

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

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In the matter of: .  
BERKLEE COLLEGE OF MUSIC, .  
Employer, . Case No. 01-CA-089878  
and .  
BERKLEE FACULTY UNION, AFT, .  
LOCAL 4412, AFT-MA, AFL-CIO, .  
Petitioner. .  
.....

**Employer’s Brief In Response To Counsel for the General Counsel’s Answering Brief**

Berklee College of Music (“Berklee”) files this brief in response to Counsel for the General Counsel’s Answering Brief in Response to Respondent’s Exceptions and Brief in Support Thereof (“Answering Brief”). This brief also responds to Counsel for the General Counsel’s Brief In Support of the Decision of The Administrative Law Judge (“Brief in Support of the ALJ”), as large portions of that brief are incorporated into the Answering Brief by reference.

**1. The Board Must Apply the Standard for Effects Bargaining in this Effects Bargaining Case.**

On page 11 of the Answering Brief, apparently unable to find a single helpful Board decision in the effects bargaining context, Counsel for the General Counsel cites several more decision bargaining cases to supplement the decision bargaining cases she cited in her Brief in Support of the ALJ. These new cases involve unilateral changes in work assignments, work schedules and retiree benefits. They are all inapposite, for the reasons stated in Employer’s Brief In Support Of Exceptions to the Decision of the Administrative Law Judge.

Counsel for the General Counsel seeks to excuse her reliance on decision bargaining cases in this effects bargaining dispute by saying the standards are the same. Significantly, she cites no decision in the Board's history which supports that argument – because there is none. Rather she claims that it is Berklee's burden to cite a case saying the standards for these two distinct breeds of cases are different. What Berklee in fact has done is cite effects bargaining cases in which the Board has articulated and applied the standard, and has asked the Board to apply the same standard here.

**2. No More Than One Employee Was Affected.**

Both the Answering Brief and Brief in Support of the ALJ, while purporting to support the Judge's decision, are replete with factual claims and arguments the Judge rejected. This makes the briefs difficult to understand, because Counsel for the General Counsel urges the Board to uphold the Decision on grounds rejected by the Judge herself. The proper means for Counsel for the General Counsel to do what she did was to file timely cross-exceptions, but that did not occur. Her cross-exceptions were filed late and were therefore rejected. At this point, those arguments are waived. *See* NLRB's Rules and Regulations 102.46(g) ("No matter not included in . . . cross-exceptions may thereafter be urged before the Board. . .").<sup>1</sup>

**3. The One Employee the Judge Found to be Affected Withdrew from Consideration for a Replacement Course.**

Counsel for the General Counsel accuses Berklee of misrepresenting the Judge's finding with respect to Linda Gorham's opportunity to teach LHUM-400 in place of her cancelled course. Answering Brief, p. 12. But Berklee did no such thing, and Counsel for the General Counsel's argument is semantics. Berklee correctly stated that the Judge found that Gorham

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<sup>1</sup> The most glaring example of this is Counsel for the General Counsel's insistence that Joyce Lucia was affected by the alleged change. The Judge correctly found that Lucia's class, in which three (3) students enrolled in the Fall 2012 semester, was not affected because that class had a previous minimum of four (4) and a new minimum of five (5) – and thus it would have been canceled even under the old minimum.

“turned down an opportunity to teach a replacement course.” Answering Brief, p. 12. A few lines after chastising Berklee for saying that, Counsel for the General Counsel wrote that the Judge found that Gorham “withdrew from consideration” for the replacement course. *Id.* This is a distinction without a difference – “turned down an opportunity” vs. “withdrew from consideration” – and highlights the flaw in the Judge’s conclusion on this issue.

The Judge concluded that since there were more faculty notified of the opportunity to teach LHUM-400 than there were sections to be taught, Gorham was not “offered” the course. But it was undisputed (and the Judge found) that in addition to the group email Gorham received, her supervisor Kenn Brass had a one-on-one meeting with her to discuss the replacement course; that Brass told Gorham that they were in need of instructors; that initially Gorham agreed to teach the course; and that completely on her own initiative and without any urging from Berklee, Gorham changed her mind and told Brass she was not interested in teaching the course because it was a “bad fit” – even though she had taken Berklee’s money a year earlier when she volunteered to be trained to teach that very course. Decision, p. 12, Tr. 440-41. Under these circumstances, it is not meaningful to say that Berklee did not “offer” Gorham the course – she had the opportunity to teach the course, and turned it down.

