ELIZABETH M. TAFE
A. SUSAN LAWSON
National Labor Relations Board, First Region
Thomas P. O'Neill Federal Building
10 Causeway Street, Suite 601
Boston, Massachusetts 02222
Telephone Numbers: (617) 565-6722/6741

Attorneys for Petitioner

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

In the Matter of ROSEMARY PYE, Regional Director of the First Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, Petitioner v. THE LONGY SCHOOL OF MUSIC, Respondent	Civil No. _____

PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES

IN SUPPORT OF

PETITION FOR INJUNCTION UNDER SECTION 10(j) OF

THE NATIONAL LABOR RELATIONS ACT

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I. OVERVIEW

In this case, the Petitioner, Rosemary Pye, Regional Director of the First Region of the National Labor Relations Board, seeks a temporary injunction pursuant to Section 10(j) of the National Labor Relations Act (herein the Act), as amended, 29 U.S.C. Section 160(j),[1] to restrain The Longy School of Music (herein Longy or Respondent) from violating its basic obligations to bargain in good faith with the American Federation of Teachers, Massachusetts (herein the Union), the certified collective-bargaining representative of a unit (herein the Unit) of about 88 regular faculty members of Longy.[2]

Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. Sec. 151 et seq., requires employers to bargain in good faith with their employees' chosen collective-bargaining representative regarding wages, hours, and other terms and conditions of employment.[3] Well-settled law requires that when their employees are represented by a union, employers must maintain existing terms and conditions of employment until agreement on different terms is reached with the union, or the parties reach lawful impasse. Employers violate Section 8(a)(5) when they unilaterally change employees' terms and conditions of employment without giving the union prior notice or opportunity to bargain about the changes in such subjects.

[1] Section 10(j) provides: The Board shall have power, upon issuance of a complaint as provided in subsection (b) [of this section] charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

[2] On February 1, 2010, the National Labor Relations Board (herein the "Board") certified the Union as the exclusive collective-bargaining representative the Unit.

[3] Section 8(a)(5) of the Act provides: It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representative of his employees, subject to the provisions of Section 9(a) of the Act.

On October 13, 2010, [4] the Petitioner issued a Complaint and Notice of Hearing in Case 1-CA-46304. As amended on October 14 and November 10, the Complaint alleges that Longy violated Section 8(a)(5) of the Act by, without prior notice to the Union or bargaining, unilaterally: terminating the employment of eight unit employees; changing job assignments and limited work opportunities of thirty-seven unit employees; changing health insurance carriers, premiums and benefits of all unit employees; and changing the amount of employer contribution to health insurance for two unit employees, as well as the manner in which these employees' contributions are deducted from their paychecks.

Respondent also announced these unilateral changes directly to employees, thereby unlawfully bypassing the Union in violation of Section 8(a)(1) and (5) of the Act, and Respondent violated Section 8(a)(1) of the Act when its President impliedly told employees it was futile to have the Union represent them, and impliedly threatened employees with termination or unspecified reprisals if they were not loyal to Longy, supported the Union, or asserted their Section 7 rights.[5] These allegations are alleged in the amended complaint.

As part of the temporary injunction, Petitioner seeks an order requiring Longy to restore the *status quo ante*, i.e., to reinstate the terms and conditions of employment of the Unit that existed immediately prior to Longy's unlawful unilateral changes, and to maintain those terms and conditions of employment unless, and until, Longy conforms to its statutory obligation to bargain in good faith with the Union. Specifically, Longy must be ordered to cease and desist

[4] All dates herein are in 2010.

[5] Section 8(a)(1) of the Act provides: It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

Section 7 of the Act provides: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities

from impliedly threatening employees and implying to employees that selecting the Union was futile; unilaterally changing employees terms and conditions of employment; and failing and refusing to bargain with the Union as employee's collective-bargaining representative. Further, Longy must be ordered to reinstate 8 faculty members; and upon request by the Union, to restore the assignments of 34 employees; to reinstate the titles and duties of the coordinators in the Community Program; and to reinstate the health insurance contributions of two employees.

Initial contract bargaining, such as we have in this case, constitutes a critical stage of the negotiation process because it forms the foundation for the parties' future labor-management relationship. As the Federal Mediation and Conciliation Service has observed, "[i]nitial contract negotiations are often more difficult than established successor contract negotiations, since they frequently follow contentious representation election campaigns."[6] And when employees are bargaining for their first collective-bargaining agreement, they are highly susceptible to unfair labor practices intended to undermine support for their bargaining representative.[7] Injunctive relief is, therefore, necessary in this matter to reverse the effects of these substantial and pervasive unilateral changes in terms and conditions of employment immediately following the election of the Union that directly affected, and continue to affect, about 50 percent of the employees represented by the newly elected Union. Well-settled law proscribes such changes in the absence of reasonable notice to the Union and an opportunity to bargain. In the absence of injunctive relief, Respondent's unlawful actions will corrosively undermine the Union's support by making it appear to employees as not merely weak and ineffectual, but in fact irrelevant.

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except to the extent that such a right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

[6] 57 FMCS Ann. Rep. 18 (2004).

[7] *Arlook v. S. Lichtenberg & Co.*, 952 F.2d 367, 373 (11th Cir. 1992). Accord: *Ahearn v. Jackson Hospital Corp.*, 351 F.3d 226, 239 (6th Cir. 2003).

Respondent's unlawful conduct has caused, and is likely to continue to cause, employees to be disaffected from the Union, to be afraid to openly support the Union, and to blame the Union for the effects of Respondent's conduct. There is a substantial likelihood that this harm will be irreparable if Respondent's unlawful conduct is not enjoined. Petitioner seeks injunctive relief in order to guarantee that, should the Board find Respondent violated the Act as alleged in the Complaint, as amended, irreparable harm to the Union's level of support will be prevented, the *status quo ante* will be restored, and employees' Section 7 rights will be preserved.[8]

Interim reinstatement of the terminated unit employees is also critical to protect employee free choice and to reassure other employees that they are free to support the Union. As noted above, Longy's unilateral conduct has already affected employees' willingness to support the Union. Interim reinstatement of the terminated employees would also preclude the possibility that they might permanently scatter and be unavailable for reinstatement under a Board order.

Injunctive relief is necessary to reverse the effects of the substantial and pervasive unilateral changes immediately following the election of the Union that has directly affected about 50 percent of the employees represented by the newly elected Union. Well-settled law proscribes such changes without providing the Union reasonable notice and an opportunity to bargain. Such changes are particularly destructive during the certification year immediately after the election of the Union, when the parties are attempting to stabilize their relationship by bargaining their first collective-bargaining agreement and are most vulnerable to the impact of

[8] Respondent is in negotiations with Bard College, a liberal arts college in New York, regarding some form of merger of the two schools. Although Respondent has represented that these talks are confidential, it has also made clear to both Petitioner and the Union that the talks are serious and that some sort of consolidation is likely. Longy's counsel represents that these discussions will not be finalized until mid-2011. Because the Union may well have representational rights with respect to the post-merger entity, see *NLRB v Burns International Security Services*, 406 U.S. 272 (1972), it is especially important that an injunction restore the Union to its lawful position.

unfair labor practices. Unilateral changes here deprived the Union of a level playing field by confronting them with illegally reduced employment terms for more than half the Unit before bargaining had started.

