

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**  
**REGION 31**

SERVICE EMPLOYEES INTERNATIONAL  
UNION, LOCAL 721,

Petitioner,

and

UNIVERSITY OF SOUTHERN  
CALIFORNIA,

Employer.

Case No. 31-RC-164868

**NOTICE OF SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721'S  
OPPOSITION TO MOTION TO REOPEN THE RECORD  
AND FOR RECONSIDERATION**

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Service Employees International Union, Local 721

Petitioner Service Employees International Union, Local 721 hereby submits a copy of its Opposition to the Motion to Reopen the Record and for Reconsideration filed by the Employer, University of Southern California. Petitioner's Opposition is attached as Exhibit A.

DATED: April 8, 2016

ELI NADURIS-WEISSMAN  
MARIA KEEGAN MYERS  
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By  \_\_\_\_\_  
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# EXHIBIT "A"

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Case Nos. 31-RC-164864 and 31-RC-  
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## **I. Introduction**

More than three months after the Region issued its Decision and Direction of Election holding that non-tenure track faculty in the petitioned-for units employed by the University of Southern California (“USC” or “Employer”) are not managerial employees, USC now attempts to take another bite at the apple. In the instant Motion, the Employer asserts the frivolous argument that petitioner Service Employees International Union, Local 721 (“Union” or “Local 721”) witness Professor Kate Levin gave testimony during the post-election hearing (“Objections Hearing”) regarding her service on the University Committee on Curriculum (“UCOC”) that contradicted her testimony during the pre-election hearing (“Pre-Election Hearing”). The Employer asks the Region to find that Professor Levin’s testimony constitutes “extraordinary circumstances” that justify reopening the record in the representation case and reconsidering its determination that non-tenure track faculty are protected under the Act. With no legal foundation to support its Motion, the Employer devotes its entire argument to misdirecting the Region’s attention away from the legal standard and toward a topsy-turvy characterization of Professor Levin’s testimony and the Region’s reliance on it. Because it does not meet the standard for reopening the record or for reconsideration, the Employer’s Motion should be denied.

## **II. Professor Levin’s Testimony at the Objections Hearing Was Entirely Consistent With Her Testimony at the Pre-Election Hearing.**

The entire premise of the Employer’s motion – that Professor Levin’s testimony at the Objections Hearing was inconsistent with her testimony during the Pre-Election Hearing – is baseless. To begin, the scope of the inquiries at the two hearings were markedly different. In the Pre-Election Hearing, the relevant inquiry was the extent to which faculty exercise effective

decision-making in critical areas, including curriculum, such that they should be excluded from the coverage of the Act. In the Objections Hearing, the relevant inquiry was the extent to which faculty participation in shared governance is an employment benefit and whether the Employer impermissibly threatened the loss of that benefit. Because the ultimate issues to be resolved through each proceeding were completely different, Professor Levin’s testimony varied from one hearing to the next. Even so, Professor Levin’s testimony at the second hearing did not conflict with her testimony from the first hearing. To the contrary, many aspects of her testimony at the second hearing reinforced her testimony at the first:

<b>Subject of Testimony</b>	<b>Found in Pre-Election Transcript</b>	<b>Found in Post-Election Transcript</b>
The UCOC reviews proposals for new courses, certificates, and programs, and for modifications to existing courses, certificates, and programs.	Tr. 657:18-21; 663:13-20	Tr. 192:18-23; 194:3-8
Professor Levin joined UCOC because she was interested in the work that it does; specifically about how the university shapes its curricula and how professors across the university designed their courses.	Tr. 667:24-668:2	Tr. 192:24-193:6
The UCOC does not usually meet in person; most work is conducted over email.	Tr. 658:22-659:2	Tr. 193:17-21
As a member of UCOC, Professor Levin makes recommendations about course, program, and certificate offerings to the chair of the committee, who then makes recommendations to administrators.	Tr. 663:13-20; 665:21-666:9	Tr. 246:8-247:8

The statements that the Employer highlights are not opposed to each other, but instead merely illustrate the fact that Professor Levin was responding to questions with different foci at each hearing. For example, during the Pre-Election Hearing, Union’s counsel asked Professor Levin detailed questions about her tasks as a UCOC member, which resulted in Professor Levin noting that on the committee, she “wasn’t providing substantive feedback,” and her tasks were mostly “technical and clerical.” *See* Mot. to Reopen the Record at 2 (*citing* Pre-Election Hearing Tr. 665:2-20, 669:16-21). During the Objections Hearing, however, neither the Union nor the Employer asked Professor Levin any specific questions about her tasks on the UCOC, so she had no reason or opportunity to explain whether her work on the UCOC was substantive versus clerical. *See* Post-Election Hearing Tr. 182:1-195:12; 242:17-246:7.

