

IN THE UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

POINT PARK UNIVERSITY,

Employer,

and

No. 6-RC-12276 on remand
Case 6-CA-34243
344 NLRB No. 17
457 F.3d 42 (D.C. Cir. 2006)

NEWSPAPER GUILD OF PITTSBURGH/
COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 38061, AFL-CIO, CLC,

Petitioner.

EMPLOYER'S MOTION FOR RECONSIDERATION

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EMPLOYER'S MOTION FOR RECONSIDERATION

COMES NOW, Employer Point Park University (“Employer” or “Point Park”) and, based on extraordinary circumstances, respectfully moves the National Labor Relations Board (“Board”) to reconsider its Order of February 25, 2015, on the basis that said Order constitutes material error. In support of its Motion, Employer would show unto the Board as follows:

INTRODUCTION

Nearly nine years ago, on August 1, 2006, the United States Court of Appeals for the District of Columbia Circuit granted the Employer’s Petition for Review, denied the Board’s cross-petition for enforcement, and remanded this matter to the Board with a specific mandate. *Point Park University v. NLRB*, 457 F.3d 42 (D.C. Cir. 2006). The D.C. Circuit held that the Board had “failed to adequately explain why the faculty’s role at the University is not

managerial.” *Id.* at 44. The Court instructed the Board to identify which of the relevant factors set forth in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980) (“*Yeshiva*”) are significant and which are less so in its determination that the Employer’s faculty are not managerial employees and also to explain why the factors are so weighted. The Court justified its remand in unmistakably clear and succinct terms:

. . . *Yeshiva* identified the relevant factors that the Board must consider. *LeMoyne-Owen* held that the Board must clearly explain its analysis. The failure to provide such an explanation is grounds for remand to the Board, which we do here.

Id. at 51 (internal citations omitted). Despite having received these unequivocal instructions, the Board has yet to comply with the D.C. Circuit’s mandate.

Indeed, there has never been any dispute as to the scope of the D.C. Circuit’s remand and mandate. On October 24, 2006, following the D.C. Circuit’s mandate, the Board notified the parties that it had accepted the remand from the D.C. Circuit and invited the parties to file Statements of Position. Significantly, in recognition of the narrow scope of the Court’s remand to the Board, it limited such Statements of Position “to the issues raised by the remand.”¹ In its Statement of Position, the Union declared that “the task of the Board on remand is straightforward” and that “[t]he Board should clarify those factors that were critical to its earlier conclusion that the faculty members are non-managerial.”²

Despite this universal agreement as to the task assigned to the Board by the D.C. Circuit, the Board, after remanding the matter to the Regional Director, took no action in this case for

¹ Letter of Richard D. Hardick to the Parties, October 24, 2006, a copy of which is attached hereto as Exhibit “A” (emphasis added). Exhibit “A” correctly styles this matter on remand as *Point Park University*, 6-CA-34243, 344 NLRB No. 17. Accordingly, the case caption herein should include this same case number.

² Letter of Joseph Pass and Robert Eberle to Lester Heltzer, December 14, 2006, p. 18 (a copy of which is attached hereto as Exhibit “B”).

nearly five years before issuing its Notice and Invitation to File Briefs.³ Even in this 2012 solicitation for additional briefing, however, the Board first acknowledged as follows:

The central issue in this case is whether the University faculty members sought to be represented by the Petitioner are statutory employees or rather excluded managerial employees, consistent with the Supreme Court's decision in *NLRB v. Yeshiva University*, 44 U.S. 672 (1980).

Id. Point Park objected to this additional round of briefing but nevertheless acquiesced in the hope that the Board would soon comply with the instructions it received from the D.C. Circuit.

Most significantly, the Board's Order of February 25, 2015, makes no reference whatsoever to the D.C. Circuit's mandate and remand, nor does the Order reference the additional round of briefing the Board solicited in *Point Park* in 2012. Rather, the only reference to *Point Park* in the Board's Order was the statement that on November 28, 2007, the Board granted the Employer's Request for Review of the Regional Director's Supplemental Decision on Remand.⁴ As such, it does not appear that the Board considered either the 2006 mandate or the 2012 briefing at all in issuing the Order. Instead, the Board states that it is remanding this matter to the Regional Director "for further appropriate action consistent with *Pacific Lutheran University*, including reopening the record, if necessary."

The Board announced in *Pacific Lutheran* that it had "decided to revise [its] analytical framework for determining the managerial status of university faculty." *Pacific Lutheran University and Service Employees International Union*, 361 NLRB No. 157, *18 (2014). It acknowledged that it did so based upon full consideration of the record [in *Pacific Lutheran* and]

³ A copy of the Notice and Invitation to File Briefs is attached hereto as Exhibit "C."

⁴ The Board observed that "[t]he only issue on which review was sought and granted was whether the Regional Director properly reaffirmed his Decision and Direction of Election and concluded that the Employer had not met its burden of affirmatively demonstrating that the petitioned-for full-time faculty are managerial employees within the meaning of *NLRB v. Yeshiva University*, 444 U.S. 672 (1980)." Order, n. 1.

the briefs by the parties and amici. . .” *Id.* Rather than complying with the order of remand that the D.C. Circuit issued in *Point Park University*, the Board’s Order herein applies its newly-adopted analytical framework developed in *Pacific Lutheran* to Point Park, thereby circumventing the mandate of the D.C. Circuit. Based on this and other extraordinary circumstances detailed below, the Employer files this Motion for Reconsideration on the ground that the Order constitutes material error because it violates the Court’s mandate, and remand will have serious ill effects, subjecting the parties to further unwarranted delay and forcing them to incur additional considerable expense.

FACTS

The procedural posture of this matter illustrates the material error committed by the Board in remanding this matter for a second time to the Regional Director for further proceedings. In 2003, the Newspaper Guild of Pittsburgh/Communications Workers of America, Local 38061, AFL-CIO, CLC (“Union”) filed a petition with the Board seeking to represent a bargaining unit consisting of all full-time faculty at Point Park. Employer contested the petition on the grounds that all its full-time faculty members were managerial and therefore outside the Board’s jurisdiction. After a hearing, the Region Six Regional Director issued a Decision and Direction of Election on April 27, 2004, finding that Point Park’s full-time faculty members were not managerial employees. Subsequently, the Board denied Point Park’s Request for Review of the Regional Director’s Decision and Order.

More than a decade ago, an election was held, and the Union was certified as the exclusive collective bargaining representative. In order to challenge the propriety of the Regional Director’s ruling regarding the managerial status of the faculty, the Employer thereafter refused to recognize and bargain with the Union, and the Union filed unfair labor charges against

Point Park. On February 15, 2005, the Board ruled in favor of the Union on the unfair labor charges. Point Park filed a Petition for Review with the United States Court of Appeals for the D.C. Circuit. As referenced above, the D.C. Circuit granted Point Park's Petition for Review and remanded the case to the Board "for proceedings consistent with this opinion so that the Board can provide such an explanation or reconsider its conclusion." *Point Park v. NLRB*, 457 F.3d 42 (D.C. Cir. 2006). The Board, after specifically accepting the Court's remand and receiving Statements of Position of the Petitioner, Employer and *amici curiae*, in turn, remanded the case on February 28, 2007, to the Region Six Regional Director.

The Regional Director reopened the record and received briefs from the parties. On July 10, 2007, the Regional Director issued its Supplemental Decision on Remand reaffirming its original decision, and Employer filed a Request for Review with the Board on August 23, 2007. The Board granted Employer's Request for Review on November 28, 2007, and Point Park filed Employer's Brief on Review of the Regional Director's Supplemental Decision on Remand. Thereafter, nothing happened for quite some time.