Respondent's unlawful conduct has interfered with the parties' ability to negotiate a first labor contract and risks making the Union appear weak and ineffectual, or even irrelevant to employees. There is a substantial likelihood that this harm will be irreparable if Respondent's unlawful conduct is not enjoined. Petitioner seeks injunctive relief in order to guarantee that, should the Board find Respondent violated the Act as alleged in the Complaint, irreparable harm to the Union's level of support will be prevented, the *status quo ante* will be restored, and employees' Section 7 rights will be preserved.[9]

II. THE UNDERLYING ADMINSTRATIVE PROCEEDING

Petitioner issued a Complaint and Notice of Hearing in this matter on October 13 (P-Ex. 1(a)).[10] A hearing is scheduled before an Administrative Law Judge of the Board commencing December 13.[11] Following the conclusion of the hearing, and the likely submission of briefs by the parties, under Section 102.45 of the Board's Rules and Regulations, the Judge will issue a decision containing findings of fact and conclusions of law based on the evidence submitted at

[9] Respondent is in negotiations with Bard College, a liberal arts college in New York, regarding some form of merger of the two schools. Although Respondent has represented that these talks are confidential, it has also made clear to both Petitioner and the Union that the talks are serious and that some sort of consolidation is likely. Longy's counsel represents that these discussions will not be finalized until mid-2011. Because the Union may well have representational rights with respect to the post-merger entity, see *NLRB v Burns International Security Services*, 406 U.S. 272 (1972), it is especially important that an injunction restore the Union to its lawful position.

[10] "Petitioner's Exhibits" shall be referred to as "P-Ex." The Petitioner issued an Amended Complaint on October 14, 2010 (P-Ex. 1(c)), and an Amendment to the Amended Complaint on November 12, 2010 (P-Ex. 1(f)). These pleadings together are referred to herein as "the Complaint." Respondent's Answer to the Amended Complaint is submitted as P-Ex. 2.

[11] Additional charges filed by the Union against Longy are currently pending in the Region. Although the hearing in the underlying unfair labor practice charge in Case 1-CA-46304 is currently scheduled to commence on December 13, 2010, the Regional Director is currently investigating these additional unfair labor practice charges. In the event the Regional Director authorizes complaint in any of these additional charges, it would be necessary, absent settlement, to consolidate those charges with the Case 1-CA-46304 for hearing before an administrative law judge. In that event, the hearing before an administrative

the hearing. Under Section 102.46 of the Board's Rules, the Judge's decision may be appealed to the Board by the filing of exceptions and cross-exceptions. The Board may then issue a written decision and order under Section 102.50 of the Board's Rules. The Board's decision and order is not self-enforcing, however, and if the parties do not comply with the Board's order, the Board must seek enforcement in the applicable United States Court of Appeals to effectuate its order. Parties may also appeal the Board's decision and order to the United States Court of Appeals, and, ultimately, a petition for a writ of *certiorari* may be filed with the United States Supreme Court. Thus, final resolution of the issues may be years away. Petitioner, however, is seeking interim relief only until the Board issues its final Decision and Order.

III. STATEMENT OF FACTS

Longy is a private, non-profit music school located in Cambridge, Massachusetts. Founded in 1915 as a community music school, it has traditionally maintained a faculty of adjunct instructors serving two major divisions: a Conservatory that grants undergraduate and graduate degrees and certificates, and a Community Programs Division that serves children (the preparatory program) and adults (continuing studies) (P-Ex. 3, p. 2).[12] In the past few decades, the Conservatory ("CV") has taken on a more prominent role in Longy. Id. The Community Programs Division ("CP") enrolls about 900 students per year, and the Conservatory enrolls about 200 students. Many prominent and world-renowned musicians teach at Longy. Id. All faculty members at Longy are considered part-time and are paid on a "per service" basis. Id. Before the unilateral changes at issue in this case, there were about 190 faculty members

law judge might have to be postponed in order for an amended consolidated complaint to be issued, answer to be filed, and in order for the parties to prepare to litigate the additional unfair labor practices before an administrative law judge.

[12] P-Ex. 3 is a copy of Respondent's September 10, 2010, position statement provided to Petitioner during the investigation of the underlying charge. The original contains approximately 100 pages of attachments, which are not included here.

affiliated with Longy; approximately 45 of them taught enough hours to be the equivalent of full-time. Id.

Following an election held on January 20, the Board certified the Union as the exclusive collective-bargaining representative of a unit of regular faculty at Longy on February 1 (P-Ex. 4). There were approximately 88 employees in the bargaining unit on February 1.[13]

On February 12, the Union notified Longy that it wanted to begin bargaining toward an initial collective-bargaining agreement (P-Ex. 5, p. 1; P-Ex. 14). Prior to the first scheduled meeting on March 12, on February 15, Longy President Karen Zorn sent an email to the faculty telling them that she would hold an all-faculty meeting on March 5 to announce significant developments at Longy involving difficult decisions (P-Ex. 6, p. 2). Longy did not give the Union prior notice about either the substance of this announcement or the fact that it would be made. The Union learned of Zorn's February 15 email from employees (P-Ex. 5, p. 1). On February 23, by letter, Union Business Agent Diane Frey requested a meeting with Zorn regarding her February 15 announcement and asserted the Union's right to bargain about any changes in terms or conditions of employment (P-Ex. 5, p. 2; P-Ex. 15). On March 2, by letter from its legal counsel, Longy refused to meet with the Union before the March 5 meeting, stating that the March 5 announcement would affect the entire school, so "a meeting beforehand for a small sub-section of the audience would be inappropriate." (P-Ex. 5, p. 2; P-Ex. 9).

The March 5 all-faculty meeting lasted several hours, during which Zorn announced pervasive changes to terms and conditions of employment (P-Ex 3, p. 6; P-Ex. 6, pp. 3-6; P-Ex.

[13] The Regional Director found the following Unit appropriate:

> All faculty currently teaching, and who have a weekly average of at least three benefit units in one of the last two fiscal years, excluding all other employees, visiting faculty, administrators, confidential employees, office clerical employees, managers, guards, and supervisors as defined in the Act.

7, pp. 2-4). Zorn told employees that Longy was in talks with Bard College[14] to consider merging the two institutions, and that Longy planned to "realign" the faculty, which she explained meant, among other changes, that the work of some employees would be reassigned, some employees would be terminated, and the CP Chair/Coordinator positions would be eliminated. While explaining Longy's plans, Zorn told employees that the changes had been voted on by the trustees and were "non-negotiable" (P-Ex. 6, p. 3; P-Ex. 7, p. 3); that this was "not a democracy" and you don't get your best decisions with a democracy (P-Ex. 6, p. 5; P-Ex. 7, p. 3); that she (Zorn) is the President and she makes decisions (P-Ex. 6, p. 5; P-Ex. 7, p. 3); that "we are going to make this shift and motor on" (P-Ex. 6, p. 5); that she likes to communicate with people who are "on the bus" for "positive change" and who are not "nay-sayers;" that they "want people to get on the bus and move forward with us" (P-Ex. 6, p. 3; P-Ex. 7, p. 3); and that she needed faculty who are "committed to Longy." (P-Ex. 7, p. 2)

Regarding the reorganization, Zorn told employees that, by March 15, each faculty member would get a letter from the administration setting forth what would happen to his or her job (P-Ex. 6, p. 3). Further, Zorn announced that she had eliminated the CP Chair/Coordinator positions and created two new management positions in their place (P-Ex. 6, p. 3).

Just after the March 5 faculty meeting, the Union held an impromptu bargaining unit meeting at a nearby Church to address Zorn's announcements (P-Ex. 5, p. 2). About 12 to 15 members attended (P-Ex. 5, p. 2). Members wanted to know what the Union could do about the changes; the Union responded it had to find out more because it did not know enough. Members expressed fear and apprehension (P-Ex. 5, p. 2).