Similarly, during the Objections Hearing, both the Union and the Employer’s counsel asked Professor Levin about how she felt about being a member of the UCOC, including whether she enjoyed being on the committee, presumably to elicit the extent to which Professor Levin considers her service on that committee to be a benefit. *See* Mot. to Reopen the Record at 4 (*citing* Post-Election Hearing Tr. 193:22-194:8). During the Pre-Election Hearing, however, neither the Union nor the Employer asked Professor Levin how she felt about her committee membership, or whether she felt the technical and clerical tasks undertaken by committee members were important, *because such an inquiry would have been irrelevant to the issue of managerial control*. Indeed, the scope of the Pre-Election Hearing was limited to whether non-tenure track faculty exercise managerial control over academic areas such as curriculum, not

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faculty's feelings or opinions regarding their service on committees.<sup>1</sup> See Pre-Election Hearing Tr. 657:7-666:9; 669:16-671:11; 688:13-689:9; 691:4-694:23.

### **III. The Employer's Motion Fails to Meet the Standard to Reopen the Hearing.**

Section 102.65(e)(1) of the NLRB Rules and Regulations limits the reopening of a record only to "extraordinary circumstances." The rule specifies the requirements for such a motion:

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

*Id.* The rule further requires that "a motion to reopen the record shall be filed promptly on discovery of the evidence sought to be adduced." NLRB Rules and Regulations § 102.65(e)(2). Accordingly, "a party seeking to introduce new evidence after the record of a representation proceeding has been closed must establish (1) that the evidence was unavailable to the party before the close of the proceeding; (2) that the evidence would have changed the result of the proceeding; and (3) that it moved promptly upon discovery of the evidence." *Manhattan Center Studios, Inc.*, 357 NLRB No. 139, slip op. at 4 (2011). The Employer's Motion fails to meet these requirements.

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<sup>1</sup>During the Pre-Election Hearing, on one occasion counsel for the Union attempted to elicit testimony from Professor Levin about her opinion regarding the work she performs on the committees. "And now that you've served for a semester on two separate committees, what is your sense of the work of the committees?" Pre-Election Hearing Tr. 668:3-4. Counsel for the Employer objected to this line of inquiry, stating that it was "vague and ambiguous and calls for a subjective opinion." Pre-Election Hearing Tr. 668:5-6. The Hearing Officer agreed that the Union's inquiry should be limited to facts and not Professor Levin's opinions about her service on the committees. Pre-Election Hearing Tr. 668:16-20.

A. The Alleged “New Evidence” Was Available to the Employer Prior to the Close of the Pre-Election Hearing.

The Employer’s Motion fails the first prong of the test because the alleged “new evidence” [Mot. at 1] was available to the Employer during the Pre-Election Hearing. During the Pre-Election Hearing, the Employer had the burden of creating a record to support its claim that faculty in the petitioned-for unit were excluded from the Act’s coverage by virtue of their alleged managerial status. If, as the Employer asserts, Professor Levin’s personal opinions about the value of her service on shared governance committees are powerful enough to compel a different outcome in the representation case, it was the Employer’s responsibility to raise and litigate these issues during its cross-examination of Professor Levin at the Pre-Election Hearing.

A party’s failure to develop the record during a representation case hearing does not satisfy the standard for “extraordinary circumstances” sufficient to warrant a reopening of the hearing. *See, e.g., Trinity Continuing Care Services*, 359 NLRB No. 162, n. 1 (2013) (denying motion to reopen the record where party failed to call a witness to testify); *Atlantic Veal & Lamb, Inc.*, 355 NLRB 228, 230 (2010) (denying motion to reopen the record so employer could subpoena additional records); *Univ. of San Francisco*, 265 NLRB 1221, 1224, n. 1 (1982) (denying motion to reopen the record to permit party to present arbitration decision as an exhibit).<sup>2</sup>

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<sup>2</sup>The purpose to which the Employer intends to use Professor Levin’s Objections Hearing testimony also weighs in favor of denial of the Employer’s Motion. The Board’s rules regarding reopening a record and for reconsideration are analogous to Rules 59 and 60 of the Federal Rules of Civil Procedure, which govern Board procedures. *NLRB v. Jacob E. Decker and Sons*, 569 F.2d 357, 363 (5th Cir. 1978). When, as here, a party moves to reopen a record on the grounds of newly discovered evidence, the Board’s consideration is the same as those that guide motions for a new trial or to reopen a case under FRCP 59 and 60. *Id.* Interpreting FRCP 59 and 60, federal courts have held that “newly discovered evidence, the effect of which is merely to discredit,

B. Reopening the Record to Admit Professor Levin’s Testimony Would Not Compel a Different Result.

The Employer contends that the Regional Director relied upon Professor Levin’s testimony in concluding that non-tenure track faculty are not managerial, asserting that the Regional Director’s finding that the role of the UCOC subcommittees was to verify that course proposals met criteria such as offering sufficient contact hours “drove the result in these cases.” Mot. to Reopen the Record at 3. To the contrary, the RD’s determination that petitioned-for faculty are not managerial was based on the record evidence – or lack thereof – and not substantially on Professor Levin’s testimony.