Almost five years later, on May 22, 2012, a divided Board issued its Notice and Invitation to File Briefs, in which the Board sought input from the parties and *amici* on several issues, some of which were not related to the mandate issued to the Board by the D.C. Circuit.

As stated by the Board majority:

To aid the Board in properly addressing the court's remand, the Board invites the parties and amici to file briefs that address the court's instruction that the Board explain the weight of the various factors identified by the Supreme Court in *Yeshiva* and their application to this case.

Notice and Invitation to File Briefs, May 22, 2012. Members Hayes and Flynn dissented from the majority's decision, stating:

We dissent from the majority's decision to solicit additional briefing now, nearly 5 years after the Board granted the Employer's Request for Review of the Regional Director's Supplemental Decision on Remand. An amicus brief has already been filed in this case by the American Council on Education ("ACE"), the National Association of Independent Colleges & Universities ("NAICU"), the Council of Independent Colleges ("CIC"), and the Association of Independent Colleges & Universities of Pennsylvania ("AICUP"), which collectively represent virtually all institutions of higher education. After the Board granted review in November 2007, the Petitioner did not avail itself of its opportunity to file a brief. Further, no additional organizations have asked to participate as amici during the lengthy pendency of this case despite the publicity surrounding it [footnote omitted]. Under these circumstances, we find it unwise to further delay the processing of this case to solicit additional briefing.

Id.

Although Point Park objected to the Board's Notice and Invitation to File Briefs, it, along with *amici*, expended significant resources responding to the Board's Notice in the hope that the Board would finally comply with the order of the D.C. Circuit and explain its 2005 ruling in favor of the Union on unfair labor charges. Despite the fact that the Board received hundreds of pages of briefing in response to its 2012 Notice,⁵ the parties have again been left waiting for nearly three additional years for the Board to comply with the D.C. Circuit's 2006 mandate. Now, instead of doing so, the Board has remanded this matter to the Regional Director once again, this time for "further appropriate action consistent with *Pacific Lutheran University*, including reopening the record if necessary."

⁵ The following responded to the Notice and Invitation to File Briefs: Point Park University (Brief of Employer and Reply Brief) and Petitioner joined by AFL-CIO as Amicus Curiae. Additionally, the following submitted *amicus* briefs in response to the Board's Notice and Invitation to File Briefs: Higher Education Council of the Employment Law Alliance; Rochester Healthcare Decision-Making Group; The American Council on Education; the National Association of Independent Colleges and Universities; the Council of Independent Colleges; the Association of Independent Colleges and Universities of Pennsylvania, the College and University Professional Association for Human Resources; the Association of American Universities; the American Federation of Labor and Congress of Industrial Organizations; American Association of University Professors; Louis Benedict, MBA, JD, PhD.; the National Education Association; Michael Hoerger, Ph.D.; the National Right to Work Legal Defense & Education Foundation, Inc.; and The Center for the Analysis of Small Business Labor Policy, Inc., a group of employment and labor relations scholars.

ARGUMENT

I. The Board's Order of February 25, 2015, remanding this case to the Regional Director for further proceedings consistent with the Board's recent decision in *Pacific Lutheran*, does not comply with the 2006 mandate issued by the Court of Appeals for the D.C. Circuit and imposes additional, unwarranted burdens on the parties and the judicial and administrative systems.

A. The D.C. Circuit's 2006 Mandate binds the Board and defines the manner in which the Board must comply with the Court's Order.

“[U]ntil reversed, the dictates of a Court of Appeals must be adhered to by those subject to the appellate court's jurisdiction ... Administrative agencies are no more free to ignore this doctrine than are district courts.”⁶ *Beverly Enterprises v. NLRB*, 727 F.2d 591, 592-93 (6th Cir. 1984) (holding that the Board's actions were “even more disturbing in light of” a prior opinion in which the Court had “recently articulated to the Board the bounds of its statutory authority and discretion relative to directions issued by this court.”). In *Beverly Enterprises*, the Sixth Circuit remanded a matter to the Board with specific instructions that the Regional Director clarify the extant uncertainties by making certain factual determinations identified by this court. *Beverly Enterprises*, 727 F.2d at 592. Instead of complying with the Sixth Circuit's mandate by allowing the Regional Director to provide the required information, the Board *itself* “purported to respond to the questions identified in the mandate.” *Id.* (emphasis added). The Sixth Circuit labeled the Board's conduct as “contumacious” and again remanded the matter to the Board so that the Board could finally comply with the Sixth Circuit's order. *Id.* at 593. As is discussed below, the Sixth Circuit, in *Beverly Enterprises*, was not the first Court of Appeals to admonish the Board

⁶ The holding of the D.C. Circuit also constitutes the “law of the case” and cannot be challenged on remand. *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987) (“Under the law of the case doctrine, a legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time.”)

for failing to comply with its mandates, thereby causing needless expense, delay, and uncertainty.

In *Ithaca College*, the Second Circuit issued its opinion in the *Yeshiva* case⁷ shortly before a runoff election between “no union” and the International College Faculty Association. *Ithaca College v. NLRB*, 623 F.2d 224, 226 (2nd Cir. 1980). In a decision affirmed by the Board, the Regional Director denied the College’s request to hold additional hearings based on the *Yeshiva* decision, stating that it would adhere to Board precedent over the holdings of the Second Circuit “at least until the Supreme Court speaks to the contrary or the Board decides to acquiesce to the decision of the Court of Appeals.” *Id.* The Second Circuit chastised the Board that it, “as must a district court, ... is bound to follow the law of the Circuit.” *Id.* at 228. The *Ithaca* Court went on to advise the Board that, “[w]hen it disagrees in a particular case, it should seek review in the Supreme Court.” *Id.* What the Board cannot do, however, is “choose to ignore the decision as if it had no force or effect.” *Id.*

The Third Circuit raised similar concerns about the Board’s failure to conform to the authority of the Courts of Appeals in *Allegheny General Hospital*, holding that judgments of the Courts of Appeals are “binding” on the Board when the Board deals with issues pertaining to those judgments. *Allegheny General Hosp. v. NLRB*, 608 F.2d 965, 970 (3rd Cir. 1979) *reversed on other grounds*. According to the Third Circuit, “the Board is not a court nor is it equal to this court in matters of statutory interpretation.” *Id.* As such, “a disagreement by the NLRB with a decision of this court is simply an academic exercise that possesses no authoritative effect.” *Id.*

⁷ *NLRB v. Yeshiva University*, 582 F.2d 686 (2nd Cir. 1978).

(also holding that “Congress has not given to the NLRB the power or authority to disagree, respectfully or otherwise, with decisions of this court.”)⁸

Based on the jurisprudence discussed above, it is quite clear that the Board is bound by the rulings of Courts of Appeals when it appears before those Courts. In this case, not only did the D.C. Circuit issue a clear and specific mandate to the Board, but the Board explicitly and intentionally submitted itself to the D.C. Circuit’s mandate, and the scope of this mandate has not been challenged. As such, it cannot be credibly disputed that the Board is bound by the 2006 mandate issued by the D.C. Circuit.

B. The Board’s February 25, 2015, Remand Order not only violates the 2006 mandate of the D.C. Circuit, but also improperly and arbitrarily prejudices the parties with further delays, subjects the parties to undue expense, and strains an administrative system that is already overburdened.