[14] Bard College has a Conservatory of Music. The merger plan, which is still being developed but appears to be going forward, contemplates, among other things, that Bard would provide the undergraduate degrees for music students and the Longy Conservatory would serve graduate students.

On March 8, by letter, the Union requested bargaining as soon as possible about the impact of the announced changes, including the proposed merger with Bard and about the reorganization of programs and faculty announced on March 5 (P-Ex. 5, p. 3; P-Ex. 10). The Union set forth various dates and times it was available to bargain prior to the pending March 15 date on which Longy intended to implement its changes (P-Ex. 10).

On March 12, the parties met for the first time in a bargaining session.[15] Although this meeting had originally been intended to commence bargaining for a collective-bargaining agreement, the session was consumed with discussion of Longy's announced changes. The Union explicitly objected to the unilateral nature of the changes and the lack of notice or opportunity to bargain, and demanded that Longy rescind the changes and bargain with the Union about the decision, its implementation, and its effects (P-Ex. 5, p. 3). Longy's chief bargaining spokesperson, its attorney, told the Union that Longy would not discuss the details in advance with the Union because the reorganization and restructuring were happening beyond the faculty and the bargaining unit (P-Ex. 6, p. 8; P-Ex. 7, p. 6). The Union disagreed with Respondent's attorney's assertion that Respondent was privileged to unilaterally make these significant changes in terms and conditions of employment.[16] Respondent's attorney said that the changes were in place, but they were not effective this school year (P-Ex. 5, p. 5). He said Longy knew exactly what it was doing already, but it would not tell the Union in advance; he

[15] The Union's bargaining team was: Diane Frey, Business Agent AFT MA (spokesman); Clayton Hoener, President LFU; and employees Jonathan Cohler, Eric Entwistle, and Peter Evans. Longy's team was: Donald Schroeder, legal counsel (spokesman); Paula Lyons; Karen Zorn; and Kalen Ratzlaff. In the most recent bargaining session on 10/4, the Vice President of Bard College attended on behalf of Longy, and President Zorn was absent.

[16] Although Schroeder said Longy would be willing to bargain about the effects of the changes, as discussed below, the changes were announced as *faits accomplis*, and Respondent never engaged in meaningful bargaining about the effects of the changes (P-Ex. 5, p. 5).

claimed that it would be disrespectful to the other non-union staff to talk to the Union about the changes in advance (P-Ex. 5, p. 5).

Longy mailed letters dated March 11 and 12 to all the faculty members, including to the 88 bargaining unit members.[17] Eight bargaining unit members were informed that their contracts would not be renewed the following school year (P-Ex. 6, p. 7; P-Ex. 7, p. 9). [18] Thirty-three bargaining unit members were "divisionally reassigned," meaning they could no longer teach in one of Respondent's two Divisions (P-Ex. 6, p. 7; P-Ex. 7, pp. 9-11). One employee was reassigned to a different department in the Conservatory and told she could no longer teach the French Horn (P-Ex. 16). The Five CP Chairs/Coordinators were relieved of those duties (P-Ex. 7, p. 6). Further, each letter invited its recipient to discuss these employment actions further with the CV Dean or the Director of CP (P-Ex. 7, Exhibit A; P-Ex. 11, Exhibit A; P-Ex. 16). The Union was not given these letters in advance; in fact, the Union did not receive copies of the letters sent to bargaining unit employees until March 29, following a formal information request the Union made to Longy (P-Ex. 5, p. 5-6).

Of the 46 bargaining unit employees whose "realignment" resulted in something other than "no change," 39 experienced identifiable loss of work.[19] Because Longy faculty members are paid on a per-service basis, loss of private students, classes, or any other work results in the loss of income. The criteria used to "realign" faculty, as eventually described by Longy, was

[17] Longy has been unable to confirm exactly when the letters were mailed between March 12 and March 15. Employees report receiving them by U.S. mail just after March 15. It remains unclear whether the letters had already been mailed before the March 12 bargaining meeting. Longy has represented in the investigation that the letters had been drafted already and were being reviewed for accuracy by senior management on March 12.

[18] One of the eight, Sophie Vilker, was told she was put in the honorific emeritus status; however, the designation effectively terminated her employment (P-Ex. 11).

[19] One was promoted to management (Michael Bonner); and six did not have any students in the Divisions they were "realigned" out of. These six may still have lost work other than their private student hours. (See P-Ex. 7, pp. 9-11, for details of lost work of 18 individuals.)

based primarily on how many private student hours the teachers taught per week during the 2009-2010 academic year, regardless of how much other work (such as teaching classes, running auditions, or performing administrative tasks) the employee did, so some teachers lost significant amounts of compensable work, even if they did not have 3 hours or more of private students on average per week.[20]

Respondent also made unilateral changes to employees' benefits and premiums, and change health insurance carriers on June 1 without giving the Union prior notice or opportunity to bargain (P-Ex. 6, pp. 8-9). Respondent's Human Resources Director, Kalen Ratzlaff, included a cover letter with employees' insurance "open season" packets that described the new health insurance options and outlined some of the differences between the new options and the prior options.[21] There is no dispute that Respondent failed to give the Union notice of this decision before Respondent made it or before the "open season" packets were sent out announcing the changes on about June 1. In fact, the Union as an institution was never given notice of the changes.[22] Although the Union requested information about employee health insurance for purposes of collective bargaining, and asked Respondent to bargain about them, on June 21, Respondent, by its attorney, told the Union the change in the health insurance plan resulted in a

[20] Respondent eventually told the Union that it had applied "objective criteria" for determining who would be retained and who was to be let go. In brief, the criteria in CV were that the teacher had to have at least 3 benefit hours of private primary student teaching in the Conservatory that year (2009-2010). In CP, a teacher had to have 3 benefit hours of private student teaching, on average, over the past three years, and had to not show a decline in hours over the past three years. No other teaching work counted (i.e., teaching classes, secondary students in the Conservatory, coordinating summer programs, doing auditions, etc.) However, Longy also explained that it took various exceptions to its own criteria for "programmatic needs" and other reasons. For example, new employees were not subjected to the criteria, because they were still in "studio building mode." (P-Ex. 7, p. 4-5; P-Ex. 3, p. 5-6).

[21] Longy provided three plans in 2009-2010 through Harvard Pilgrim Health (an HMO, and two PPOs). Longy now offers two plans through Blue Cross/Blue Shield (an HMO and a PPO). Ratzlaff's cover memo explicitly identifies that 1) the deductible for the family PPO will increase; 2) Co-pay for emergency room visits will increase; and 3) Retail and mail order prescription prices will increase. The Union has identified additional benefit differences: The new PPO does not cover pediatric well-dental care, as Harvard Pilgrim did; maternity benefits are now subject to co-pays and deductibles; and there is a different list of physicians (P-Ex. 6, p. 9)

cost savings and was already in effect (P-Ex. 5, p. 7). On June 29, Respondent produced to the Union information about the health insurance plans; the open enrollment period had ended June 25 (P-Ex. 5, p. 7).

In addition to the above-described changes that affected all employees, Longy altered the health insurance of Union President Clay Hoener and his life partner, Lisa Lederer, who is also a faculty member at Longy (P-Ex. 6, p. 9). Hoener and Lederer both qualify individually for Longy's full employer contribution toward their health insurance premiums.[23] For years, Respondent has applied the full-employer contribution earned by both Hoener and Lederer toward a shared family plan; thus Respondent has contributed twice the value of one individual plan toward their shared family plan and they only had to pay the difference (P-Ex. 6, p. 9-11).

