gorham accepted Berklee’s offer to teach LHUM-400, there would have been no change to her hours or compensation. The Judge creatively blames Berklee for Gorham’s decision. Although the Judge was compelled to recognize that Gorham did, in fact, withdraw from consideration, Decision, p. 12, she then stated that because there were more available faculty to teach than there were LHUM courses, Berklee did not prove that Gorham necessarily would have been assigned that class. Id. However, it is impossible for Berklee to prove this negative, because Gorham took herself out of the running. Furthermore, the General Counsel had the burden of proving material, substantial and significant impact; it was not Berklee’s job to disprove it.

To reach her conclusion, the Judge misapplied the standard. She found that the only time bargaining is not required is when the effects are “essentially de minimis,” citing Berkshire

⁷ The Judge’s citation in footnote 29, Kendall College, 228 N.L.R.B. 1083 (1977), is inapposite. That case was not an effects bargaining case and otherwise had significantly different facts.

Nursing Home, 345 N.L.R.B. 201, 221 (2005). This is not what that case says. Berkshire Nursing Home does not contain the words “de minimis” or say anything else to suggest the standard for the duty to bargain is anything other than “material, substantial and significant.” In Berkshire Nursing Home the effects were trivial (as they are here), but that was not a silent establishment of a new triviality standard. De minimis is not the opposite of “material, substantial and significant.” There is a whole universe of theoretical changes that are not de minimis but still do not warrant bargaining because they don’t reach the Board’s threshold for material, substantial and significant.

Even if de minimis were the standard, the cancellation of one course out of 5200, especially where the faculty member declined an opportunity to teach a replacement course, is surely de minimis.

The Judge accepted the General Counsel’s argument that an affect on one employee can be enough to warrant bargaining. In support of this point the Judge relied on Kentucky Fried Chicken, 341 N.L.R.B. 69, 84 (2004) and Bonnell/Tredager Industries, Inc., 313 N.L.R.B. 789, 790 n.5 (1994). However these cases are easily distinguishable.

Kentucky Fried Chicken is not an effects bargaining case at all; it is a decision bargaining case. Therefore it tells us nothing about the standard for effects bargaining. The employer there had reassigned delivery duties from one bargaining unit employee to another, resulting in a loss of 4-6 hours of overtime per week Kentucky Fried Chicken, 341 N.L.R.B. at 77. The ALJ concluded that “the decision to reduce overtime by transferring the delivery duties to another employee is a mandatory subject of bargaining, which requires the Respondent to give notice to and bargain with the Union concerning the decision and its effects.” (emphasis added). Id. at 80.

Effects bargaining is only mentioned because it accompanied decisional bargaining. The ALJ in Kentucky Fried Chicken was not talking about effects bargaining; the issue there was a direct change in an employee's terms and conditions of employment. That issue is squarely covered by 8(d) and 8(a)(5). Those concepts cannot be stretched to mean that where decision bargaining is not required, a change affecting one individual can meet the "material, substantial, and significant" standard for effects bargaining. There is nothing incongruous about a rule that an employer who directly changes terms and conditions of employment must bargain, while a change an employer is permitted to make without bargaining triggers an effects bargaining duty only if the effects are "material, substantial and significant." The situations are different and the rules are different.

The case the Kentucky Fried Chicken ALJ cited regarding the duty to bargain, Carpenters Local 1031, 321 N.L.R.B. 30 (1996), is revealing. In Carpenters Local 1031 the Board stated: "We emphasize that we are not holding that every unilateral decision that only affects one individual employee constitutes a per se violation of Sec. 8(a)(5). Rather, in each case the Board must consider the employer's conduct in light of all of the circumstances..." Id. at 32. The Board then gave extreme examples where changes affecting one employee might be enough, i.e., "an employer's unilateral decision to lay off one employee in a unit of two employees [or] instituting a series of unilateral changes, each of which affected only one employee." Id. There was no suggestion at all that a change affecting one employee triggers effects bargaining as a general rule. Quite the opposite, the point was that in an appropriate case a seemingly small change could really be a big change—as in a layoff of half the bargaining unit (one of two). This cannot be extrapolated to mean that a change in one course out of 5200, affecting one faculty member, is material, substantial and significant.

The second case the Judge cited, Bonnell/Tredager Industries, Inc. 313 N.L.R.B. 789 (1994), is also a decision bargaining case and is otherwise fundamentally different than the case at hand. In Bonnell/Tredager, the employer unilaterally changed its bonus policy, which resulted in what was essentially a \$200-\$300 pay cut for every employee. Id. at 789. This was a direct change in terms and conditions of employment and impacted every employee.