Because the Board’s remand order will not assist the Board in complying with the D.C. Circuit’s 2006 mandate, the unnecessary strain and expense to which the parties will be subjected is worthy of particular note. Indeed, the opinions discussed above in which the Courts of Appeals have admonished the Board for failing to comply with their mandates have recognized the needless expense to the parties when the Board fails to comply with court orders and mandates.

In *Beverly Enterprises*, the Sixth Circuit noted that “the Board’s indifferent attitude toward the order of this court has resulted in the expenditure of considerable time and cost in a useless second full briefing and oral argument on the petitions.” *Beverly Enterprises*, 727 F.2d at 593. The Sixth Circuit raised additional criticism regarding the fact that the case “remains fundamentally unchanged from its status” on remand. *Id.* Notably, in *Beverly Enterprises*, the

⁸ In addition, the Board should be mindful of Member Leibman’s dissent in *LeMoyne-Owen College*, 345 NLRB 1123, 1133 (2005) (“LeMoyne-Owen II”) in which Member Leibman emphasized that the Board must confine itself to the scope of remand ordered by the Court of Appeals.

time between the first remand order and the second remand order was less than three years. In the current matter, not only have the parties been subjected to a “useless second full briefing” (which the Board does not appear to have considered), but also nearly *nine* years have passed since the D.C. Circuit’s remand order, and the procedural posture remains fundamentally unchanged.

Similarly, in *Ithaca College*, the Second Circuit bemoaned the fact that the Board squandered “the opportunity to address the issue of faculty status and ... improperly and arbitrarily refused to resolve that issue.” *Ithaca College*, 623 F.2d at 229-30. The Second Circuit further noted that the Board’s actions “exposed the College to needless expense and unwarranted prejudicial publicity.”⁹ *Id.*

Thus, Courts of Appeals have previously been forced to reprimand the Board for ignoring the mandates issued by such courts. In addition, these Courts of Appeals have demonstrated marked sensitivity to the harm to the parties when the Board behaves in a manner labeled “contumacious” by the Sixth Circuit.¹⁰ Quite simply, when the Board fails to comply with court orders, it hampers the speedy and efficient administration of justice, causes the parties to endure undue stress and expense, and delays resolution of disputes (which, in this case, the Board has allowed to linger for over a decade).¹¹

Twelve (12) years have passed since the Union petitioned for representation in this matter. Ten (10) years have passed since the election. Nine (9) years have passed since the D.C. Circuit issued its mandate to the Board. Eight (8) years have passed since the Regional Director

⁹ The Second Circuit also recognized that “[t]he passage of time created by the Board’s refusal to address these issues has undoubtedly been accompanied by changes in faculty personnel.” *Id.*

¹⁰ *Beverly Enterprises*, 727 F.2d at 593.

¹¹ This Board has recently admitted that “[t]he Board and court are rightly concerned with administrative delay in Board certification proceedings, especially when it is coupled with other bases for questioning the continuing viability of the certified union’s majority support.” *Independence Residences, Inc.*, 358 NLRB No. 42 at *4 (2012).

issued his supplemental opinion following the Board's first remand of this matter. Three (3) years have passed since the Board subjected the parties to an additional round of briefing to which it has never responded. Now, instead of merely complying with the D.C. Circuit's 2006 mandate, the Board has ordered the parties to again argue the same issue to the Regional Director that they have already argued to the Regional Director twice before and has further authorized the Regional Director to reopen the record. Rather than subject the parties to these unnecessary proceedings with the concomitant expense and delay, Point Park respectfully urges this Board to comply with the D.C. Circuit's 2006 mandate and allow this case to proceed to its proper and just conclusion.

II. The Board should reconsider and vacate its February 25, 2015, Order because the Board has already delayed resolution of this matter for over a decade.

- A. The Board committed material error in issuing the February 25, 2015, Order because of the Board's unprecedented and unforgiveable delay in resolving this matter.

Even if the Board had not disregarded the D.C. Circuit's mandate for the last nine years, the Board's unnecessary and inexcusable delay in deciding this case provides an independent basis for concluding that the Order constitutes material error. Just as Courts of Appeal have harshly criticized the Board for failing to comply with mandates and remand orders, several of the Courts of Appeal have taken the Board to task for prejudicing all parties by unjustifiably delaying resolution of the matters before it.

"Remedies in unfair labor practice cases must be designed 'to restore the status quo as nearly as possible had the wrong not been committed.'" *Emhart Industries v. NLRB*, 907 F.2d 372, 378 (2nd Cir. 1990) (citation omitted). Furthermore:

For this reason, prompt resolution of these claims is critical. Without a final determination of the charge, the rights and duties of the parties remain unresolved, injuries not only remain

uncompensated but also continue to be incurred, and neither side can enter into any negotiations with any confidence about where it stands as to past wrongs and future liabilities. As then-Chief Judge Lumbard succinctly put it, remedies for unfair labor practice “must be speedy in order to be effective.”

Id. (internal citations omitted).

Unfortunately, however, “once a case is presented to the board, ‘it appears to enter a new dimension – one where time has little meaning.’” *Id.* (quoting Home Committee on Government Operations, *Delay, Slowness in Decisionmaking, and the Case Backlog at the National Labor Relations Board*, H.R. Rep. No. 1141, 98th Cong., 2d Sess. 16 (1984)). Courts should not turn a blind eye to the extensive administrative delay by the Board. *Olivetti Office U.S.A. v. NLRB*, 926 F.2d 181, 189 (2d Cir. 1991). As such, “circuit courts of appeals have been quick to recognize their responsibility to deny enforcement of NLRB orders rendered pointless and obsolete by virtue of the NLRB’s self-inflicted administrative delay.” *NLRB v. Mountain Country Food Store, Inc.*, 931 F.2d 21, 23 (8th Cir. 1991).

Not only do these delays harm the parties, but they are also “corrosive to the collective bargaining process itself ... and, when a decision is finally issued, the remedy often ‘will bear little relation to the human situation which gave rise to the need for Government intervention.’” *Emhart Industries*, 907 F.2d at 379 (quoting Advisory Panel on Labor-Management Relations Law, *Report to the Senate Committee on Labor and Public Welfare, Organization and Procedure of the National Labor Relations Board*, S. Doc. No. 81, 86th Cong., 2d Sess. 2 (1960)). “Protracted delay ... increases the likelihood that the remedy imposed on the employer will become draconian.” *Olivetti Office U.S.A., Inc.*, 926 F.2d at 189. Rather, “[e]lementary considerations of fairness, therefore, require that the remedy be implemented as soon after the transgression as possible. *Id.*

Because Courts of Appeals maintain supervisory responsibility over Board decisions, they “must withhold enforcement of orders that will not effectuate any reasonable policy of the act, even where the problems with the order are caused by the lapse of time between the practices complained of and the remedy granted.” *Id.* If Courts ignore the effects of the NLRB’s ‘inexcusable and unfortunate’ delay, they abandon this supervisory responsibility. *Mountain Country Food Store, Inc.*, 931 F.2d at 23. Simply put, because there was no reason for the Board to delay resolution of this matter as long as it has, there is clearly no reason to subject the parties to further delay and expense in a manner that will not assist the Board in complying with the 2005 mandate. In the words of the D.C. Circuit in a case decided in 2006:

This matter is now 10 years old, largely because of the Board’s extraordinary delays in case processing. In this situation, it is the height of chutzpah for the Board to pronounce that the passage of time is irrelevant.