Beginning in July, however, Respondent reduced its contribution to Hoener's and Lederer's health insurance by making only a single employee's contribution toward their shared premium. Respondent also ceased splitting the cost of the health care premium between Hoener and Lederer.[24] This unilateral change has resulted in Hoener being charged $1,152.20 each month (and Lederer is charged nothing); if there had been no change, Hoener and Lederer each would have paid $365.07 per month (P-Ex. 6, p. 9-11). Respondent made this change without prior notice or opportunity to bargain with the Union.[25]

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[22] Instead, Respondent's attorney and Ratzlaff explained the changes to the Union at the table after they were announced and implemented (P-Ex. 6, p. 9; P-Ex. 3, p. 7-8).

[23] Longy pays 80 percent of the cost of an individual plan toward whichever plan an employee chooses, provided the employee works the a set number of benefit hours, as Hoener and Lederer do (P-Ex. 6, p. 9).

[24] This change has resulted in Hoener having $1152.20 deducted out of his pay each month (and none is deducted from Lederer's check); if there had been no change, Hoener and Lederer each would have paid $365.07 per month (P-Ex. 6, p. 9-10).

[25] Although in its Answer to the Complaint, P-Ex. 2, Respondent asserts that it provided the Union prior notice and opportunity to bargain about these changes, any discussions the parties had about these changes clearly occurred after they were unilaterally made by Respondent (P-Ex. 6, pp. 9-11).

Since March 12, the Union has repeated its request that Longy rescind the changes and engage in bargaining about the changes and their effects on the bargaining unit. Discussion of these changes has virtually monopolized those bargaining sessions the parties did have (P-Ex. 5, p. 6; P-Ex. 6, pp. 8-9). It was not until April that Longy attempted to explain its reasoning for the employment decisions reflected in the March letters to faculty. It was not until the end of June that Longy fully explained what it had done to each bargaining unit member's job (P-Ex. 7, p. 5). Respondent refused to provide a written explanation for its actions (P-Ex. 6, p. 8). Respondent's verbal explanations of its actions consumed at least five bargaining sessions, and the Union was forced to glean specific information about each job change at the bargaining table (P-Ex. 6, p. 8; P-Ex. 7, p. 5).

Despite the distractions created by Respondent's unilateral changes, between May 17 and August 3, the Union presented Respondent with over 40 written proposals for contract provisions. Respondent, however, presented only two counter-proposals (one on a non-discrimination clause and one on access to personnel files) that amounted to less than one page of writing (P-Ex. 6, p. 7). The parties met twice in September, and spent the two-hour sessions addressing new unilateral changes the Union had just discovered (P-Ex. 12, p. 2-5). The parties also met on October 4 and October 8 in two-hour sessions and discussed settlement of the unfair labor practices (P-Ex. 12, p. 5-6).[26] Despite the Union's repeated request for proposals or counter-proposals from Respondent, Respondent has made no substantive proposals and has not responded to the Union's proposed contract (P-Ex. 12, p. 6; P-Ex. 6, p. 7). Although Respondent assured the Union it would have some written responses or proposals at their October 22 bargaining session, Respondent did not present any (P-Ex. 13, p. 5). Instead, Respondent told

the Union it was revamping its bargaining team, that it would have a full proposal for the Union on November 19, and that Respondent's attorney had to cut the meeting short because he had another appointment (P-Ex. 13, p. 8). The parties appear to have made almost no progress toward reaching agreement on a collective-bargaining agreement.

It is no surprise that Longy's actions have derailed meaningful bargaining and seriously undermined employee support of the Union.[27] In late April, about six weeks after Respondent's unilateral staffing changes were made, 20 employees signed a letter in support of President Zorn that criticized the Union (P-Ex. 6, p. 8). The letter was sent to the whole faculty. One unit employee resigned her membership in the Union immediately following the announcement of the staff reductions (P-Ex. 6, p. 14; P-Ex. 8, p. 7). Employees have expressed their reluctance to join the Union or to openly support the Union because of their fear that the administration will retaliate against them for their support (P-Ex. 8, p. 6-9; P-Ex. 7, p. 5; P-Ex. 5, p. 3). Because of employees' fear of retribution for supporting the Union, the Union does not list who attends Union meetings in its minutes, and informs employees that it will not do so when they join the Union (P-Ex. 13, p. 6). At least one bargaining unit member has resigned her employment in the face of these drastic changes in her job (P-Ex. 17, p.6).

Individual faculty agreements were sent to employees in early summer, consistent with Respondent's long-term practice before the Union was elected (P-Ex. 12, p. 1). These agreements set forth terms and conditions of employment. The Union acquiesced to this process,

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[26] Petitioner has redacted any references to the substance of the parties' settlement talks from P-Ex. 12.

[27] Petitioner has submitted affidavits sufficient to establish that grant of the relief prayed for is just and proper. In order to protect the identities of individual employees, Petitioner does not intend to make an initial submission of *all* of the affidavits relevant to the existence and extent of employee chill arising from Respondent's conduct. In the event that Respondent in its answer raises a legitimate question as to the existence and extent of chill, Petitioner will seek leave of this Court to provide supplemental affidavits on this issue.

in part, because the faculty members were so nervous about whether they would have jobs that they wanted to have something in their hands.

IV. ARGUMENT -- AN INJUNCTION IS WARRANTED IN THIS CASE

Section 10(j) of the Act authorizes United States District Courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. This provision reflects Congressional recognition that, because the Board's administrative proceedings often are protracted, in many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint and it could thereby render a final Board order ineffectual. See *Fuchs v. Hood Industries, Inc.*, 590 F.2d 395, 396 (1st Cir. 1979), citing S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted at *Legislative History of the Labor Management Relations Act of 1947*, 414, 433 (Government Printing Office 1985). Thus, Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. See, e.g., *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d 445, 454 (1st Cir. 1990); *Angle v. Sacks*, 382 F.2d 655, 660 (10th Cir. 1967).

To resolve a 10(j) petition, a district court in the First Circuit considers only two issues: whether there is "reasonable cause to believe" that a respondent has violated the Act and whether temporary injunctive relief is "just and proper." See, e.g., *Pye v. Excel Case Ready*, 238 F.3d 69 (1st Cir. 2001); *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d at 450; *Asseo v. Pan American Grain Co.*, 805 F.2d 23, 25 (1st Cir. 1986). The court indicated in *Pye v. Sullivan Brothers Printers*, however, that, to the extent the reasonable cause test still survives as an independent element, it is, in any event, subservient to the question, posed under the just and

proper standard, of whether the Board has demonstrated a likelihood of success on the merits. 38 F.3d 58, 64 n.7 (1st Cir. 1994).

A. Petitioner has Met the "Reasonable Cause" Standard.

In determining whether there is reasonable cause to believe that the Act has been violated, the district court may not decide the merits of the case. See *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d at 450; *Maram v. Universidad Interamericana de Puerto Rico, Inc.*, 722 F.2d 953, 958-959 (1st Cir. 1983). Rather, the court's role is limited to determining whether "the Regional Director's position was fairly supported" by the evidence. *Maram v. Universidad Interamericana*, 722 F.2d at 959; *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d at 450. The district court should not resolve contested factual issues and should defer to the Regional Director's version of the facts if it is "within the range of rationality." *Maram v. Universidad Interamericana*, 722 F.2d at 958. Accord: *Fuchs v. Hood Industries*, 590 F.2d at 397 (whether contested factual issues could ultimately be resolved by Board in favor of General Counsel).