The Judge attempts to sidestep the fact that the effects in this case are indisputably very small by stating “the potential effects are material, substantial and significant.” Decision, p. 50 (emphasis added). Under this logic, the standard is not what actually happened but rather, the worst parade of horrors the Union can imagine determines materiality, substantiality and significance. Faculty could have lost their jobs. Faculty could have lost health insurance. But none of these possible bad outcomes actually materialized, nor is there even any evidence they were ever seriously at risk. In any case, potential effects is not the standard the Board uses. The correct inquiry under Board law is whether the effects are material, substantial and significant, not whether they could be.

In Berkshire Nursing Home, for example, the Board rejected the argument that moving a parking lot had a significant effect on handicapped employees, stating, “[t]he General Counsel properly had the burden of producing such evidence, and did not do so. Consequently, we cannot conclude that any employees fit into this category or, if they did, that Respondent failed to make special arrangements.” 345 N.L.R.B. at 221 n.7. This shows that to prove a duty to effects bargain, the General Counsel must prove real, not merely theoretical or possible harm. The Board made a similar point in Crittenton, 342 N.L.R.B. No. 67 (2004), requiring the General Counsel to prove a material change, not just the possibility of one. “[A]part from presenting evidence of the change itself, the General Counsel presented no evidence how this change

affected or would affect the RNs' terms and conditions of employment.” 342 N.L.R.B. at 686. Likewise, in Martin Marietta, 270 N.L.R.B. 114 (1984), the Board found that an employer was not obligated to bargain over the effects of its decision to sell its business, because [the General Counsel could not show] the buyer's “plans [would] result in an immediate adverse impact on unit employees.” See also Providence Hospital v. NLRB, 93 F. 3d 1012, (1st Cir. 1996)(“[I]t is common ground that a union cannot demand bargaining over effects that are purely speculative, ephemeral, or too far removed from the underlying activity”); International Asso. of Machinists & Aerospace Workers v. Northeast Airlines, Inc., 473 F.2d 549 (1st Cir. 1972) (finding no need to engage in effects bargaining about a pending merger because effects were too speculative: “Since the merger itself is not the proximate cause of job displacement, which will occur only as a result of management decisions subsequently made by the surviving company, any negotiations . . . about what protection the employees should have against such displacement would be recklessly speculative”).

For what it is worth, the evidence is overwhelming that but for one hysteria-prone Chair, nobody thought the change would have material, substantial and significant effects. The Judge credited Cowen's testimony that the changes had “no expected impact” and would result in “no material change.” Decision, p. 8. She credited Simpson's testimony that he did not consider the change in minimums to be a change but rather “business as usual” and an “administrative detail.” Id. Dean Hanley presented the change in a matter-of-fact e-mail, noting she had learned of it that day. Decision, p. 11. Chair Hanser wrote in her email that no classes in her department would be effected. Id. Chair Savage noted that low population courses would be cancelled “as they have been in the past,” revealing that he did not expect any change from past practices. Id. at 13.

Chase wrote that he didn't expect anyone in his department to lose hours because of the higher minimums. Id.⁸

We do not know what the faculty thought, because the Union fought to keep it out of the record. Berklee subpoenaed the Union's records to see its correspondence with faculty concerning the impact. Subpoena Duces Tecum. The Union filed a motion to quash, not wanting Berklee to see the information. Charging Party's Petition To Revoke Subpoena Duces Tecum. This issue was resolved by the Union and General Counsel stipulating that only three faculty were affected (which was wrong and overstated, as discussed above). We do know that the Union's reaction was based on a misunderstanding of another email, which the Judge correctly found had nothing to do with increased minimums. Decision, p. 15. With this background, it is especially troubling that the Judge indulged the General Counsel's speculation about what horrible things might have happened.

The General Counsel in this case had the burden to show that the change at issue had a material, substantial and significant effect on faculty members' terms and conditions of employment. She did not meet this burden. All she did was develop a litany of speculative, unrealistic and unmet possibilities. This did not meet her burden, and because the actual effects were not material, substantial and significant, the Judge erred in finding Berklee had a duty to bargain.

⁸ One Chair, Kenn Brass, wrote a doom-and-gloom email in the heat of the moment on the heels of another announcement of the College that upset him. Brass testified that his email was based on assumptions that were incorrect. Id. at 12. As the Judge noted, "Brass testified that he misspoke in his emails, regarding cancelling classes for not meeting the minimum population. He said that, in fact, he did not know how the new policy was being implemented. He noted that under populated courses continue to be run if a student needs it or it is a popular class." Id.