Cogburn Health Center, Inc. v. NLRB, 437 F.3d 1266, 1275 (D.C. Cir. 2006).

Other than receiving additional briefing in 2012 that it appears not to have considered, the Board has taken no action in this case since it granted Employer’s Request for Review on November 28, 2007. The parties have been waiting on the Board’s ruling on Employer’s Request for Review ever since. Given this extraordinary delay, all of which is directly attributable to the Board’s failure to take any action in this matter whatsoever, the Board’s February 25, 2015, Order constitutes material error.

- B. Based on the Board’s ruling in *Pacific Lutheran*, the holding in *Pacific Lutheran* should not be applied retroactively in this case.

Given the extent to which the Board has already delayed resolution of this case, remand for retroactive analysis under the Board’s new *Pacific Lutheran* test constitutes material error. As the Board admitted in *Pacific Lutheran*, “[i]n representation cases, the Board has recognized

a presumption in favor of applying new rules retroactively, *which is 'overcome ... where retroactivity will have ill effects that outweigh "the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles."*'" *Pacific Lutheran University*, 361 NLRB 157, *14, n. 20 (2014) (emphasis added) (quoting *Crown Bolt, Inc.*, 343 NLRB 776, 779 (2004) (internal citations omitted)). As is discussed above, the several Courts of Appeals have emphasized the ill effects on the parties and on the collective bargaining process itself of the type of extensive and unjustified delays to which the Board has subjected this matter. Further delay will only compound these ill effects. Therefore, the February 25, 2015, Order, which will unquestionably further delay the resolution of this matter at great expense to the parties is materially erroneous and should be reconsidered by the Board.

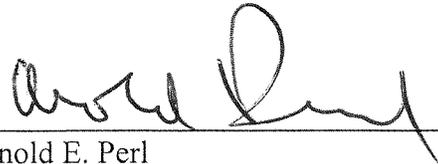
CONCLUSION

The Board's February 25, 2015, Order of remand to the Regional Director for further proceedings consistent with the Board's decision in *Pacific Lutheran* does not comport with the Court's remand to more fully explain the Board's 2005 decision in a manner consistent with *Yeshiva*. Instead, the Board inappropriately seeks to apply an entirely new analytical framework established by the Board in *Pacific Lutheran*. It is incumbent upon the Board to issue a decision consistent with the issues raised by the D.C. Circuit on remand and not circumvent the Court's decision on remand by ordering yet another remand to its Regional Director, especially for the purpose of applying the new analytical framework of *Pacific Lutheran* to the instant case.

In sum, the Board must either decide this case forthwith under the law set forth by the D.C. Circuit or be subject to appropriate remedial action by the Court for its failure to do so.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was emailed to the following on this 16th day of March 2015:

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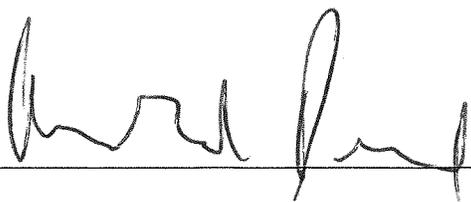
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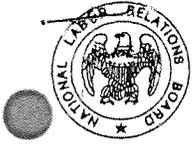
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United States Government

NATIONAL LABOR RELATIONS BOARD
1099 14th STREET NW
WASHINGTON DC 20570

October 24, 2006

Re: Point Park University
Case 6-CA-34243
344 NLRB No. 17

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NLRB, Region 6
Two Chatham Center, Suite 510
112 Washington Place
Pittsburgh, PA 15219-3458

Gentlemen:

This is to advise you that the Board has decided to accept the remand from the Court of Appeals in the above proceeding and that all parties, should they so wish, may file statements of position with respect to the issues raised by the remand.

Such statements of position must conform to Section 102.46(j) of the Board's Rules and Regulations and must be received by the Board in Washington, D.C. on or before November 14, 2006. Such filings must also be served on the other parties and the Regional Director. Thereafter, of course, the Board will take whatever action is consistent with the Court's remand.

Sincerely,

A handwritten signature in cursive script that reads "Richard D. Hardick".

Richard D. Hardick
Associate Executive Secretary

cc: Parties

EXHIBIT

A

tabbles

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December 14, 2006

VIA HAND DELIVERY

Lester Heltzer, Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

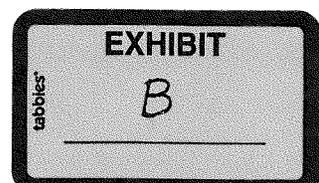
Re: Point Park University and Newspaper Guild of Pittsburgh, Communications Workers of America, Local 38061, AFL-CIO, CLC,
Case No. 6-CA-34243

Dear Mr. Heltzer:

Please accept this letter as the Union's Statement of Position regarding the above-referenced matter.

POSITION STATEMENT OF THE UNION ON REMAND

The Petitioner, Newspaper Guild of Pittsburgh, Communications Workers of America, Local 38061, AFL-CIO, CLC (hereinafter the "Union"), submits this Position Statement to the National Labor Relations Board regarding Case No. 6-CA-34243. This Position Statement is submitted in connection with the remand by the Court of Appeals for the District of Columbia Circuit in its decision dated August 1, 2006.



For the reasons stated herein, the Union respectfully requests the Board to clarify and restate its decision affirming the Regional Director's finding that the faculty members of the respondent, Point Park University (hereinafter the "University"), are non-managerial. Further, the Union requests the Board to deny the University's motion to reopen the record. Finally, the Union requests the Board to again conclude that the University violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain with the Union as the certified representative of the faculty and to issue an appropriate Order.

I. Procedural Statement

The Union filed a Representation Petition on October 20, 2003 at Case No. 6-RC-12276 seeking to represent a unit of all full-time faculty employed by the University. Following a lengthy hearing the Regional Director for Region Six issued his Decision and Direction of Election. In his Decision the Regional Director found that full-time faculty members were not managerial. The Regional Director directed an election in the appropriate unit. The University filed a Request for Review, and by decision dated June 23, 2004 a panel of the Board denied the University's Request.

An election was conducted on June 9, 2004. The tally of ballots reflected that the employees voted by a margin of 49 to 14 in favor of representation, with four non-determinative challenges. On July 9, 2004 the Regional Director issued a Certification of Representative. Thereafter, the Union requested bargaining. The University refused to bargain in order to test the Certification. The Charge in the instant matter was filed on August 11, 2004.

On August 31, 2004 the Regional Director issued a Complaint. The University timely filed an Answer, in which the University admitted that it had refused to bargain with the Union. As part of its response to the Complaint the University raised the issue of whether the Board should reopen the record in the representation proceeding to receive additional evidence. On October 4, 2004 Counsel for the General Counsel filed a Motion for Summary Judgment and Notice to Show Cause. On November 27, 2004 the University submitted its Response to the Motion for Summary Judgment. On February 17, 2005, the Board granted the General Counsel's Motion for Summary Judgment [Point Park University, 344 NLRB No. 17 (2005)].

The University filed its Petition for Review with the Court of Appeals for the District of Columbia Circuit. The General Counsel cross-filed for enforcement. On August 1, 2006, the Court of Appeals issued its Order declining to enforce the Board's Order and remanding the matter to the Board for further consideration.

On the substantive issue of the managerial status of the faculty members, the Court held that the Board, in affirming the Decision of the Regional Director, failed to state with clarity which factors discussed in the Decision were significant to the outcome and why.