The affidavits tendered in support of this petition clearly establish a factual basis supporting the Regional Director's issuance of Complaint. Indeed, there is no dispute that multiple unilateral changes have been made, affecting the entire unit, Respondent has bypassed the Union, and by word and deed characterized the Union as irrelevant.

Similarly, on questions of law, the Regional Director need only establish that the legal theories relied on are "not without substance." *Union de Tronquistas de Puerto Rico, Local 901 v. Arlook*, 586 F.2d 872, 876 (1st Cir. 1978) (Section 10(l) proceeding).[28] Accord: *Aguayo v. Tomco Carburetor Co.*, 853 F.2d 744, 748 (9th Cir. 1988) ("substantial and not frivolous" legal

[28] Section 10(l) of the Act (29 U.S.C. Section 160(l) is a companion provision to Section 10(j); it mandates the Board to seek temporary injunctions involving certain enumerated violations, such as secondary boycotts. The legal analysis under the two

theory satisfies "reasonable cause" test); *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 29 (6th Cir. 1988).[29]

The legal foundation of the Complaint in this action far exceeds this standard. Indeed, black letter Board law holds that in circumstances where parties are negotiating a collective-bargaining agreement, as is the case here, the employer *must* maintain terms and conditions of employment until agreement is reached *on an entire agreement*, or the parties reach impasse in their negotiations. *Bottom Line Enterprises*, 302 NLRB 373 (1991). The exceptions to this rule are limited, and none apply here. See *RBE Electrics of S.D.*, 320 NLRB 80 (1995)("exigent circumstances") and *Stone Container*, 313 NLRB 336 (1993).

B. An Injunction in the Case Is "Just and Proper".

In *Pye v. Sullivan Bros.*, 38 F.3d at 63, the Court of Appeals reviewed the "reasonable cause" and "just and proper" standards, explaining:

> In assessing whether the Board has shown reasonable cause, the district court need only find that the Board's position is "fairly supported by the evidence." *Centro Medico del Turabo*, 900 F.2d at 450. In satisfying the court that injunctive relief is just and proper, however, the Board faces a much higher hurdle, for here the district court must examine "the whole panoply of discretionary issues with respect to granting preliminary relief." *Centro Medico del Turabo*, 900 F.2d at 454 (quoting *Universidad Interamericana de Puerto Rico*, 722 F.2d at 958). Thus, the district court must apply the familiar, four-part test for granting preliminary relief. Under this test, the Board must demonstrate:
>
> 1) a likelihood of success on the merits;
> 2) the potential for irreparable injury in the absence of relief;
> 3) that such injury outweighs any harm preliminary relief would inflict on the defendant; and
> 4) that preliminary relief is in the public interest.

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sections is basically the same. See, e.g., *Boire v. International Brotherhood of Teamsters*, 479 F.2d 778, 787 n. 7 (5th Cir. 1973); *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1084 (3d Cir. 1984).

[29] In the separate "just and proper" inquiry, the district court considers how likely the Regional Director is to succeed on the merits in the ultimate unfair labor practice cases. *Maram v. Universidad Interamericana*, 722 F.2d at 959; *Asseo v. Pan American Grain Co.*, 805 F.2d at 25.

> See, e.g., *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 5 (1st Cir. 1991); *Centro Medico del Turabo*, 900 F.2d at 453. When… the interim relief sought by the Board "is essentially the final relief sought, the likelihood of success should be strong." *Asseo v. Pan American Grain Co.*, 805 F.2d 23, 25 (1st Cir. 1986).

In *Winter v. Natural Resources Defense Council*, __ U.S. __, 129 S.Ct. 365, 375 (2008), the Supreme Court required "plaintiffs seeking preliminary relief to demonstrate that irreparable harm is likely in the absence of an injunction." In the only case to date in which the First Circuit has addressed *Winter*, a case concerning a request for injunctive relief during the pendency of an appeal in a private action challenging the constitutionality of election laws in Maine, the First Circuit panel emphasized that the first two prongs of its injunction test, 1) likelihood of success on the merits and 2) likelihood of suffering irreparable harm, are the most important. *Respect Maine PAC v. McKee*, et al, __ F.3d __, 2010 WL 3861051 (1st Cir. October 5, 2010).

Interim relief under Section 10(j) is "just and proper" in this case to prevent irreparable harm to the employees' Section 7 rights and the Board's remedial authority. Petitioner, by the evidence submitted, has shown a strong likelihood of success on the merits and potential for irreparable injury, absent interim relief. Petitioner demonstrates below that such injury outweighs any harm preliminary relief would inflict on Respondent, and that the granting of relief is in the public interest.

1. Petitioner Has a Strong Likelihood of Success on the Merits.

Longy has acted in near total derogation of its legal obligations following its employees' selection of the Union. There is, therefore, a strong likelihood that Petitioner will prevail on all the allegations of the Complaint.

An employer violates Section 8(a)(1) of the Act when it tells employees that selecting a Union to collectively represent them is futile, or when it threatens to retaliate against them for their Union activity. Id. In the March 5 meeting before the entire faculty, Respondent's highest executive, President Zorn, told employees that "this is not a democracy" and that she, the president, makes the decisions. She also told employees that the changes had already been voted on by the Trustees and were "non-negotiable."[30] Zorn's statements at this time, just after the Union was selected and in the context of announcing these dramatic and material changes, unambiguously delivered the message that the Union was irrelevant and that, if employees thought they were going to achieve some meaningful voice in their workplace by their selection of the Union, they were mistaken.

Zorn's comments about wanting people "on the bus" with her toward "positive change," and that she wanted people "committed to Longy" and who were not "nay-sayers," in the context of her announcements of a unilateral reorganization that would result in some employees losing their jobs and many employees losing work or status, also violate Section 8(a)(1) by impliedly threatening that employees must be completely loyal to her to maintain their jobs.[31]

It is axiomatic that after a Union has been certified, an employer may not make material changes in terms and conditions of employment without first giving the Union prior notice and

[30] See, e.g., *Goya Foods of Florida*, 347 NLRB 1118, 1122 (2006) (threatening employees with underemployment or lost work if they support the union is unlawful).

opportunity to bargain about those changes. *NLRB v. Katz*, 369 U.S. 736, 747 (1962). When parties are engaged in negotiations for a collective-bargaining agreement, Respondent has a heightened duty to not only refrain from making unilateral changes without prior notice and opportunity to bargain, but also to refrain from any implementation of changes until the parties have reached an overall agreement or reached a lawful impasse in bargaining for the agreement as a whole. *Bottom Line Enterprises*, 302 NLRB 373 (1991).[32]

When a reorganization is not a substantial departure from what an employer does, such as a sale of assets or capital reorganization, or a termination, relocation, liquidation, closure, or sale of its activities, an employer is obligated to bargain about its decision to make staffing changes as part of a reorganization.[33] A mere change of administrative structure, no matter how large scale, is not the kind of entrepreneurial decision that can be made without bargaining with the Union. Id. Respondent's reorganization and the resulting staffing changes did not change the fundamental type or character of Respondent's enterprise. See, e.g., *International Ladies Garment Workers Union v. NLRB*, 463 F.2d 907, 917-18 (D.C. Cir. 1972); *Transmarine Navigation Corp. v. NLRB*, 380 F.2d 933, 939 (9th Cir. 1967). Both before and after the staffing changes Respondent has engaged in the same business of teaching music at the same location, servicing the same clientele and using the same methods, schedules, rooms, instruments, and materials.

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[31] See, e.g., *K-Mart Corp*., 336 NLRB 455, 471 (2001).