#### **4. The Evidence Establishes Waiver.**

Counsel for the General Counsel’s argument that the bargaining history evidence is a-contextual and insufficient ignores the record. Berklee did not introduce the bargaining proposals and talking points without explanation. Larry Simpson testified about the nature of talking points, how talking points and proposals work together, and how they function to modify existing agreements. Tr. 363-64. Simpson explained that the form of the Union’s requests varies from year to year, and “may be talking points [or] may be specific proposals” but that they

function similarly. *Id.* He further explained that there may be discussions pursuant to talking points that never end up becoming written proposals. *Id.*

Moreover, for each talking point and proposal entered into evidence, Simpson described Berklee's position as given to the Union, and whether or not the proposal or talking point ultimately made its way into the contract. Tr. 365. For example, Simpson explained a 2005 Union proposal regarding the effects of course cancellations due to under-enrollment. Contrary to Counsel for the General Counsel's claim that "there is nothing in the record to show that the subject of minimum course population was mentioned, much less discussed during contract negotiations," Answering Brief, p. 6-7, Simpson identified a 2005 Union Talking Point proving that the parties discussed (at the Union's initiative) "Compensation for course cancellations due to under-enrollment." Tr. 375. Simpson testified that the talking point specifically concerned courses canceled for under-enrollment, while other union proposals and talking points dealt more broadly with course cancellations. *Id.* at 377. Simpson also explained that the College did not agree to this talking point, and that it is not reflected in the contract today. *Id.* This is ample context for understanding this failed union initiative on the precise subject at issue in this case.

Ironically, while Counsel for the General Counsel now criticizes Berklee for not putting on more of this evidence, at trial she objected that it was irrelevant. *Id.* at 367 ("The current contract is in evidence, so we know what the current contract provides. I think it is completely irrelevant"). Moreover, she attempted to truncate Simpson's testimony on the basis that explanation was unnecessary, as "we all can read here and if he wants to [point] out the section I think that's more than adequate." *Id.* at 374-75.

Counsel for the General Counsel was correct that the agreement itself is in evidence. JX-2. Thus, there can be no legitimate confusion about what the Union asked for in bargaining, what Berklee's response was, and whether or not the Union's bargaining agenda was successful.

The Board does not need to know the specific words spoken across the table to understand what happened, and the General Counsel's insistence on some artificial amount of speaking about unambiguous written proposals and talking points must be rejected.

**5. Kendall College of Art Does Not Support the Complaint.**

Counsel for the General Counsel's reliance on *Kendall College of Art*, 288 NLRB 1205 (1988), is misplaced. In that case, a policy change resulted in many instructors becoming ineligible to teach and being laid off. The Board found an effects bargaining obligation, as "those who faced separation from employment were not unlike those employees in the *First National Maintenance Corp.* case who were discharged. The effects were the same." *Id.* at 1210. Thus *Kendall College of Art*, where multiple faculty lost their jobs, stands in stark contrast to the minimal effects at issue here.

**6. The Facts Here Are Not Analogous to Enforcing a Rule for the First Time.**

On page 10 of the Answering Brief, Counsel for the General Counsel makes the new argument that Berklee's memorializing of the presumptive minimums is analogous to an employer beginning to enforce a work rule that in the past was never enforced. This argument misunderstands the facts as found by the Judge. First, there is no "enforcement" at issue in this case. Both before and after the alleged change, Berklee has run scores of courses each semester even though student enrollment was below the stated minimum. Decision, p. 17. Indeed, in Fall 2012 – the first semester after the alleged change – Berklee ran more below-minimum courses than ever. Tr. 299-300. Second, for at least a decade, Berklee had recognized a pedagogically ideal minimum of thirty-three to thirty-five percent of course maximums, regardless of what the formal records reflected – and this was taken into account when Berklee did the case-by-case assessment of whether to run certain courses. Tr. 258-68, 295, Decision, p. 6. As such,

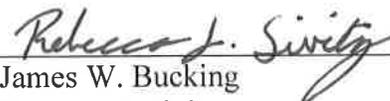
standardizing the minimums was not a matter of rule enforcement but a matter of transparency. Thus, the cases cited by Counsel for the General Counsel are inapposite.

**7. The Parties' Arbitration Procedure Provides Redress For This Dispute.**

Counsel for the General Counsel argues that because certain parts of the Collective Bargaining Agreement are exempted from the grievance procedure, *Collyer* cannot apply. However, the limited number of provisions the parties chose to exclude from the grievance procedure does not change the *Collyer* analysis. Berklee set forth the numerous, relevant arbitrable provisions of the Collective Bargaining Agreement in its Employer's Brief in Support of Exceptions. The fact that some other provisions are not arbitrable does not diminish the importance of arbitrating the ones that are.

**BERKLEE COLLEGE OF MUSIC**

By its attorneys,

  
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Dated: January 15, 2014

**CERTIFICATE OF SERVICE**

I, Rebecca J. Sivitz, hereby certify that on January 15, 2014, 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