Exception: The Judge Erred in Finding that Berklee Refused to Bargain.

Berklee did not refuse to bargain with the Union. To the contrary, Berklee met with the Union upon request; engaged in give-and-take both at and away from the table; answered the Union's questions and gave written responses and documents to information requests; and otherwise engaged with the Union and the issues. The Judge's finding that Berklee refused to bargain is based on a misconception of how bargaining works, and an emphasis on certain formalities that are not required for bargaining. The Judge's factual findings, when applied to the correct body of Board law, reveal that Berklee did in fact bargain with the Union and that the Union did not take advantage of this opportunity.

The Judge drew a false distinction between bargaining and Berklee's dealings with the Union. She found that Berklee did not respond to the Union's request for "bargaining" but merely agreed to "sit down" and "discuss." Decision, p. 36. She later stated, "Simpson refused to bargain" and "merely agreed to confer and explain the reasons for taking the action." *Id.* at 20. This analysis both misrepresents the facts, and reveals a fundamental misunderstanding of bargaining.

The law intends bargaining to be flexible to suit the needs of the parties and the circumstances. No magic words are required. Simpson did not have to say, "I will bargain with you." Nor are there any other required formalities. As the Board explained in Pease Co., 237 N.L.R.B. 1069 (1978), "It is not, of course, the prerogative or desire of this Board to impose upon the parties any bargaining format, either substantive or procedural." This notion is echoed in Bridon Cordage, Inc., 329 N.L.R.B. No. 258, 264 (1998): "[S]crutiny . . . need not and does not mean that we choreograph the dance by imposing upon the parties any bargaining format, either substantive or procedural." The Board takes a holistic approach to this analysis,

explaining that “[g]ood faith or the lack of it depends upon a factual determination based on overall conduct.” Atlanta Hilton & Tower, 271 N.L.R.B. 1600, 1603 (1984). Further, the Act is clear that bargaining does not compel adjustments or agreements. See Section 8(d) (“such obligation [to bargain] does not compel either party to agree to a proposal or require the making of a concession[.]”) The Board has always “recognized . . . that agreement might in some cases be impossible,” and no one ever “intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement.” Altorfer Mach. Co., 332 N.L.R.B. at 148 (quoting H.K. Porter Co. v. NLRB, 397 U.S. 99, 103 (1970)).

These principles apply in effects bargaining cases, where the crux of the inquiry is whether the parties met “at a meaningful time and in a meaningful manner.” First Nat’l Maintenance Corp. v. NLRB, 452 U.S. 666, 682 (1981). Whether bargaining was conducted in a “meaningful manner” at a “meaningful time” is a fact specific inquiry. Id. The employer must act sincerely and in good faith, provide information upon request, and meaningfully engage with Union proposals. On the other side, the Union has the duty to request bargaining. See Kentron of Haw., 214 N.L.R.B. 834, 835 (1974). The Union must present proposals and demonstrate a good faith effort to resolve issues. See Medicenter, Mid-South Hosp., 221 N.L.R.B. 670, 678-79 (1975) (finding that merely objecting to the changes does not fulfill the union's responsibility). It is also incumbent upon the Union, if it wants to continue bargaining, to seek further discussions. Reynolds Metal Company, 310 N.L.R.B. 995, 1000 (1993), (“It cannot be denied that the union, once demanding to bargain over the issue, must continue to do so to the point of an agreement or to a bona fide impasse. For that is the obverse of the employer’s statutory obligation to bargain with the union.”)

Berklee satisfied its obligations. Berklee expressed a willingness to meet with the Union as soon as the Union first asked for a meeting. Decision, p. 14. Simpson immediately responded to Schultz's email, confirming receipt of the message and suggesting that the parties meet to discuss the matter a week later. Id. Simpson followed up the next day with a lengthy phone call to Schultz, in which they discussed the Union's concerns. Id. at 25. He spoke with Schultz again on the phone the night before the meeting. Id. at 16. During these calls, Simpson answered all questions and provided all the information the Union sought. Id. at 25. Simpson then scheduled an in-person meeting with the Union leadership team and the Berklee leadership on the first day back from summer break. Id. At the meeting with the Union, Berklee negotiated in good faith. Simpson listened to Schultz's concerns and addressed them. As Simpson testified, "It was a conversation back and forth." Tr. at 343.