The Court also addressed the issue of the University's request to reopen the record. The University contended that the Board committed error by denying the University's request to reopen the record in order to receive certain Faculty Assembly meeting minutes that had been subpoenaed from the Union. The University had originally subpoenaed three years of monthly Faculty Assembly meeting minutes from the Union, but the Union had provided only a portion of those documents. In September 2004 the University received a complete set of the minutes from the Faculty Assembly. As part of the University's response in opposition to the General

Counsel's Motion for Summary Judgment, which was filed on September 13, 2004, the University submitted its request to reopen the record to receive the additional Faculty Assembly meeting minutes as well as other documentation. The Board held in its decision issued on February 17, 2005 that the University failed to act with reasonable diligence in that the University never sought to enforce its subpoena directed to the Union and the University failed to move immediately to reopen the record after coming into possession of the documents. The Court held that the Board's decision rejecting the University's request to reopen the record was not supported by substantial evidence.

On October 24, 2006 the Board invited the parties to submit statements of position regarding the issues raised by the remand. The instant Position Statement is submitted on behalf of the Union.

II. The Board Should Clarify Those Factors Critical To Its Earlier Decision Finding The Faculty To Be Non-Managerial

The District of Columbia Circuit declined to enforce the Board's prior decision in this case, principally on the ground that "both the Board and the Regional Director failed to . . . explain 'which factors are significant and which less so, and why' in their determination that the faculty at Point Park were not 'managerial employees'" under NLRB v. Yeshiva University, 444 U.S. 672 (1980). Point Park University v. NLRB, 457 F.3d 42, 50 (D.C. Cir. 2006), quoting LeMoyne-Owen College v. NLRB, 357 F.3d 55, 61 (D.C. Cir. 2004). The Court remanded for the Board to "state[] with clarity which factors were significant to the outcome and why." *Id.* at 51. The Court cited, as an example of "the Board . . . perform[ing] such an analysis," the Board's decision in Duquesne University, 261 NLRB 587, 589 (1982). *Ibid.*

The Duquesne University decision identifies as “critical” to the managerial status of college faculty members the faculty’s control over “academic matters and curriculum, grading systems, and admission and matriculation standards.” 261 NLRB at 589. That decision identifies as secondary the degree to which “the faculty . . . exercises its authority in nonacademic matters, including decisions concerning hiring and tenure.” *Ibid.*

By contrast with the Board’s decision in Duquesne, the D.C. Circuit faults the underlying representation case decision here on the grounds that:

“the Regional Director mentioned some of the academic factors relied upon by the Supreme Court in its managerial analysis in Yeshiva, . . . referred to various non-academic factors that the Supreme Court listed in Yeshiva but which the Supreme Court described as ‘features of faculty authority’ upon which it did not need to ‘rely primarily, 444 U.S. at 686 n. 23,’ and “touched upon several factors relied upon in previous Board decisions,” all without “stat[ing] . . . which factors were ‘significant and which less so, and why.’” 457 F.3d at 51.

At the present juncture, the Board need not revisit the conclusion that the faculty members were non-managerial. What is required in view of the Court’s remand is for the Board to clarify the factors that were relied upon as ‘critical’ to the Regional Director’s finding (affirmed by the Board) that the faculty members were non-managerial.

The Court of Appeals correctly states that the key to determining the managerial status of college faculty under Yeshiva is “whether the faculty in question so controls the academic affairs of the school that their interests are aligned with those of the university or whether they occupy a role more like that of the professional employee in the ‘pyramidal hierarchies of private industries.’” 457 F.3d at 48, quoting Yeshiva, 444 U.S. at 48. In making this determination, “the Board must consider the degree of faculty control over academic matters such as curriculum, course schedules, teaching methods, grading policies, matriculation standards,

admission standards, size of the student body, tuition to be charged and location of the school.” *Id.* at 49. This “template for . . . analysis of whether faculty are managerial employees,” *ibid.*, derives from the nature of the managerial exception.

As the D.C. Circuit observed, “the Act did not contain an express statutory exclusion for management employees like what Congress had provided for supervisors,” but the Supreme Court implied such an exclusion for employees who may be “regarded as so clearly outside the Act . . . that no specific exclusionary provision was thought necessary.” 457 F.3d at 47, quoting NLRB v. Bell Aerospace Co., 416 U.S. 267, 288 (1974). Consistent with that understanding, “[m]anagerial employees, who cannot form or join a union, [a]re those who ‘formulate and effectuate management policies.’” *Ibid.*, quoting Bell Aerospace, 416 U.S. at 288. Thus, “[t]he key inquiry” is “whether employees [a]re ‘aligned with management.’” *Ibid.*, quoting Yeshiva, 444 U.S. at 683. In other words, as the Board put it in an early lead case, the managerial exception applies to “employees who occupy ‘executive-type positions [and] are closely aligned with management as true representatives of management.’” *Id.* at 47, n. 5, quoting General Dynamics Corp., 213 NLRB 851, 857 (1974).

Given the nature of the managerial exception, the question is whether – “consider[ing] the function of a university” – “the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.” Yeshiva, 444 U.S. at 686. In this regard, it is important to keep in mind that “the core professional activities of faculty that are common at most colleges and universities – ‘determin[ing] the content of *their own* courses, evaluat[ing] *their own* students, and supervis[ing] *their own* research’ – are not enough, by themselves, to remove faculty from the

protection of the Act. 457 F.3d at 48, quoting with emphasis Yeshiva, 444 U.S. at 690, n. 31. Rather, what is determinative is the role of the faculty in determining how these functions are performed generally throughout the university.

As the D.C. Circuit recognized, the Regional Director, in his very thorough decision, found that the Point Park faculty lacked substantial authority with respect to the following key “academic factors”:

“(1) control over curriculum and course schedules; (2) control over teaching methods; (3) control over grading policies; and (4) control over which students will be admitted, retained, and graduated.” 457 F.3d at 50.

The Board should expressly state that these are the key factors in determining that the Point Park faculty are not managerial employees. Further, the Board should explain that these factors are determinative, because without control over these matters, the faculty cannot be said to have authority to “formulate and effectuate management policies,” Bell Aerospace, 416 U.S. at 288, in the sense of “determin[ing] . . . the product to be produced, the terms upon which it will be offered, and the customers who will be served,” Yeshiva, 444 U.S. at 686.

The Board should also explain that matters such as “statements made by the Administration” concerning faculty authority and “the size of the University’s administrative component,” 457 F.3d at 50, are not independent factors but rather go to whether the faculty has authority to “*effectively* determine” the core academic matters identified above, *id.* at 48 n. 6, quoting with emphasis Yeshiva, 444 U.S. at 676. In this regard, the Administration’s statements to the effect that faculty recommendations are only advisory indicate that the faculty does not have authority to “effectively recommend decisions in the . . . critical areas” in the sense of having its “recommendations . . . routinely approved.” LeMoyne-Owen College, 345 NLRB No.

93, p. 7 (Sept. 30, 2005). In addition, the large administrative component at Point Park, which includes the departments chairs, supports the finding that the administration was *not* “compelled to rely upon the faculty for advice, recommendations, establishment of policies, and implementation of policies.” Loretto Heights College, 264 NLRB 1107, 1121 (1982), *enf’d*, 742 F.2d 1245, 1254 (10th Cir. 1984).¹

In sum, the task before the Board at this juncture is to identify which factors are significant for determining the managerial status of the Point Park teaching faculty and explain why those factors are significant. Once the Board has carried out that legal analysis, the Union submits that the detailed factual findings contained in the Regional Director’s report are fully sufficient to allow the Board to determine that the faculty members at issue are non-managerial without further evidentiary proceedings.

