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.	CASE 1:10-cv-11974-PBS

RESPONDENT'S ANSWER TO PETITION FOR INJUNCTION UNDER SECTION 10(j) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED

On November 16, 2010, the National Labor Relations Board (the "Board" or "Petitioner") filed a Petition seeking interim injunctive relief pursuant to Section 10(j) of the National Labor Relations Act ("Act"). Respondent The Longy School of Music ("Longy," the "School," or "Respondent") opposes the Board's Petition for Injunction Under Section 10(j) of the National Labor Relations Act and files this Answer.

The underlying unfair labor practice charge is based on allegations that Longy violated the Act by making certain unilateral changes in working conditions without providing the American Federation of Teachers ("AFT" or the "Union") with prior notice and/or the opportunity to bargain about the decision, the implementation, and the effects of these changes. The procedural background is particularly relevant to the Petition before the Court: (1) after waiting over five (5) months, the Union filed an unfair labor practice charge regarding the alleged unilateral changes implemented in March 2010; (2) following the issuance of a

Complaint, the Board sought and received an expedited hearing date (December 13, 2010); and (3) just weeks before the hearing before an Administrative Law Judge which will last at least five (5) days, the Board rushed to this Court seeking preliminary injunctive relief, claiming in part that the hearing date may be pushed back because the Board expects to amend the Complaint.

The Board fails to make out a sufficient showing of reasonable cause or a strong likelihood of success on the merits. Specifically, the Board claims that Longy (1) announced changes to terms and conditions of employment directly to employees without prior notice and meaningful opportunity to bargain about changes or the effects of those changes; (2) unilaterally changed the bargaining unit members' terms and conditions of employment and removed work from the bargaining unit; (3) announced the change in Longy's health insurance carrier to employees without prior notice and meaningful opportunity to bargain; (5) impliedly threatened employees and implied to employees that it is futile to have the AFT represent them; and (6) that on account of these aforementioned alleged acts, did not bargain in good faith. These claims lack merit, and Longy vigorously denies that it has violated any section of the Act.

Petitioner cannot demonstrate the requisite strong likelihood of success on the merits. Longy's core business decisions regarding the School's reorganization and faculty re-alignment were directly related to the implementation of its Strategic Plan and in preparation for the merger with Bard. College ("Bard"). This was not "a mere change of administrative structure" as the Board asserts in its Petition. Longy does not need to bargain over the decisions "involving a change in the scope and direction of the enterprise." First National Maintenance Corp. v. NLRB, 452 U.S. 666, 667 (1981). Moreover, Longy's reorganization and realignment decisions were well underway more than a year before the bargaining unit was certified, and thus could not have been motivated by anti-union animus. Contrast Pan American Grain Co., Inc. v. NLRB, 558 F.3d

22, 28 (1st Cir. 2009) (company president told two non-striking truck drivers that he "would rather close the company" than reach an agreement with the striking employees, whom he called "jerks" among other things); Maram v. Universidad Interamericana De Puerto Rico, Inc., 722 F.2d at 959-60 (finding that employer, whose "decision to subcontract was made in haste, and coincided with the appearance of union cards" had failed to prove that discharge would have occurred absent antiunion motivation).

Given the unexplained delay in pursuing redress for Longy's alleged violations of the Act, there is no question that the Union can afford to wait until the Board's disposition for the relief it seeks, and thus has not established a threat of irreparable harm. See Moore-Duncan v. Traction Wholesale Ctr., No. Civ. A. 97-6544, 1997 WL 792909 (E.D. Pa. 1997) (finding that Board did not provide any concrete evidence that "it was more likely than not that remedial measures by the Board would fail."). The conduct in question – Longy's implementation of a school-wide reorganization and faculty realignment – occurred almost six months prior to the filing of the underlying charge in this case. See Sharp v. La Siesta Foods, 859 F.Supp. 1370, 1375 (D. Kansas 1994) (denying 10(j) injunction and explaining that "[d]elay is an appropriate consideration in determining whether section 10(j) relief is just and proper, especially if the harm has already occurred" and "whatever 'lingering effect' exists as the result of respondent's unfair labor practices will no more be cured now than it would be at the conclusion of the Board proceedings."); Siegel v. Marina City Co., 428 F.Supp. 1090, 1093 (C.D. Cal. 1977) (denying petition for 10(j) injunction and holding that a "preliminary injunction could not preserve the status quo because the Board has waited three months since the alleged unfair labor practices occurred before filing its petition herein…"). In light of the fact that the Union had been aware of Longy's faculty realignment since March, and waited until right before the start of the new