There is no support in the record for the Judge's conclusion that Simpson was unwilling to do more than explain why the College took the action it did. Explaining its actions is a perfectly appropriate and commonplace thing for an employer to do in bargaining. Yet the Judge acted as though explaining why Berklee did what it did manifested an intent not to "bargain" and that its conduct was suspect. Remember that the Union made no proposals. If the Union had made proposals and Berklee had ignored them, refused to discuss them, or to counter-propose, that might be a different story. However, this is not what happened. The onus was on the Union as the party demanding bargaining to advance the agenda. See Richmond Times-Dispatch, 345 N.L.R.B. 195, 199 (2005) ("it was incumbent on the Union to test the Respondent's intent to bargain").

If anyone failed to bargain, it was the Union. Schultz was more interested in teeing up an NLRB charge than working things out. The Union did not take advantage of its opportunity to

bargain with Berklee. The Union failed to make any proposals. Tr. at 343. It is the Union's responsibility, not Berklee's, to form proposals if it would like changes to be made. Medicenter, Mid-South Hosp., 221 N.L.R.B. at 678. The Union did not make any information requests at the meeting but only weeks later after it had filed the instant charge. When the Union made information requests, Berklee willingly complied even though it was clearly discovery for the Board charge. Berklee cannot be faulted for the Union's failure to demonstrate a serious effort to bargain. After this meeting, the Union made no additional requests to meet with Berklee. Decision, p. 23. Simpson testified that he would have met with the Union again had Schultz requested a meeting, but, as the Judge found, the Union did not request any additional bargaining. Id.

The Union's behavior is all the more puzzling given Scott's testimony that these issues historically were discussed and resolved between the parties. Tr. at 62. Scott testified that when a course was cancelled in the past, the Union would typically go to the Administration and see if the parties could work out a solution. Id. This usually meant some sort of compensation or replacement course for the affected faculty. Id. Often the parties agreed on a solution. But in August-September 2012, no such solutions were proposed by the Union. Berklee was not required to offer a solution of its own—it was the Union claiming there was a problem to be solved, not Berklee, so it was the Union's responsibility to propose a solution.

The Judge's finding that Berklee met and "conferred" but did not "bargain" is perplexing. Section 8(d) of the Act defines the duty to bargain as the duty to "meet at reasonable times and confer in good faith..." (emphasis added).

The Judge makes much out of Berklee's attending the September meeting without counsel. Id. at 22. However, the fact that Berklee did not bring counsel to the September bargaining session is irrelevant. The Board does not require that lawyers be present for bargaining to occur. On the contrary, this idea runs afoul of the Board's imperative that the parties not be forced into any particular substantive or procedural format. See Bridon Cordage, Inc., 329 N.L.R.B. at 264. Bargaining occurs without lawyers all the time. Berklee should be commended for its willingness to meet without its lawyer even if he is normally present. It shows flexibility and a willingness to directly engage with the Union. The bargaining was held on short notice and Berklee was responsive to the Union's desire to meet immediately.

The Judge improperly credited Schultz's testimony that "he knew from experience that neither side would bargain in the absence of their attorneys." Decision, p. 22. This testimony is of no value. It is mere state of mind or opinion, not competent factual testimony. Schultz's decision to not bring his attorney to bargaining is irrelevant to the question of whether Berklee satisfied its statutory obligations under the Act. The question is what the parties said and did, not who an interested party thinks should have been at the table for the other side.

The Judge's implicit finding that lawyers need to be present for "bargaining" to occur (and the rest of her bargaining analysis) is particularly troubling given the Board's recent emphasis on the adaptability of collective bargaining to various circumstances, including Alan Ritchey, Inc. 359 N.L.R.B. No. 40 (2012). Member Liebman's dissent in Brown University made the point well: "Like other regulatory agencies, however, the Board is 'neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday,' but rather must 'adapt [its] rules and practices to the Nation's needs in a volatile changing economy. . . . [T]he institution of collective bargaining is flexible" 342 N.L.R.B. at 77 (citing American

Trucking Associations v. Atchison Topeka & Santa Fe Railway Co., 387 U.S. 397, 416 (1967). n25.). Unfortunately, in today's world, many believe collective bargaining's days are past, that it was a solution for another century and another economy. The Judge's decision plays right into those stereotypes, by positing an inflexible regime that glorifies form and not substance.