III. The University’s Motion To Reopen The Record To Receive Newly Discovered Evidence Should Be Denied

The Court of Appeals held that the Board’s decision to deny the University’s Motion to reopen the record was not supported by substantial evidence. The Court limited its discussion on this issue to the question of whether the Board abused its discretion in refusing to reopen the record to admit certain Faculty Assembly meeting minutes that the university claims it received for the first time in August and September 2004. As a threshold matter the Union submits that the Board should confine its analysis on remand to that question². Moreover, the Union submits

¹ The exclusion of the department heads from the bargaining unit of teaching faculty is especially significant in this regard. In Yeshiva, the department chairs, who were included in the bargaining unit, wielded substantial authority with respect to personnel and budgetary matters. NLRB v. Yeshiva University, 582 F.2d 686, 691-94, 703.

² The Court of Appeals took issue with the Board’s conclusion that the University did not make a timely request to reopen the record. The Court noted that the documents in question came into the University’s hands in

that there is ample evidence to justify, and indeed compel, the conclusion that the proffered evidence does not meet the definition of 'newly-discovered' evidence, so that the Board should again deny the University's Motion.

The University seeks to reopen the record in part in order to receive evidence that is characterized by the University as "newly-discovered and previously unavailable" (See, Respondent's Statement in Opposition to General Counsel's Motion for Summary Judgment³, page 5; Petitioner/Cross-Respondent's Brief to the Court of Appeals for the D.C. Circuit, page 37). The evidence that the University seeks to proffer is not newly-discovered, and in fact that evidence was readily available to the University at the time of the hearing. Accordingly, the University has failed to meet its burden under the Board's Rules and Regulations to warrant the reopening of the record. For this reason, the University's motion to reopen the record should be denied.

The University contends that the record should be reopened in order to receive nine sets of Faculty Assembly meeting minutes that were not produced to the University at the time of the hearing in this matter. The minutes that are the subject of the University's motion were prepared in connection with Faculty Assembly meetings that occurred over a time frame from February 7, 2000 through October 6, 2003 (Statement in Opposition, page 7).

August and September 2004, and the University's request to reopen the record was submitted on September 13, 2004. The Court found that the Board's conclusion that this request was untimely, when viewed against those facts, was not supported by substantial evidence. The Union submits that the task of the Board on remand is to identify those facts of record that support the conclusion that the evidence in question is not 'newly-discovered' evidence, such that the University's proffer cannot meet the standard set forth in Section 102.48(d)(1) of the Board's Rules and Regulations.

³ Respondent's Statement in Opposition to General Counsel's Motion for Summary Judgment will hereinafter be referred to as the "Statement in Opposition".

The University served a subpoena on the Union on October 31, 2003, calling for the production of, inter alia, "Point Park Faculty Assembly meeting minutes from 2000 to the present" (Statement in Opposition, page 6). The Union provided meeting minutes for approximately fifteen monthly meetings of the Faculty Assembly that occurred in the three-year span covered by the subpoena (Statement in Opposition, page 6). The Union's counsel provided the documents along with a cover letter dated November 6, 2003 (Attachment 3 to the Affidavit of Sydney Zonn, Attachment A to the Statement in Opposition), in which Union counsel stated, "I am continuing to determine whether there are any further documents responsive to your request." There was no further communication from the Union on this subject, and the University never inquired further with the Union about this matter.

According to the University's Motion, the University later directed a request to its Faculty Assembly (in September 2004) for a full and complete set of Faculty Assembly minutes. In response to that request, the Faculty Assembly provided the University with minutes of meetings that were covered by the time frame of the subpoena, including some monthly meeting minutes that had not been included in the response previously received from the Union (Statement in Opposition, page 7). Having received a complete set of the documents from the Faculty Assembly, the University concluded with absolutely no justification that the Union must have been in possession of the additional meeting minutes. The University then moved to reopen the record to receive these documents. In its motion, the University contends that the Union "accepted responsibility" to determine whether there were any further documents responsive to the subpoena (Statement in Opposition, page 7), and the University seeks to excuse its own

neglect in obtaining these documents by making a baseless claim that the Union suppressed these documents⁴.

Section 102.48(d)(1) of the Board's Rules and Regulations permits a party to move to reopen the record. Section 102.48(d)(1) states in relevant part:

A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence that has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

The Board has long held that newly discovered evidence is evidence that was in existence at the time of the hearing, and of which the movant was excusably ignorant. Seder Foods Corporation, 286 NLRB 215, 216 (1987), citing Nabco Corp., 266 NLRB 687 (1983). In order to warrant a reopened hearing, the newly discovered evidence, in addition, must be such that if adduced and credited it would require a different result. Seder Foods, 286 NLRB at 216. To find excusable ignorance, the Board applies a "due diligence/reasonable diligence" standard whose

⁴ One example of the University's blatant effort to mischaracterize the pertinent facts can be found at page 7 of the Statement in Opposition. The University asserts that "after it became apparent that there was non-compliance with the *subpoena duces tecum*, the Union merely stated that it would provide the documents requested if they became available." That statement is patently false. There was no "non-compliance" with the subpoena at the time that Union counsel sent her letter to the University's counsel. In fact, the letter was a cover letter to transmit those documents the Union regarded to be responsive to the subpoena. If it was apparent at that time that there was non-compliance, then why did the University do absolutely nothing to pursue enforcement of its subpoena?

In addition, Union counsel's letter does not say that the requested documents would be provided if they became available. Union counsel said that she would continue to determine if there were any other documents responsive to the request. Presumably she did so and did not come across any other responsive documents. The University has not offered one bit of evidence to suggest otherwise. The University's mischaracterization of this response is intended to suggest that Union counsel was aware that there were other documents responsive and that they would be produced, so as to insinuate that the Union misled the University into doing nothing about the "missing documents" until the hearing was over. The University reiterated this misstatement in its Brief to the Court of Appeals, at page 39 in footnote 29, when the University stated that the Union "agreed to turn over additional documents if they became available." In that footnote the University asserted, without any foundation whatsoever except its own prior claim, that the documents did become available and were not produced to the University. There is not a shred of evidence that the Union subsequently came into possession of the "missing" documents and then failed to produce them.

aim is to ensure that the moving party could not have discovered and brought the evidence to the Board's attention" at the time of the hearing. Manhattan Center Studios, Inc. v. NLRB, 452 F.3d 813, 817 (D.C. Cir. 2006). In the present situation the University has failed completely to meet this standard.

As an initial matter, the University's motion to reopen the record is built on a series of faulty factual premises. First and foremost, the documents in question most definitely existed and were known to the University, as evidenced by the fact that the University issued a subpoena for those documents in advance of the hearing. The problem here rests with the decision of the University to direct its subpoena for Faculty Assembly minutes not to the Faculty Assembly, which the University knew to be in possession of those documents, but rather to the Union. The University has not made any showing that the Union ever possessed the documents in question. In fact, the University points out in its Statement in Opposition, at page 7, that the Union has still never produced the documents, but the University is silent about any statement that the Union ever possessed these documents.

In addition, the University had absolutely no trouble obtaining the documents in September 2004. The University simply went straight to its own Faculty Assembly and asked for the documents, at which time the University received a complete set of the monthly meeting minutes.