school year to file the charge, the threat of irreparable harm is nonexistent. Overstreet v. El Paso Elec. Co., 176 Fed.Appx. 607, 610-11 (5th Cir. 2006) (affirming District Court's denial of 10(j) relief and its finding that elapsed time allowed the detrimental effect of the unfair labor practice to be fully realized with no lingering threat of additional harm warranting injunctive relief). Additionally, the central conduct at issue here – the realignment and attendant faculty cuts – can be compensated by money damages. See Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 217 F.3d 8, 13 (1st Cir. 2000) (explaining that irreparable harm is "a substantial injury that is not accurately measurable or adequately compensated by money damages.").

Even if the Board had the requisite showing of irreparable harm, the real potential for harm to Longy cuts against the issuance of an injunction. Contrary to the Board's contention, Longy faces a great deal more than "economic inconvenience" if an injunction issues. (Petitioner Memo, p. 28). In fact, injunctive relief would place significant business, administrative, and pedagogical burdens on the School. First, the pending merger with Bard is at a crucial stage, and the upheaval an injunction would cause to the operations and environment at Longy could place this deal in jeopardy. Second, the administrative challenge of reinstituting the discharged employees and reversing the divisional reassignments would be a logistical and practical nightmare. See Asseo v. Pan American Grain Co., 805 F.2d at 27 (acknowledging that the "…granting of an interim bargaining order and the reinstatement of employees, are burdensome to the employer, and should not be imposed as a matter of course in all cases…"). Importantly, as an institute of higher education, Longy's ultimate priority is to its students. The domino effect of the business and administrative harm caused by an injunction will ultimately harm the student body. Forcing the School to, on an interim basis, undo the changes of the March realignment will undoubtedly disrupt the educational environment of Longy. The Longy community has had

many months to adjust to the newly aligned divisions and the change in scope and direction of the School. This progress should not be halted.

Finally, public policy supports the denial of the Petition. While the Board seeks to short-circuit a process initiated by it, namely the expedited hearing scheduled for the week of December 13, 2010, the public interest here will be best served by conducting a full hearing on the merits of the Board's case. See Kaynard v. Mego Corp., 633 F.2d 1026, 1035 (2d Cir. 1980) (noting that "the issuance of a section 10(j) injunction diminishes whatever incentives for speed the General Counsel and the charging union might have otherwise had, since a considerable portion of the desired relief has already been obtained. Moreover, in the interval between the grant of an injunction and final adjudication by the Board, the rights of the parties will have been determined by a court rather than by the expert agency established by Congress."). Indeed, the Board's expeditious decision on the underlying Charge will provide the most resolution for all parties involved. Given the Union's delay in bringing the underlying Charge, and the Board's litigation tactics vis-à-vis the upcoming hearing on the merits, a denial of Petitioner's motion will not adversely impact the remedial powers of the Board, the rights of the bargaining unit, or the statutory intent of the Act.

The issuance of injunctive relief against Longy is not just and proper. For the above-stated reasons, Longy respectfully request that this Court deny Petitioner's Petition for Injunction Under Section 10(j) of the National Labor Relations Act.

IN RESPONSE TO THE ALLEGATIONS OF THE PETITION, RESPONDENT ANSWERS AS FOLLOWS:

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7. Respondent is without sufficient knowledge to either admit or deny the allegations in Paragraph 7.