Bargaining should be proportionate to the situation. Not all effects require the same amount of bargaining. The Board recognized this principle in Alan Ritchey, 359 N.L.R.B. at 5, where it analyzed a variety of management decisions and found the extent and timing of bargaining variable based on the situation. The Board explained that some decisions, such as the implementation of serious disciplinary sanctions that implicate the union's effectiveness, should usually be bargained pre-implementation. Id. at 16. However, "other actions that may nevertheless be . . . viewed as bargainable . . . have a lesser impact on employees. . . . Bargaining over these lesser sanctions--which [may be] required--may properly be deferred until after they are imposed." Id. at 17.

The Alan Ritchey principle applies here. In the effects bargaining context, the closing of a 10,000-employee factory does not require the same timing, duration and type of bargaining as Linda Gorham not teaching the class she prefers.

The Judge unfairly faulted Berklee's timing, finding that the Union was not given a meaningful opportunity to bargain over effects. Id. at 22. This finding is not supported by Board law. To satisfy its statutory obligations, Berklee was obligated to bargain at a "meaningful time." First Nat'l Maintenance Corp., 452 U.S. at 682. This is a fact specific inquiry, and in appropriate cases the Board has found that only a few days is sufficient for effects

bargaining. See Creasey Co., 268 N.L.R.B. 1425, 1426 (1984) (four days); Chippewa Motor Freight, Inc., 261 N.L.R.B. 455, 460 (1982) (two days).

Berklee satisfied its obligations by bargaining when it did. Berklee met with the Union in person once, and telephonically twice, before the semester had begun. The two phone calls were lengthy and substantive. They were therefore part of the bargaining process. Show Indus., Inc., 326 N.L.R.B. at 912 (finding the parties' exchange of letters expressing their views about a plant closing to be part of the bargaining process). In the two lengthy phone calls, Simpson and Schultz discussed the Union's concerns and Simpson explained Berklee's position. Decision, p. 16. This was two weeks before classes were scheduled to begin. The in-person bargaining session between Berklee and the Union occurred on September 5, 2012, still before classes began. The Judge's decision recognized that the schedule was not finalized at the time of the meeting. Id. at 6. There was no fait accompli.

There was plenty of time for the meeting to be productive. First, there was very little to talk about. Only one course out of 5200 that academic year was affected. Perhaps the Union could have requested, if it had bothered to make any proposals at all: "offer Linda Gorham a replacement course." Presumably the College would have responded: "We already did and she said no." One can only wonder what the Union would have said next; perhaps: "pay her anyway." Maybe the College would have said yes, maybe no, or maybe some other resolution would have been reached. As Scott testified, the parties had typically resolved such issues in the past. Tr. at 62. But what is clear beyond any doubt is that this series of exchanges would not have taken weeks or even days to occur. As the Board noted in Alan Ritchey, different kinds of bargaining are appropriate in different situations. 359 N.L.R.B. at 17. Surely if the Union had

shown any interest in such a discussion on September 5, the parties could easily have concluded bargaining before the fall schedule was finalized in mid-September.

But even if the discussion had not concluded by then due to some mysterious complication, that would not have made bargaining futile. This bargaining could logically have occurred after the semester began and the schedule was finalized. Effects bargaining need not occur before the decision is made or even before it is implemented. In Alan Ritchey, the Board found it permissible for an employer to defer bargaining on the effects of some aspects of a new plant-wide discipline policy until it was already in effect. 359 N.L.R.B. No. 40, *16 (2012). The Board explained that bargaining over lesser forms of discipline “may properly be deferred until after they are imposed.” Id. Here, only one class out of 5200 was affected. Given how small this impact was, this is precisely the kind of case where pursuant to Alan Ritchey, an employer could wait to engage in effects bargaining until after implementation. Indeed, as Scott testified, the Union’s traditional approach was to discuss resolution for cancelled classes once the semester had already begun. Tr. at 62. In fact, that makes the most sense, because before then the dust has not settled and the parties do not necessarily know what the final schedule will look like; this is only known after the fact.⁹

Exception: The Judge Erred By Not Deferring This Dispute To Arbitration.

If the Board does not dismiss this case, it should be deferred to arbitration under the principles articulated in Collyer Insulated Wire, 192 N.L.R.B. 837 (1971). The Judge disposed

⁹ The Judge also took issue with the fact that Berklee did not formally alert the Union of the change in minimums, however, the Board does not require formal notice. In Chippewa Motor Freight, Inc., 261 N.L.R.B. at 460, the Board explained that in the context of effects bargaining, “Surely if Respondent . . . was not required to bargain about the decision to close, it was not required to give notice before the decision was made.” The Judge ignored this decision. The Board recognizes constructive notice as valid, and there is no question that the Union had timely notice of the change, in light of Schultz’s emails sent to the Berklee administration. See California Portland Cement Co. 330 N.L.R.B. 144, *1 (1999) (“Respondent has . . . burden of proving that the Union received actual or constructive notice of . . . unilateral changes”).