In her analysis of the role of non-tenure track faculty decision-making as it relates to Academic Programs, the RD noted that the evidence offered by the Employer regarding the actual work of the UCOC committee was vague. Decision and Direction of Election at 34. Further, and more importantly, the RD observed that the Employer failed to offer evidence regarding the level of investigation conducted by administrators into the UCOC recommendations or what type of review the Employer’s administrators conduct. *Id.* On that basis, the RD concluded, “the record evidence here is not sufficiently detailed or specific to find

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contradict, or impeach a witness, does not afford a basis for the granting of a new trial.” *NLRB v. Sunrise Lumber & Trim Corp.*, 241 F.2d 620, 625-26 (2d Cir. 1957), *cert. denied*, 355 U.S. 818 (1957); *accord NLRB v. Jacob E. Decker and Sons*, 569 F.2d at 365. “[W]here the new evidence only suggests that a witness might be less credible, the interest in finality outweighs the slight possibility of injustice to a party.” *Id.* Indeed, “[t]he time for testing of proof is the time of trial. Our judicial system does not contemplate that the rights of litigants shall be held in abeyance for months or years in order that hindsight may provide a more accurate appraisal of the evidence.” *Locklin v. Switzer Bros., Inc.*, 299 F.2d 160, 169 (9th Cir. 1961), *cert. denied*, 369 U.S. 861 (1962). Here, the Employer offers Professor Levin’s Objections Hearing testimony solely for the purposes of impeachment. It does not, despite the Employer’s contentions to the contrary, relate to any material fact at issue in the representation case.

that these committees exercise actual control or effective recommendation over the University's academic programs." *Id.* Moreover, the RD explained, any control over decision-making as it relates to academic programs cannot be imputed to non-tenure track faculty in the petitioned-for units, "as they do not constitute a majority of either [the UCAR or UCOC] committee." *Id.* Professor Levin's allegedly contradictory testimony which the University seeks to admit relates only to her motivations in accepting the nomination to the UCOC committee, her feelings about her service on the committee, and the tasks that are assigned to her as a committee member. Employer's Motion at 4. The introduction of this evidence does not compel a different outcome as it was not the basis for the RD's Decision.

C. The Employer Motion Is Not Timely.

The NLRB Rules and Regulations require a moving party who wishes to reopen a representation case record to establish that it moved "promptly on discovery of the evidence sought to be adduced." NLRB Rules and Regulations § 102.65(e)(2). The requirement that a moving party act quickly is particularly important in representation cases in light of "the Act's policy of expeditiously resolving questions concerning representation." *Northeastern University*, 261 NLRB 1001, 1002 (1982).

Here, Professor Levin offered testimony during the Objections Hearing on February 24, 2016. *See generally* Employer's Motion to Reopen Record, Exhibit B. Yet the Employer failed to file the instant motion until more than a month later, on March 31, 2016. The Employer's Motion fails to provide any explanation for this delay.

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**IV. Conclusion**

For the foregoing reasons, Local 721 respectfully requests that the Employer's Motion to Reopen the Record and for Reconsideration be denied.

DATED: April 8, 2016

ELI NADURIS-WEISSMAN  
MARIA KEEGAN MYERS  
HANNAH WEINSTEIN  
ROTHNER, SEGALL & GREENSTONE

By

  
\_\_\_\_\_  
MARIA KEEGAN MYERS

Attorneys for Petitioner  
Service Employees International Union, Local 721

Re: *University of Southern California*  
31-RC-164864 and 31-RC-164868

CERTIFICATE OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 510 South Marengo Avenue, Pasadena, California 91101.

On April 8, 2016, I served the foregoing document described as **SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721'S OPPOSITION TO MOTION TO REOPEN THE RECORD AND FOR RECONSIDERATION** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Al Latham  
Cameron W. Fox  
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515 South Flower Street, Twenty-Fifth Floor  
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Mori Pam Rubin  
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National Labor Relations Board, Region 31  
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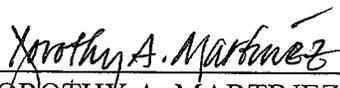
**(By Electronic Mail)**

Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused such documents described herein to be sent to the persons at the e-mail addresses listed above. I did not receive, within a reasonable time after the transmission any electronic message or other indication that the transmission was unsuccessful. Executed on April 8, 2016.

**(By Mail)**

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice I place all envelopes to be mailed in a location in my office specifically designated for mail. The mail then would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Pasadena, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit. Executed on April 8, 2016.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 8, 2016, in Pasadena, California.

  
\_\_\_\_\_  
DOROTHY A. MARTINEZ

Re: *University of Southern California*  
31-RC-164864 and 31-RC-164868

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DOROTHY A. MARTINEZ