[32] See *Pan American Grain, Inc. v. NLRB*, 558 F.3d 22, 27-28 (1st Cir. 2009)(enforcing Board's decision that employer's layoff decision was mandatory subject of bargaining because it was premised in part on labor costs); *Sociedad Espanola de Auxilio Mutuo y Beneficiencia de P.R. v. NLRB*, 414 F.3d 158, 165-67 (1st Cir. 2005)(employer failed to give union notice of subcontracting decision.)

[33] See *International Harvester Co.*, 236 NLRB 712 (1978) (The Board found that, even when the Employer engaged in a nation-wide reorganization plan that involved reorganizing work in 150 branches, it was still required to bargain with the Union about the decision to do so in one branch that was unionized, because the reorganization was not a change in the scope or direction of the company, but merely a rearrangement in how it did its work.)

Respondent has no valid defense to its unilateral actions. Although Respondent claims its reorganization plan was underway before the Union was elected in January, Respondent cannot show that it was committed to these specific changes prior to the Union's selection. Even taking at face value Respondent's assertions that it had been contemplating staffing changes in September and October 2009, Respondent admits it had no concrete plans for staff reductions or staff re-organization at that time.[34] Thus, Respondent's assertion that it was privileged to make these unilateral staffing changes has no legal basis and must be rejected.[35]

Nor does the fact that the reorganization Respondent announced and implemented affected more than just the bargaining unit employees exempt Respondent from its obligation to have bargained with the Union about it, before it was announced or implemented. See *Larry Geweke Ford*, 344 NLRB 628, 632 (2005). An employer is obligated to bargain in good faith about terms and conditions of employment, even when those terms and conditions of employment affect a group of workers larger than just the bargaining unit. Id. Here, Respondent clearly refused to notify or bargain with the Union about the staffing changes before they were

[34] Indeed, Respondent concedes that even by February 2010 (after the Union was certified), it had only "preliminarily agreed to implement the … faculty changes." (P-Ex.3, p 5) The strategic plan Respondent points to outlines future goals for the School, and has no references to any specific staffing changes.

Moreover, Respondent's suggestion that the Union had time to bargain about these changes after they were announced is without merit. Notice, to be effective, must be given sufficiently in advance to allow reasonable scope for bargaining. See *International Ladies' Garment Workers Union v. NLRB*, 463 F.2d 907, 915-17 (D.C. Cir. 1972), and cases cited there. A union will not be held to have waived its right to bargain about a decision or its effects, if it has not been given adequate notice. Within ten days of Zorn's unlawful announcement, Respondent sent individual letters to every member of the bargaining unit, effectuating the changes. The letters themselves instructed employees to contact the managers directly to discuss it further; there was no mention of the Union. Respondent set the "realignment in motion" and effectuated the changes, despite the Union's protests, demands for bargaining, and requests for information. Such unilateral changes circumvent the basic duty to negotiate in good faith, which frustrates the objectives of the Act. See *Loral Defense Systems-Akron*, 200 F.3d 436, 451-54 (6th Cir. 1999).

[35] To the extent that Respondent relies on *First National Maintenance v. NLRB*, 452 U.S. 666 (1981), to justify its unilateral reorganization of its unionized faculty, Respondent is simply mistaken. Respondent's decisions to reduce the number of faculty that it had on its rolls, reassign certain faculty from one division to another, and to take certain work out of the bargaining unit, fall into the second category of management decisions described by the Court in *First National Maintenance* – those that are almost exclusively an aspect of the employer/employee relationship. Id. Unlike in *First National Maintenance*, Respondent's decisions to reorganize faculty assignments were not "a change in the scope or direction of the enterprise, akin to whether or not to be in business at all." Id. These decisions were more akin to an order of lay off, than to a decision to close a plant, and Respondent could not lawfully take these actions without bargaining with the Union.

announced and implemented, and it is legally irrelevant that staffing changes were also made to non-union employees.

With respect to the movement of bargaining unit work to two new management positions, it is well-settled that an employer must bargain about the decision to relocate bargaining unit work. See, e.g., *American Needle & Novelty Co.*, 206 NLRB 534 (1973), relying on *Fiberboard Paper Products Corp*., 379 U.S. 203 (1964). In *Catalina Pacific Concrete*, 330 NLRB 144 (1999), for example, the Board determined that Respondent's unilateral changes in terms and conditions of employment that resulted in the removal of employees (batch plant operators) from the bargaining unit by making them supervisors violated Section 8(a)(5).[36] In the present case, the removal of five CP Chair/Coordinator positions from the bargaining unit by "reorganizing" them into two management positions was a mandatory subject of bargaining.[37]

Respondent committed a separate violation by failing to bargain about the effects of the reorganization or "realignment" on bargaining unit employees.[38] *International Ladies Garment Workers v. NLRB*, 463 F.2d at 917. Indeed, Respondent partially acknowledged this obligation to the Union on March 12, and in its position statement to the Region, saying it was prepared to bargain over the effects of these actions. However, Respondent was not entitled to spring its decisions on the Union as *faits accomplis*, and expect the Union to bargain about the effects of

[36] See also, *Kendall College*, 228 NLRB 1083, 1087-89 (1977), finding the assignment of supervisory duties to bargaining unit employees, thus removing them from the bargaining unit, was a mandatory subject of bargaining. Note: In dicta, in *Kendall College*, the ALJ reasoned that the "divisional reorganization" of the faculty in that case was not a mandatory subject of bargaining. 228 NLRB at 1087.

[37] In *Catalina Pacific Concrete*, 330 NLRB at 149, the ALJ further found that, because the parties had agreed to include the batch plant operators in the bargaining unit, the Employer was not entitled to assert their supervisory status without giving the Union notice and opportunity to bargain about it. Here, Respondent has told the Union that it believes the CP Chair/Coordinator positions constituted management work, similar to the CV Chair positions that were excluded from the bargaining unit by the RD in the DDE. However, neither party disputed the inclusion of the CP Chair/Coordinator positions in the voting unit, and they were included in the Unit by the Regional Director.

[38] Even if the Employer were correct that its basic decision to reorganize was not a mandatory subject of bargaining, the effects of that decision on the bargaining unit would, nevertheless, be a mandatory subject of bargaining.

the changes after the fact.[39] Respondent was required to give the Union prior notice and meaningful opportunity to bargain about the effects of its employment decisions, at a minimum. *Transmarine Navigation Corp. v. NLRB*, 380 F.2d 933, 939 (9th Cir. 1967). It did not do so, and, thus, it violated Section 8(a)(5) of the Act.

It is well-settled that health care benefits and health insurance are mandatory subjects of bargaining.[40] The Board has held that the health insurance carrier, as well as premiums and benefits, are mandatory subjects of bargaining. *Josten Concrete Products Co., Inc*., 303 NLRB 74 (1991). Changing health benefits without bargaining is unlawful, even when the change applies to more employees than just the bargaining unit; the standard remedy is return to the *status quo*.[41] Here, although Respondent asserts it had a practice of reviewing its health insurance annually, there had been no changes in the health care carrier in at least 13 years.[42] As there was no union for these employees until February, it could not have acquiesced to Respondent's previous changes. An employer must bargain about a material change in terms and conditions of employment, including benefits, regardless of whether the change is positive or negative. *Carrier Corp.*, 319 NLRB 184, 195 (1995). Here, Respondent cannot justify the unilateral nature of changes made by its assertions that the changes were "better" for the

[39] See, e.g., *Soule Glass and Glazing Co.*, 246 NLRB 792, 801-802 (1979) (The employer kept its decision to reorganize and the effects on the bargaining unit a secret from the Union, then sprung it upon the union's negotiators in a *fait accompli*. The ALJ discussed that, in his view, "Section 8(d) of the Act requires a much higher standard of conduct. Only by open and full discussion of the issues and of the full effects of proposals upon the employees can fair and lasting agreements be achieved and peaceful labor relations be restored and maintained."), enfd. in relevant part, 652 F.2d 1055, 1088-89(1st Cir. 1981)(employer's work transfer decision was presented as *fait accompli* to union).