of the deferral issue in a footnote, claiming that there is no dispute about the interpretation of any portion of the contract. The Judge did not question that the other requirements for applying the Collyer doctrine are satisfied in this case. The dispute in this case satisfies the test articulated in Collyer and should therefore be deferred to arbitration.¹⁰

The Board has long recognized that “it will not effectuate the statutory policy of ‘encouraging the practice and procedure of collective bargaining’ for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act.” Consolidated Aircraft Corp., 47 N.L.R.B. 694, 706 (1943). To encourage collective bargaining, the Board will not “exercise . . . jurisdiction in such a case, where the parties have not exhausted their rights and remedies under the contract as to which the dispute has arisen.” Id. Consistent with this principle of restraint, the Board in Collyer Insulated Wire instituted the rule that the Board will defer a dispute to arbitration where the underlying disagreement involves the interpretation or application of a collective bargaining agreement. See also Teamsters Local No. 70, 198 N.L.R.B. 552, 554 (1972) (when alleged unfair labor practices are “intimately entwined with matters of contractual interpretation,” the Board must defer to arbitration); Public Service Company of Okla., 319 N.L.R.B. 984, 986 (1995) (deferring to arbitration when there was a history of a collective bargaining relationship between the parties and the employer expressed its willingness to arbitrate the matters at issue).

Under the Collyer doctrine, the Board considers six factors when deciding whether or not to defer a dispute to arbitration:

¹⁰ Berklee, both at the hearing and before, has made clear that it is willing to arbitrate the underlying dispute. At the hearing, it proposed “a stipulation that it has requested deferral of the charge, that it expressed a willingness to arbitrate the charge, and that it expressed a willingness to waive the procedural obstacles to the charge that are necessary to waive as part of the Collyer doctrine.” Tr. at 11. General Counsel accepted this stipulation. Therefore, Collyer’s requirement that “the employer asserts its willingness to resort to arbitration” is satisfied.

(1) whether the dispute arose within the confines of a long and productive collective-bargaining relationship; (2) whether there is a claim of employer animosity to the employees' exercise of protected rights; (3) whether the agreement provides for arbitration in a very broad range of disputes; (4) whether the arbitration clause clearly encompasses the dispute at issue; (5) whether the employer asserts its willingness to resort to arbitration for the dispute; and (6) whether the dispute is eminently well-suited to resolution by arbitration.

St. Francis Reg'l Med. Ctr., 2013 N.L.R.B. LEXIS 417 (N.L.R.B. Div. of Judges June 12, 2013). In this case, each of these factors weighs in favor of deferring to arbitration.

There is no question that Berklee and the Union have had a long and productive bargaining relationship. The faculty at Berklee organized in 1985, almost thirty years ago, and the Union has had a strong relationship with Berklee ever since. Tr. at 47. Berklee and the Union have a comprehensive Collective Bargaining Agreement. The parties are productive at resolving disputes. Berklee and the Union meet monthly to discuss issues, and the College has never refused to meet to hear a Union concern. Id. at 348. Grievances are filed infrequently, and those that are filed typically settle informally. Id. at 348-49. Berklee has never refused to hear a grievance. Id. There is no allegation, let alone evidence, of enmity towards employees' exercise of protected rights.

The CBA provides for binding arbitration for a broad range of disputes. The grievance procedure applies to all "allegations by the Union that there has been a breach or misapplication or misinterpretation of the expressed term(s) of this Agreement." JX-2 at 9-10.

The Judge questioned whether the arbitration clause encompasses the dispute at issue. Decision, p. 1 n.1. What the Judge is really saying is that unless there is a contract provision that would allow the Union to win the arbitration, deferral is not appropriate. But that is not the standard. Deferral is also appropriate if the contract demonstrates that Berklee would win. The issue is not who would win, but whether the issue is arbitrable. It is. Here the Judge ignored the

applicable provisions of the CBA that weigh in Berklee's favor (as well as some that arguably favor the Union).

At the center of the dispute are the contract's provisions on scheduling of courses. There are a myriad of specific restrictions and rules: there are restrictions on consecutive teaching hours; limits to the number of teaching units that can be taught per week; and provisions detailing how scheduling preferences will be considered; among others. JX-2. Beyond that, Articles XXV and XXVI of the Agreement state: "Faculty must meet each teaching assignment at the scheduled time and place as determined at the beginning of each semester by the Senior Vice President for Academic Affairs or designee." *Id.* at 38. This provision grants Berklee the right to decide what courses are taught and when, subject only to the specific restrictions in the CBA.