8. Denied.

9.

a) Admitted.

b) Admitted.

c) Admitted.

d) Respondent states that the Union has been a labor organization within the meaning of Section 2(5) of the Act since February 1, 2010, when the Union was certified as the exclusive bargaining representative of the Unit.

e) Respondent states that (i) effective May 2010, Kalen Ratzlaff's position is Chief of Staff and (ii) Mr. Tremble began working at Longy on April 1, 2010. Respondent admits the remaining allegations in Paragraph 9(e).

f) Respondent states that on March 5, 2010, President Zorn held a three-hour faculty meeting to confidentially announce Longy's anticipated merger with Bard College and to explain the changes to Longy's faculty and programs attendant to the implementation of the School's strategic initiatives, which were approved by the Board of Trustees in January 2009. At this meeting, President Zorn also discussed the administrative reorganization of the Conservatory and Community Programs, phasing out the undergraduate program, Longy's expectations of the

faculty moving forward, revamping of the Pedagogy program, and faculty realignment changes. The remaining allegations of Paragraph 9(f) are denied.

g) Admitted.

h) Admitted.

i) Admitted.

j) Respondent states that on February 15, 2010, President Zorn sent an email to all Longy faculty members explaining that Longy's Board of Trustees had approved a number of strategic initiatives in furtherance of the School's strategic plan, and informing the faculty members that Longy would be announcing a related development at a March 5, 2010 faculty meeting. Answering further, Respondent states that this February 15, 2010 email is a document that speaks for itself. To the extent a further response is required, the remaining allegations in Paragraph 9(j) are denied.

k) Denied.

l) Respondent states that the letter referenced in Paragraph 9(l) is a document that speaks for itself and, therefore, no responsive pleading is required.

m) Respondent states that the letter referenced in Paragraph 9(m) is a document that speaks for itself and, therefore, no responsive pleading is required.

n) Respondent states that at the March 5, 2010 faculty meeting, President Zorn informed Longy's faculty members that the School was implementing a faculty realignment, including reassignments and nonrenewals of faculty agreements, to better meet the needs and goals of the School, and that these assignments would be communicated to faculty members in letters to be sent out on or about March 15, 2010. To the extent a further response is required, the remaining allegations in Paragraph 9(n) are denied.

o) Denied.

p) Respondent states that during the collective bargaining session on or about March 12, 2010, Respondent informed the Union of its position that bargaining was not required with respect to implementation of its strategic initiatives as well as other changes initiated in anticipation of the Bard College merger. To the extent a further response is required, the remaining allegations in Paragraph 9(p) are denied.

q) (i) Admitted.

(ii) Admitted.

(iii) Respondent states that the employees listed in Paragraph 9(q)(iii) were informed by letter that they would "be listed only as a member of the Conservatory faculty." Respondent states that these letters also contained the following language: "If you are a private studio teacher and you are willing to accept an incoming Continuing Studies student who asks to study with you, we will be happy to assign them to your studio. Should your Community Programs studio grow in the future, you will once again be listed as a member of the Community Programs faculty." Answering further, Respondent states these employees can all continue to teach adult Continuing Studies students if they wish. Answering further Respondent states that the only faculty member whose current teaching was affected was Leslie Amper, who had one preparatory (pre-18) student; she will continue teaching this preparatory student, but Longy will not accept any more preparatory students in Ms. Amper's studio. Respondent denies the remaining allegations in Paragraph 9(q)(iii).

(iv) Admitted.

(v) Respondent states that Jean Rife was one of three modern French horn teachers in the Conservatory's Woodwinds & Brass department and, as a result of the

implementation of Longy's strategic plan and resulting realignment, Longy only needed two French Horn teachers in this department. As a result, Ms. Rife was assigned to teach Baroque Horn in the Conservatory's Early Music Department. Respondent denies the remaining allegations in Paragraph 9(q)(v).

r) Denied.

s) Respondent states that the effective date for the faculty assignments and non-renewals described in Paragraphs 9(q)(i), 9(q)(ii), 9(q)(iii), and 9(q)(v) above were effective September 1, 2010. Answering further, Respondent states that the effective date for the faculty assignments described in Paragraphs 9(q)(iv) was effective June 1, 2010, and that these employees were paid for this work through August 31, 2010.