[40] See e.g., *W. W. Cross & Co., v. NLRB 174 F.2d 875, 878* (1st Cir. 1949); *Larry Geweke Ford*, 344 NLRB 628, 632 (2005); *Laurel Bay Healthcare*, 355 NLRB No. 118 (August 24, 2010). As a consequence of this characterization, a change in health insurance must be preceded by notice and an opportunity to bargain.

[41] *Larry Geweke Ford*, 344 NLRB 628 (2005)(Board distinguishes this case from *Courier-Journal*, 342 NLRB 1093 (2004), in which Board found Union had acquiesced over 10 years to the Employer's annual changes to health insurance, and therefore had waived its right to bargain.)

[42] There had been changes in the cost of coverage, and the percentage Respondent would contribute.

employees and Respondent. In fact, the Union was entitled to bargain about sharing the cost savings. Id.

Respondent changed the way it calculated its contribution to employees' Hoener's and Lederer's health insurance and the way it deducted the employee contributions from their paychecks. Respondent did not give the Union prior notice or opportunity to bargain about this change. As set forth above, Respondent may not make material changes in health insurance benefits while the parties are engaging in bargaining for an overall collective-bargaining agreement, as the parties here were doing. *Bottom Line Enterprises*, supra. Respondent was not entitled to abrogate the arrangement these employees had made for payment of their health insurance without consulting with the Union. Indeed, as discussed above, Respondent was obligated to maintain the *status quo*. Id.

Respondent presented the changes directly to the employees as a *fait accompli* and, by the letters of March 11 and March 12, directed employees to discuss any concerns directly with management representatives. This invitation to employees to deal directly with Respondent as to wages and essential terms and conditions of employment circumvented the Union and constitutes unlawful direct dealing.[43] By this action, Respondent failed in its most basic collective-bargaining duty – to deal with the bona fide representative of the employees in the bargaining unit, rather than deal directly with them.[44]

[43] See, e.g., *General Electric Company*, 150 NLRB 192, 276 (1964)(unlawful to invite employees to discuss terms of employment directly with employer).

[44] See *El Paso Electric Co.*, 355 NLRB No. 95 (August 18, 2010); *General Electric Co*., 150 NLRB 192, 195 (1964); *J. I. Case Co.*, 321 U.S. 332, 339 (1944).

2. Irreparable Injury Will Occur Absent Section 10(j) Relief.

Unilateral changes strike at the heart of a union's ability to represent employees by allowing an employer to enjoy the fruits of its unlawful conduct and gain an undue bargaining advantage.[45] They must "of necessity" obstruct bargaining, contrary to congressional policy. *NLRB v. Katz*, 369 U.S. 736, 747 (1962). If the *status quo* is not restored, Respondent can use restoration of the proper *status quo* working conditions as "bargaining bait" to force acceptance of its other bargaining proposals.[46] Significantly, these drastic and pervasive changes in terms and conditions of employment have been made during the first year of union representation a time period when the collective bargaining relationship is vulnerable to unfair labor practices.[47] During the first year of representation – called the certification year -- the Board bars the filing of new petitions for representation (neither petitions to remove a union nor to bring in a new union maybe filed) to provide stability the infant collective bargaining relationship, and to encourage the parties to accomplish the often difficult task of reaching mutual agreement on a first labor contract.[48] Here, Respondent tilted the playing field severely at the inception of the relationship between the parties, making it virtually impossible for the Union to bargain on behalf of the employees who exercised their federally protected rights to select the Union as their exclusive collective-bargaining representative. By seeking an injunction, Petitioner seeks to level the playing field and permit a fair opportunity for the Union to represent the employees.

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[45] See *Herman Sausage Co., Inc.*, 122 NLRB 168, 172 (1958), enfd. 275 F.2d 229 (5th Cir. 1960); *Little Rock Downtowner, Inc.*, 168 NLRB 107, 108 (1967), enfd. 414 F.2d 1084 (8th Cir. 1969).

[46] See *Florida-Texas Freight, Inc.*, 203 NLRB 509, 510 (1973), enfd. 489 F.2d 1275 (6th Cir. 1974). Accord: *Southwest Forest Industries, Inc. v. NLRB*, 841 F.2d 270, 275 (9thCir. 1988) (restoration of *status quo ante* ensures "meaningful bargaining").

[47] *Arlook v. S. Lichtenberg & Co.*, 952 F.2d 367, 373 (11th Cir. 1992); *Accord: Ahearn v. Jackson Hospital Corp*., 351 F.3d 226, 239 (6th Cir. 2003).

[48] *Brooks v. NLRB*, 348 US 96 (1954)(Supreme Court approved the Board's requirement that an employer recognize a union for an entire certification year.)

The requested relief is necessary to prevent irreparable injury to employee statutory rights. There is no question that Longy's refusal to maintain or restore the *status quo* has negatively impacted bargaining. Respondent announced the staffing changes only weeks after the Union was certified, and put the Union in an untenable position of trying to initiate bargaining for its first contract in the face of drastic unilateral changes to the bargaining unit. They created fear and apprehension among the faculty members, and a sense of doom and helplessness, in that Respondent has made clear that it will do whatever it wants to do, disregarding its legal obligations to give notice and opportunity to bargain about changes in terms and conditions of employment. Indeed, it is difficult to imagine a scenario that would disempower the Union more than this one by rendering it hopeless, helpless, and irrelevant.[49] Respondent's President and CEO told employees the changes were "non-negotiable" and that "this is not a democracy." Respondent refused to even speak with the Union in advance of the changes being made, announced, or implemented.

Respondent's unlawful conduct was far-reaching in that it affected the terms and conditions of employment of half of the bargaining unit. Absent the requested interim relief, the eight discriminatees who were terminated -- all open Union supporters -- will likely "scatter to the four winds" during the Board's procedures and may not be available for reinstatement by the time the Board issues its final order.[50] At least one bargaining unit employee has resigned her employment in the face of these drastic changes to her job, and more may similarly seek other employment. Moreover, interim relief is necessary to remove any possible "chilling" impact

[49] See *NLRB v. Hardesty Co., Inc*. 308 F.3d 859, 865 (8th Cir. 2002)("unilateral action will also often send the message to the employees that their union is ineffectual, impotent, and unable to effectively represent them").

[50] See, e.g., *NLRB v. Electro-Voice, Inc*., 83 F.3d 1559, 1573, 152 LRRM 2145 (7th Cir. 1996), cert. denied 519 U.S. 1055 (1997); *Aguayo v. Tomco Carburetor Co*., 853 F.2d 744, 749, 129 LRRM 2086 (9th Cir. 1988). *Silverman v. Imperia Foods*, Inc., 646 F. Supp. 393, 400 (S.D.NY 1986); See also *Bloedorn v, Francisco Foods Inc.*, 276 F.3d 270, 299 (7th Cir. 2001).

upon the willingness of the directly affected employees and other unit employees to continue to support the Union.[51] Employees have expressed reluctance to join the Union for fear that the administration will find out and retaliate against them (P-Ex. 13, p. 5; P-Ex. 7, p. 5, P-Ex. 8, pp. 3, 5-8). Shortly after the unilateral changes, 20 employees signed an open letter to the faculty in support of the administration and President Zorn, and criticizing the Union (P-Ex. 6, p. 8). At least one employee, who joined the Union just after the election, withdrew from the Union and requested her name not be listed as a member shortly after the "realignment" letters were sent to employees (P-Ex. 6, p. 8). The Union officers take care to not expose the identities of members without their permission; the Union purposefully refrains from including a list of attendees in Union meeting minutes, which are published, so as not to discourage employees from participating (P-Ex. 13, p. 5). Thus, interim relief is necessary to prevent Respondent's unilateral changes from severely eroding the "prestige and legitimacy" of the Union in the eyes of employees. *Morio v. North American Soccer League*, 632 F.2d 217, 218 (2d Cir. 1980).