These provisions are clear enough on their face, but the nature of the dispute is further illuminated by Cowen's testimony (as credited by the Judge) of how scheduling works. The CBA allows Linda Gorham to express her preferences, but ultimately the College decides what she teaches and when she teaches it. No other process could work given the complex dynamics of the scheduling process. Most of these factors are student based, but faculty requirements are significant as well. For example, the CBA preferences full time faculty and three-year part timers, for example, JX-2 at 35, rather than one-year faculty like Gorham.

Thus the Judge is wrong when she states that the Agreement is "silent as to the matters at issue." Decision, p. 1. The CBA is not silent; it just addresses the issues in a way that does not permit the Union to stop Berklee from doing what it did here. Indeed, to the extent the contract is silent, it is because the Union proposed and Berklee rejected language that would have further restricted Berklee's rights. The Union tried but failed to secure protections for faculty whose

courses were cancelled. As discussed above, in three consecutive negotiations the Union proposed contractual restrictions concerning course cancellations. The College said no. Now the Union argues that the contract's silence renders arbitration inappropriate. What all this really means is that if the matter was deferred to arbitration as it should be, Berklee would win. That is not a reason to reject deferral. Arbitrators find unsuccessful union efforts to negotiate specific language probative when interpreting the contract. As the Arbitrator explained in Progress-Bulletin Publishing Co. 47 LA 1075, 1077 (1966), unions must be aware when making specific contract demands in negotiations that "[i]f the provision gets caught up in a grievance, the Party who proffers the language will have to bear the burden of demonstrating in a later arbitration proceeding that its omission ought not be given its normal significance. Normally, of course, the plain inference of the omission is that the intent to reject prevailed over the intent to include." See also Hussman Corp. 84 LA 137, 141 (Robert, 1983) ("of course, . . . where a proposal is rejected in negotiations, that bargaining history may help to interpret the language that was adopted by indicating that the rejected proposal was not intended in the presence of ambiguous language").

The Union's unsuccessful efforts in their collective bargaining to address course cancellations has another significance. It shows a past practice the Union was attempting to mitigate. Other evidence, including Scott's testimony about cancelled courses and Cowen's broader testimony on the subject, illuminated the history of Berklee's practices concerning course scheduling, including the cancellation of courses. This implicates another provision of the CBA relevant to Collyer: "neither party gives up the right to argue to prove the existence of a past practice or lack thereof." JX-2 at 67. Past practices are a major component of most contract interpretation arbitrations. See Elkouri & Elkouri, How Arbitration Works 460 (6th ed.

2003) (“One of the most important standards used by arbitrators in the interpretation of ambiguous contract language is that of the relevant custom or past practice of the parties.”).

To the extent the issue was course minimums rather than course cancellations, the same result obtains.¹¹ Cowen’s testimony and the undisputed evidentiary record proves that Berklee has a long past practice of setting and changing course minimums. See discussion, page 34, infra. The Union has a different interpretation of the contract. Union President Schultz testified that the old course minimums were a past practice. Thus this is a perfect dispute for an arbitrator. There are conflicting contract interpretations at issue. The Union says the old minimums are a past practice, and the College says its practice (and history) of changing minimums is the past practice.

Another example of the Judge finding the contract to be inapplicable because it favors Berklee and not the Union is on the subject of class size. There are two aspects to the class size issue: minimum population and maximum population, and they are related. See Decision, p. 6 (minimums are set as a percentage of maximums). The result of the parties’ bargaining is that the CBA regulates maximum class size and not minimum class size. A competent arbitrator would reach the obvious conclusion the College has the management right to establish and change minimums, although it is restricted when it comes to maximums. See discussion, page 35-36, infra.

Rejecting deferral is just another way to deny Berklee the benefit of its bargain. When the CBA was bargained, the Union achieved 78 single-spaced pages of restrictions—but some goals it did not achieve. The Union did not restrict Berklee’s ability to schedule classes or change class sizes, nor did Berklee agree to compensate faculty if classes were canceled. The

¹¹ Because the Judge found that Berklee was not required to bargain over course minimums but was required to bargain over the effects, i.e., course cancellations, it is the latter issue and not the former that should be the focus of the Collyer analysis. But either way, the issue is arbitrable.