t) Respondent states that, as part of the implementation of Longy's strategic plan, the School eliminated the nine Community Program chair positions and created a part-time administrative staff position ("Associate Director of Community Programs") to handle delegated duties from the Director of Community Programs, as well as a new position, Chair of Chamber Music and Small Ensembles. The remaining allegations contained in Paragraph 9(t) are denied.

u) Respondent states that the elimination of the Community Programs chair positions referenced in Paragraph 9(t) were effective July 1, 2010. The remaining allegations contained in Paragraph 9(u) are denied.

v) Denied.

w) Respondent states that in Spring 2010, Longy determined that it could provide nearly identical coverage to participants in its health insurance plans by switching to Blue Cross Blue Shield ("BCBS") while, at the same time, achieving a significant cost savings for the School and its workforce of faculty, staff, and administrators. Answering further, Respondent

states that Longy, in a letter from Kalen Ratzlaff, gave employees approximately one month's notice of the decision to switch health insurance carriers and its positive impact on yearly premiums for all employees, including an average decrease of 7% in overall premium costs. The remaining allegations contained in Paragraph 9(w) are denied.

x) Respondent incorporates its response to Paragraph 9(w) and further states that Longy's switch from Harvard Pilgrim to BCBS as the School's health insurance carrier was effective July 1, 2010. The remaining allegations contained in Paragraph 9(x) are denied.

y) Respondent states that in July 2010, it was discovered that there was an anomaly regarding Clay Hoener's health insurance benefits: Anna Kuwabara, Longy's previous Executive Vice President, had provided Mr. Hoener 160% of the individual monthly premium to be applied towards the purchase of a family plan during past benefit years. While Mr. Hoener and his wife – both faculty members – were able to apply 160% of the individual monthly premiums to their family plan, the two other faculty couples at Longy were only able to apply 80% of the premium to the purchase of health insurance. In order to be fully compliant with Longy's health care benefit policies and the recent Massachusetts Health Care Reform Act, Longy could not allow for an isolated exception in this case. Answering further, Longy states that Mr. Hoener, Lisa Lederer, and the Union were given ample prior notice of this discrepancy, including by emails from Kalen Ratzlaff dated July 21, 2010 and July 22, 2010, and by a letter from Don Schroeder dated August 6, 2010, and the issue was also specifically discussed at the August 3, 2010 and August 17, 2010 negotiating sessions. The remaining allegations contained in Paragraph 9(y) are denied.

z) Denied.

aa) Denied.

bb) Denied.

cc) Denied.

dd) Denied.

ee) Denied.

ff) Denied.

gg) Denied.

hh) Respondent states that the alleged unfair labor practices, which it denies committing, took place in this judicial district.

10. Respondent denies that the requested injunctive relief is warranted here, as fully set forth in the accompanying Memorandum of Law in Opposition to the Petition, which is incorporated herein by reference. To the extent a further response is required, Respondent denies the remaining allegations in Paragraph 10.

11. Respondent denies that the requested injunctive relief is warranted here, as fully set forth in the accompanying Memorandum of Law in Opposition to the Petition, which is incorporated herein by reference. To the extent a further response is required, Respondent denies the remaining allegations in Paragraph 11.

12. Denied.

13. Denied.

14. Denied.

15. Respondent denies that the requested injunctive relief is just and proper, as fully set forth in the accompanying Memorandum of Law in Opposition to the Petition, which is incorporated herein by reference. To the extent a further response is required, Respondent denies the remaining allegations in Paragraph 15.

WHEREFORE, Respondent requests that the Petition be Denied.

Respectfully submitted,

THE LONGY SCHOOL OF MUSIC

By its attorneys,

___/s/ Donald W. Schroeder_____
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Dated: November 24, 2010

CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2010, I electronically filed the foregoing document with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to counsel of record for the parties.

___/s/_Donald W. Schroeder___
Donald W. Schroeder, Esq.