The fact that the University was able to request and obtain a complete set of the monthly meeting minutes from the Faculty Assembly is highly instructive. As noted above, this fact demonstrates that the University knew these documents existed. In October 2003 the University asked the Union to produce a complete set of monthly meeting minutes, and despite the fact that

the Union did not produce a complete set the University nevertheless asked its own Faculty Assembly to produce a complete set one year later. Obviously the University was well aware in October 2003 that the Faculty Assembly met monthly and kept minutes of its meetings.

The University's conduct in this matter does not reflect the due diligence required of a party seeking to meet the standard of excusable ignorance. See, Manhattan Center Studios, 452 F.3d at 817, and cases cited therein. The foregoing fact makes abundantly clear the University was fully aware that its own Faculty Assembly was the likely repository for a complete set of those minutes, yet the University chose to direct its subpoena to the Union. In these circumstances the University was not excusably ignorant of the additional the meeting minutes at the time of the hearing. The University never inquired of the Union why the Union provided only a partial set of minutes when the University knew there should have been additional minutes for the months not covered by the Union's response.

This case is similar to the facts in Soft Drink Workers Union Local 812 v. NLRB, 937 F.2d 684 (D.C. Cir. 1991). In that case the union sought to reopen the record following a representation election to receive payroll records that would show that the employer padded the payroll in order to affect the outcome of the election. The Court of Appeals, in rejecting this argument, noted that the union had been provided with an Excelsior list at the time of the election. The Court held that the union's failure to inquire into the validity of the list or make some effort to obtain the evidence prior to the election barred the union from claiming that the evidence was newly discovered. *Id.* at 688.

In a similar vein the University cannot show that it took steps to inquire about the partial production of Faculty Assembly meeting minutes or that it made any effort beyond the initial

service of the subpoena to otherwise obtain these documents. In order to deflect attention away from its own lack of diligence, the University crafted its motion around the baseless accusation that the Union deliberately withheld certain of the monthly meeting minutes. Of course, the University has not produced one shred of evidence that the Union suppressed this evidence or even that the Union ever possessed these documents. The University twisted around the fact that the documents were ultimately obtained from the Faculty Assembly in August 2004 into a claim that the Union withheld those documents back in October 2003.

In this regard, the University's characterization of the letter of Union counsel is illustrative of the University's approach to this matter. Union counsel stated in that letter that she was continuing to determine if there were any other documents responsive to the request. Inasmuch as the subpoena was directed at the Union, the plain import of this statement is that counsel was investigating whether the Union had any further documents that would be responsive. Counsel did not take on the task of determining whether any such documents existed anywhere in the universe, but rather whether the Union possessed any further documents that would be responsive to the subpoena.

The University could very easily have served a subpoena on the Faculty Assembly if the University felt that the documents were probative to its case. Indeed, judging from the University's Motion, all that was required to obtain the documents from the Faculty Assembly was to ask for them! The University accepted the Union's response to the subpoena without any further inquiry or question, despite the fact that the response obviously produced meeting minutes for only a portion of the meetings covered by the request. The University was well aware that the Faculty Assembly met monthly and there were most likely more meeting minutes

than had been received from the Union. Yet the University did not follow up with any further question or inquiry, and the University never sought enforcement of its subpoena during the lengthy hearing in this case.

In short, the University was not “excusably ignorant” in this situation. See, APL Logistics, Inc., 341 NLRB 994 (2004) (motion to reopen record denied in part because respondent failed to explain why through reasonable diligence it could not have discovered the evidence previously). The University knew of the existence of the documents in question well in advance of the hearing. The University was obviously aware that those documents had not been produced in response to the subpoena, and the University knew that the Faculty Assembly was the most likely source of a complete set of those documents. Yet the University did absolutely nothing about this evidence from November 2003 until September 2004 well after the conclusion of the representation case proceeding. Under these circumstances, the University’s Motion to Reopen the Record to receive this “newly discovered evidence” should be denied.

IV. There Is No Basis To Reopen The Record To Receive Evidence Of Changed Circumstances

The University also seeks to admit evidence of “changed circumstances”, consisting of (1) situations that arose following the conclusion of the hearing that, according to the University, support its claim that the faculty members at issue are managerial, and (2) an Accreditation Report that was prepared by the Commission of Higher Education of the Middle States Association of Colleges and Schools (hereinafter the “Accreditation Report”). The Court of Appeals did not address this request in its decision, and accordingly there is no basis for the Board to consider these requests on remand. The Board should decline to reconsider this ruling.

In the event the Board would feel compelled to re-visit its ruling in this regard, the outcome should not change.

The University made two separate claims to reopen the record to receive evidence of changed circumstances. First, the University claimed that there were additional instances (after the conclusion of the representation proceeding) where faculty members allegedly acted in a manner indicating that they exercised managerial authority. Second, the University sought to introduce an Accreditation Report that was in the possession of the University at the time of the hearing but was not offered into evidence. Neither claim has merit as a basis to reopen the record.

The University asserts that there were occasions since January 2004 (when the Representation hearing record was closed) where the University faculty "exercised its managerial authority" in such a fashion as to warrant inclusion of these occasions as changed circumstances (Statement in Opposition, page 13). However, the University does not offer any basis to establish that circumstances changed or that the proffered evidence reflects a change.

For example, in NLRB v. Children's Hospital of Michigan, 6 F.3d 1147 (6th Cir. 1993), the Court of Appeals directed the Board to consider evidence of changed circumstances that arose following the conclusion of the hearing. In that case, the issue in the representation proceeding was whether the petitioning union admitted both guards and non-guards to membership. The employers sought to introduce evidence that the union had filed a unit clarification petition regarding a separate employer and that a union official had testified in another proceeding, in order to establish that the union had essentially admitted in those proceedings that it admitted non-guards to its membership. 6 F.3d at 1152. The Court of

Appeals found that these proffers did amount to evidence of changed circumstances that should be considered. *Id.* at 1153.

By contrast in the instant situation, there was no other proceeding. The University simply wants to include in the record evidence of events that occurred after the record was closed. The University is not seeking to make the Board aware of 'changed" circumstances or "newly discovered" evidence. Rather, the University wants to put into the record additional evidence of some of the same contentions already advanced at the hearing. The University apparently assumes that if the record is reopened to receive the evidence of the faculty Assembly meeting minutes then why not also take the opportunity to receive evidence on other matters as well. This is not an appropriate justification to reopen the record. There is a fundamental institutional interest in favor of the finality of these proceedings, and that fundamental interest is not served by reopening the record to hear of additional occasions that one party contends support its position. For this reason, the Board should not reopen the record to receive evidence of events occurring after the conclusion of the representation proceeding.

The argument for denying the request to receive the Accreditation Report is even more straightforward. The Accreditation Report was apparently prepared at some time following a visit to the University in October 2000 (Statement in Opposition, page 22). The University readily acknowledges that the Report existed at the time of the hearing, and there can be no question that the University was in full possession of this document. Indeed, parts of the Report were offered into the record by the Union (Statement in Opposition, page 21). The University's contention in this regard appears to be that the Report should have been received into the record

at the time. Unfortunately for the University, there is absolutely no indication that the University ever sought to admit the document at the time.