Section 10(j) interim injunctive relief has been shown to be particularly appropriate in contexts like this one, when the violations are ongoing, pervasive, and obvious. *Asseo v. Pan American Grain Co., Inc*., 805 F.2d 23, 26 (1st Cir. 1986) (If an employer is permitted to continue overt violations of the Act, it may, in extreme cases, succeed in so undermining the union's strength as to render ineffective any final relief by the Board.) Similar arguments have been accepted as a basis for injunctive relief in this and other circuits. *Asseo v. Centro Medico Del Turabo, Inc.*, 900 F. 2d 445, 133 NLRB 3090, 3096 (1st Cir. 1990); see also *Levine v. C & W Mining Co., Inc.*, 465 F. Supp. 690, 690 (N.D. Ohio 1979), aff'd rel. part 610 F. 2d 432 (6th Cir.

[51] See *NLRB v. Electro-Voice, Inc.*, 83 F.3d at 1573; *Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 878-79, 880, 134 LRRM 2458 (3d Cir. 1990); *Blyer v. Pollari Electric*, 141 F.Supp. 2d 326, 330-31 (E.D.N.Y. 2001);

1979); *Pascarell v. Gitano Group, Inc*., 730 F.Supp. 616, 625 (D.N.J. 1990), 133 LRRM 2906 (1990). Without relief, Respondent will have attained its objective of thwarting the lawful exercise of its employees' rights under Section 7 of the Act and rendered the employees' selection of the Union a nullity.

3. The Balance of Hardships Favors Granting Interim Injunctive Relief.

The Union has already lost employee support as a direct consequence of Longy's unfair labor practices. Its effectiveness as a bargaining representative has essentially been nullified by unlawful means. As Respondent moves forward with an anticipated merger with another institution, Bard College, it may become increasingly more difficult to reinstate employees or reestablish the *status quo* in the future. Under settled Board law, the Union will likely continue to represent employees even in the event of some reorganization. Without injunctive relief now, the Union's ability to deal effectively with any successor will, as a result of Longy's unlawful acts, be greatly diminished. Respondent can show no more than economic inconvenience if it is forced to restore the *status quo ante*.

The relative harm to Respondent if interim relief is granted, on the other hand, is slight.[52] Reinstatement of the eight employees will not cause significant harm to Respondent, as they are extremely talented and experienced teachers, and, significantly, they held part-time positions. Similarly, returning the 33 employees to their prior divisional assignments and one employee to her departmental assignment will not cause significant harm to Respondent. These 34 teachers are currently teaching in some capacity at Longy. Returning them to their prior status will not significantly impact Respondent. Similarly, the CP Chair/Coordinator positions were performed

[52] *See Asseo v. Bultman Enterprises, Inc*., 913 F.Supp. 89, 97 (D. P.R. 1995). See also, *Bloedorn v. Franciscan Foods, Inc*., 276 F.3d at 299-300; *Aguayo v. Tomco Carburetor Co*., 853 F.2d at 750; *Kobell v. Beverly Health & Rehabilitation Services, Inc.*, 987 F. Supp. 409, 417 (W.D. Pa. 1997), affd. Mem. 142 F.3d 428 (3rd Cir. 1998), cert. denied, 525 U.S. 1121 (1999).

by bargaining unit employees in the past, and there is no harm to Respondent to return those tasks and responsibilities to the five bargaining unit employees who performed them last year (and some for many years before that).[53]

4. The Public Interest Will Be Served by by Granting Interim Relief.

The public has an interest in effectuating the policies and provisions of the National Labor Relations Act. Respondent's disregard for fundamental requirements of Section 8(a)(1) and (5) of the Act and its signal to its employees that, if they exercise their Section 7 rights by engaging in union or other protected concerted activity, they will suffer serious consequences, undermines rights granted by Congress and discourages both the employees involved and others from confidence in the statutory promise.[54] In the absence of a preliminary injunction in this case, Respondent may well reap a benefit from its unfair labor practices, even if they are ultimately adjudicated to be unlawful. Interim relief protects the employees' Section 7 rights, preserves the remedial power of the Board, and safeguards the parties' new collective-bargaining relationship, restoring the bargaining power the Union would otherwise have had.[55] Interim relief, therefore, will be in the public interest.

V. CONCLUSION

[53] See also *Norelli v. Fremont-Rideout Health Group*, 632 F. Supp. 2d 993, 1003 (E.D. Cal. 2009). Cf. *Power, Inc.*, 311 NLRB 599, 600 (1993), enfd. 40 F.3d 409 (D.C. Cir. 1994)(proper to remedy restoration of work following unilateral subcontract unless respondent demonstrates restoration is unduly burdensome). Compare *Calatrello v. Automatic Sprinkler*, 55 F.3d 208, 215 (6th Cir. 1995)(restoration of subcontracted work not just and proper where employer had already sold equipment, materials, and tools to perform work).

[54] See *Muffley v. APL Logistics*, 2008 WL 544455 at *5 (W.D. Ky. 2008); *Silverman v. Major League Baseball Player Relations Committee, Inc.*, 880 F. Supp. 246, 259 (S.D.N.Y. 1995), affd. 67 F.3d 1054, 1062 (2nd Cir. 1995)(interim rescission of unilateral change appropriate to "salvage some of the important bargaining equality that existed" prior to violations). See also *Morio v. North American Soccer League*, 632 F.2d at 218; *Overstreet v. Thomas Davis Medial Centers, P.C.*, 9 F.Supp. 2d 1162, 1167 (D. Ariz. 1997); *Overstreet v. El Paso Disposal, LLC*, 668 F.Supp. 2d 988, 1015 (W.D. Tex. 2009).

[55] See, e.g., *Lineback v. Spurlino Materials, LLC*, 546 F.3d 491, 502 (7th Cir. 2008); *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 300 (7th Cir. 2001) ("the interest at stake in a section 10(j) proceeding is 'the public interest in the integrity of the collective bargaining process' … [t]hat interest is placed in jeopardy when the protracted nature of Board proceedings threatens to circumscribe the Board's ability to fully remediate unfair labor practices").

Based on the foregoing, to prevent irreparable harm to the parties' nascent collective-bargaining relationship, the Petitioner respectfully requests that the Court grant the relief requested in the Petition.

Dated at Boston, Massachusetts, this 16th day of November, 2010.

Respectfully submitted,

Counsels for the Petitioner
National Labor Relations Board, First Region
Thomas P. O'Neill Federal Building
10 Causeway Street, Suite 601
Boston, Massachusetts 02222
Elizabeth.Tafe@nlrb.gov
Susan.Lawson@nlrb.gov

/s/ Elizabeth M. Tafe
Elizabeth M. Tafe, BBO #641529
(617) 565-6739

/s/ A. Susan Lawson
A. Susan Lawson, BBO #628347
(617) 565-6741

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