Union should not be permitted to end run the contract when Berklee attempts to exercise those rights it achieved in bargaining. This result does not enhance collective bargaining as an institution; it mocks collective bargaining as an institution. It gives the Union a second bite at the bargaining apple, and denies Berklee what it achieved at the table. What the parties did agree to do was arbitrate disputes. This case should be arbitrated.

Exception: The Judge Erred in Not Dismissing This Case In Accordance With The Contract Coverage Doctrine.

For all the same reasons, this case should be dismissed pursuant to the contract coverage doctrine. Berklee made that argument below, and the Judge ignored it.

The Board has long held that when “an employer has a sound and arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it . . . the Board ordinarily will not exercise its jurisdiction to resolve a dispute between the parties as to whether the employer’s interpretation was correct.” Vickers Inc., 153 N.L.R.B. 561, 570 (1965); see also NCR Corp., 271 N.L.R.B. 1212, 1213 (1984). This rule is well justified as the Board has long recognized that “the arbitration process and the courts are well equipped to deal with such matters if the parties choose those avenues of redress,” Bath Iron Works Corp., 345 N.L.R.B. 499, 502 (2005), and that the Board should not “serve the function of arbitrator.” NCR Corp., 271 N.L.R.B. at 1213. As such, the Board follows the general rule that “where . . . there is no evidence of animus, bad faith, or an intent to undermine the union, [it] will not seek to determine which of two equally plausible contract interpretations is correct.” Atwood & Morrill Co., 289 N.L.R.B. 794, 795 (1988).

Berklee has a sound, arguable basis for its position that the Collective Bargaining Agreement gives it the right to change course minimums and cancel low enrollment courses. As

discussed in the Collyer argument above, the Agreement supports Berklee's right to do what it did here. All of the arguments on pages 65 through 67 are incorporated herein.

The other requirements for rendering Board intervention inappropriate under Vickers, NCR and their progeny are satisfied as well. There are no signs of animus by Berklee toward the Union, bad faith or any attempt to undermine the Union. Historically, Berklee and the Union have had a positive and productive relationship. Grievances, especially those related to class cancelations, have traditionally been handled and resolved informally. Id. at 347. Berklee has never refused to hear a grievance, and during the first year of Schultz's tenure, no grievance was even filed. Id. at 349. The General Counsel has not even argued, let alone presented any evidence of, bad faith or intent to undermine the Union.

There is a sound, arguable basis for Berklee's interpretation of the Agreement, and no signs of malice. As such, the Board should exercise restraint and this matter should be dismissed.

CONCLUSION

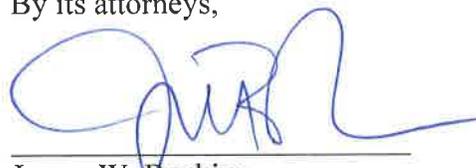
Although the Judge's decision on its face purports to be a ruling promoting collective bargaining, really it is destructive to several core bargaining principles. It promotes the idea that what unions win at the table they win, while employer wins can be explained away by rigid applications of the waiver, deferral and contract coverage doctrines, and by ignoring the ordinary and commonsense meanings of terms like material, substantial and significant. Bargaining is required always and everywhere, regardless of the miniscule nature of the issue, what the contract says, or what proposals the Union made and failed to achieve. If the Judge's decision is upheld, Berklee will have been denied the benefit of its bargain. This would be a self-inflicted wound to the integrity of the bargaining process and the sanctity of the agreements that are

reached as a result of that process. A distorted notion of “bargaining” would win the battle, and real bargaining would lose the war.

Berklee is a model employer. Indeed in this case, even though it was convinced it had the right to do what it did, Berklee still scrambled to meet with the Union upon request to discuss the relevant issues. If the Union had had a sincere desire to resolve the issues, there is no reason it could not have happened. Berklee’s long and positive relationship with the Union should be commended, and it has earned the right to exercise the prerogatives it achieved at the bargaining table. Bargaining is not a one-way street. This case must be dismissed.

BERKLEE COLLEGE OF MUSIC

By its attorneys,

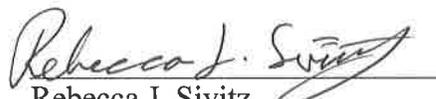


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Dated: November 18, 2013

CERTIFICATE OF SERVICE

I, Rebecca J. Sivitz, hereby certify that on November 18, 2013, the above document was sent via email to counsel for the Union, Haidee Morris, General Counsel, AFTMA at hmorris@aftma.net and counsel for the General Counsel, Emily G. Goldman at Emily.Goldman@nlrb.gov.


Rebecca J. Sivitz