Despite to its own failure to offer the Report as an exhibit, the University nevertheless seeks to cast blame for this omission from the record on the Hearing Officer (Statement in Opposition, page 25). However, there is no record indication that any party contended that the entire report should be included. The case cited by the University in support of its argument, University of New Haven, 267 NLRB 939 (1983), involved a situation where a party attempted to introduce an accreditation report and the administrative law judge rejected the proffer. That did not happen here. The University never attempted to introduce the Report, despite the fact that the University had the Report at the hearing and references were made about the Report on the record. If the University believed that the Report had such evidentiary value as the University now claims, then the University would have offered the document regardless of the Hearing Officer's alleged lack of interest in that document. The University did not offer the Report because the University obviously concluded that the Report would not significantly add to the record in this matter. The University should not now be heard to argue that the Report has such evidentiary value that it should be admitted after the record was closed.

V. Conclusion

The Union respectfully submits that the task of the Board on remand is straightforward. The Board should clarify those factors that were critical to its earlier conclusion that the faculty members are non-managerial. In particular, the Board should explain that with regard to the factors of (1) control over curriculum and course schedules; (2) control over teaching methods; (3) control over grading policies; and (4) control over which students will be admitted, retained,

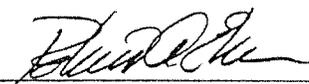
and graduated, the faculty members do not exercise actual authority to decide or effectively recommend actions in these areas to the administration, so that as a result these individuals are not sufficiently aligned with management to be excluded from coverage under the Act.

Regarding the University's efforts to reopen the record, the Board should again deny the University's motion. The pertinent facts establish that the University was not 'excusably ignorant' about the Faculty Assembly meeting minutes, and those documents are not 'newly-discovered'. In addition, there is no basis to reopen the record to receive the Accreditation Report and other documents identified in the University's motion.

Respectfully submitted,

JUBELIRER, PASS & INTRIERI, P.C.

BY: _____


Joseph J. Pass, Esquire
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Petitioner's Statement of Position was served by regular mail, postage prepaid, this 14th day of December, 2006, addressed as follows:

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Newspaper Guild Local 38061 (w/encl.)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

POINT PARK UNIVERSITY
Employer

and

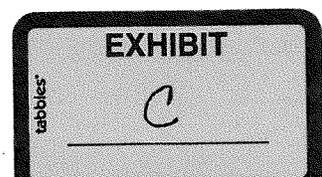
6-RC-12276

NEWSPAPER GUILD OF PITTSBURGH/
COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 38061, AFL-CIO, CLC
Petitioner

NOTICE AND INVITATION TO FILE BRIEFS

The central issue in this case is whether the University faculty members sought to be represented by the Petitioner are statutory employees or rather excluded managerial employees, consistent with the Supreme Court's decision in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). In his original decision and direction of election, the Regional Director found that the faculty members were not managerial employees, and, after an election, the Petitioner was certified as their collective-bargaining representative. The underlying issue ultimately was presented to the United States Court of Appeals for the District of Columbia Circuit, which found that the Board had "failed to adequately explain why the faculty's role at the University is not managerial." *Point Park University v. NLRB*, 457 F.3d 42, 44 (D.C. Cir. 2006). The court instructed the Board to identify which of the relevant factors set forth in *Yeshiva University*, supra, are significant and which less so in its determination that the Employer's faculty are not managerial employees and to explain why the factors are so weighted. Following the court's remand, the Regional Director issued a Supplemental Decision on Remand. The Employer sought review of that decision, which the Board granted on November 28, 2007.

To aid the Board in properly addressing the court's remand, the Board invites the parties and amici to file briefs that address the court's instruction that the Board explain the weight of the various factors identified by the Supreme Court in *Yeshiva* and their application to this



case.¹ Specifically, the briefs should address some or all of the following questions:

(1) Which of the factors identified in *Yeshiva* and the relevant cases decided by the Board since *Yeshiva* are most significant in making a finding of managerial status for university faculty members and why?

(2) In the areas identified as "significant," what evidence should be required to establish that faculty make or "effectively control" decisions?

(3) Are the factors identified in the Board case law to date sufficient to correctly determine whether faculty are managerial?

(4) If the factors are not sufficient, what additional factors would aid the Board in making a determination of managerial status for faculty?

(5) Is the Board's application of the *Yeshiva* factors to faculty consistent with its determination of the managerial status of other categories of employees and, if not, (a) may the Board adopt a distinct approach for such determinations in an academic context or (b) can the Board more closely align its determinations in an academic context with its determinations in non-academic contexts in a manner that remains consistent with the decision in *Yeshiva*?

(6) Do the factors employed by the Board in determining the status of university faculty members properly distinguish between indicia of managerial status and indicia of professional status under the Act?

(7) Have there been developments in models of decision making in private universities since the

¹ On December 12, 2007, the Employer filed a brief on review of the Regional Director's Supplemental Decision on Remand. The Petitioner did not file a brief on review. Given the amount of time that has passed since the request for review was granted and the absence of a Brief on Review from the Petitioner, the Board has decided to solicit additional briefing. We acknowledge, as our dissenting colleagues point out, that this case has suffered from considerable delay already. However, given the nature of the D.C. Circuit's remand of the case, we believe that allowing a short period of time for additional briefing will aid the Board in deciding the important issues at stake.

issuance of *Yeshiva* that are relevant to the factors the Board should consider in making a determination of faculty managerial status? If so, what are those developments and how should they influence the Board's analysis?

(8) As suggested in footnote 31 of the *Yeshiva* decision, are there useful distinctions to be drawn between and among different job classifications within a faculty--such as between professors, associate professors, assistant professors, and lecturers or between tenured and untenured faculty--depending on the faculty's structure and practices?

In answering these questions, the parties and amici are invited to submit empirical and other evidence.

Briefs not exceeding 50 pages in length shall be filed with the Board in Washington, D.C. on or before July 6, 2012. The parties may file responsive briefs on or before July 20, 2012, which shall not exceed 25 pages in length. No other responsive briefs will be accepted. The parties and amici shall file briefs electronically at <http://mynlrb.nlr.gov/efile>. If assistance is needed in filing through <http://mynlrb.nlr.gov/efile>, please contact Lester A. Heltzer, Executive Secretary, National Labor Relations Board.

MARK GASTON PEARCE, CHAIRMAN

RICHARD F. GRIFFIN, JR., MEMBER

SHARON BLOCK, MEMBER

Members Hayes and Flynn, dissenting:

We dissent from the majority's decision to solicit additional briefing now, nearly 5 years after the Board granted the Employer's Request for Review of the Regional Director's Supplemental Decision on Remand. An amicus brief has already been filed in this case by the American Council on Education ("ACE"), the National Association of Independent Colleges & Universities ("NAICU"), the Council of Independent Colleges ("CIC"), and the Association of Independent Colleges & Universities of Pennsylvania

("AICUP"), which collectively represent virtually all institutions of higher education. After the Board granted review in November 2007, the Petitioner did not avail itself of its opportunity to file a brief. Further, no additional organizations have asked to participate as amici during the lengthy pendency of this case despite the publicity surrounding it.² Under these circumstances, we find it unwise to further delay the processing of this case to solicit additional briefing.

BRIAN E. HAYES, MEMBER

TERENCE F. FLYNN, MEMBER

Dated, Washington, D.C. May 22, 2012.

² See NLRB's Weekly Summary of Cases, dated December 7, 2007, reprinted in Daily Labor Report, E-1 (Dec. 7, 2007) (summarizing Board's grant of review of the Regional Director's Supplemental Decision on Remand); *NLRB Failed to Adequately Explain Ruling on Faculty Status, Appeals Court Decides*, Daily Labor Report (Aug. 2, 2006); Bill Schackner, "College Dispute Returned to NLRB, Point Park Faculty Seek to Join Union," *Pittsburgh Post-Gazette* (Aug. 2, 2006).