

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNIVERSITY OF SOUTHERN CALIFORNIA,

Employer,

and

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 721,

Petitioner.

Case No. 31-RC-164868

**PETITIONER'S OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW
OF ORDER DENYING EMPLOYER'S MOTION TO REOPEN THE RECORD**

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I. INTRODUCTION

In its Request for Review of the Regional Director’s Order Denying Employer’s Motion to Reopen the Record and for Reconsideration (“Req. for Rev.”), the University of Southern California (“USC,” “University,” or “Employer”) misrepresents testimony, distorts precedent, and rails against Region 31 Regional Director Mori Rubin’s (“Regional Director” or “RD”) well-reasoned order denying its motion to reopen the record and for reconsideration in an attempt to distract from its failure to present a persuasive argument in both the representation and election objections hearings. Because the Employer presents no compelling reason for review, the National Labor Relations Board (“Board”) should deny its request.

II. BRIEF STATEMENT OF FACTS

The Employer’s request for review focuses on the testimony of one witness at two separate Board hearings.

In late 2015, Petitioner Service Employees International Union, Local 721 (“Petitioner,” “Union,” or “Local 721”) sought to represent a bargaining unit of full and part-time non-tenure track (“NTT”) faculty at USC’s Roski School of Art and Design (“Roski”) and the Dana and David Dornsife College of Letters, Arts and Sciences (“Dornsife”). *See* Decision and Direction of Election (“D&DE”), 31-RC-164864 & 31-RC-164868, pp. 1-2 (Dec. 24, 2015). The Employer opposed the petition, arguing that NTT faculty are exempt from coverage under the National Labor Relations Act (“Act”) because they are managerial employees. *Id.* at 2.

Region 31 held a hearing on this issue (“pre-election hearing”). One of the many witnesses who testified on behalf of the Union was Professor Kate Levin, a part-time NTT

faculty member who teaches at Dornsife and is a member of a faculty committee known as the University Committee on Curriculum (“UCOC”). *See id.* at 12; Req. for Rev. of Denial to Reopen, p. 2. This committee is tasked with overseeing curricular issues such as reviewing credit-earning courses, new or modified curricular programs, and major, minor, or new degree programs. D&DE, p. 12. Professor Levin testified that her work on the committee was mostly technical and clerical, “such as assuring that the prerequisites for a course match the specifications in the curriculum handbook, and making sure the number of credits for a course correspond with the number of contact hours between professors and students.” *Id.*, pp. 12-13. After the hearing and extensive briefing by both parties, the Regional Director held that NTT faculty are not managerial. *Id.*, p. 43. This holding was based on the RD’s findings that NTT faculty do not exert managerial control over academic programming (a subset of which is curricular programming), enrollment management, finances, personnel policies and decisions, and exert no effective control over academic policies. *Id.*, pp. 33-41. Following controlling Board precedent under *Pacific Lutheran University*, 361 NLRB No. 157 (2014), the RD held that the Employer failed to carry its burden of demonstrating faculty’s exclusion from the Act.

In January 2016, Region 31 conducted two separate mail-ballot elections for the NTT faculty at Roski and Dornsife. *See* Req. for Rev. at 3. The Union won the election at Roski, but failed to secure a majority of votes of NTT faculty at Dornsife. The Union filed objections to the Dornsife election, asserting that the Employer engaged in unlawful conduct affecting the results of the election. One of the objections was that the Employer threatened NTT faculty’s opportunity to participate in faculty governance – one of the benefits of their employment. *See* Petitioner’s Objections to Conduct of the Election and/or Conduct Affecting the Results of

Election, 31-RC-164864, p. 2 (Feb. 9, 2016). Region 31 held a hearing on these objections from February 23-25, 2016 (“post-election hearing”), during which Professor Levin testified, among other things, that she believed her membership on the UCOC committee to be a benefit of employment. *See* Hearing Officer’s Report on Objections, 31-RC-164864, pp. 9, 20 (April 4, 2016).

On April 4, 2016, the hearing officer’s report issued and sustained the Union’s objection that the Employer’s threatened to curtail NTT participation in faculty governance committees if the faculty were to become unionized. *Id.*, pp. 20-22. The Employer excepted to this recommendation, but on May 26, 2016, the Regional Director sustained the objection and ordered a second election. Decision and Direction of Second Election, 31-RC-164864, p. 17 (May 26, 2016).

Before the hearing officer issued her recommendation, the Employer filed a motion to reopen the record and for reconsideration in the pre-election case, arguing that Professor Levin’s testimony in the post-election hearing contradicted her testimony in the pre-election hearing and that the record in the pre-election hearing should be reopened to account for the post-election testimony. Employer’s Motion to Reopen the Record and for Reconsideration, 31-RC-164868 & 31-RC-164864, p. 1 (Mar. 31, 2016). On May 26, 2016, the Regional Director denied this motion. Order Denying Mot. to Reopen, 31-RC-164864 & 31-RC-164868, p. 3 (May 26, 2016). USC requests review.¹

¹The Employer seeks review of the Order Denying Employer’s Motion to Reopen the Record and for Reconsideration only as to the Roski School of Art and Design, Case No. 31-RC-164868, which is currently before the Board on a Request for Review of the RD’s Decision and Direction of Election.

III. STANDARD OF REVIEW

The Board will grant a request for review “only where compelling reasons exist therefor,” and only when a regional director’s “decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party,” or that “a substantial question of law or policy is raised because of the absence of, or a departure from, officially reported Board precedent.” NLRB Rules and Regulations § 102.67(d).

USC’s request fails to meet this standard. As shown below, the RD’s review and interpretation of the records in these two hearings was well-reasoned, and officially reported Board precedent undermines, rather than supports, USC’s position.

IV. ARGUMENT

A. Substantial Record Evidence Supports the Regional Director’s Finding that Professor Levin’s Testimony Was Not Contradictory, and Board Precedent Instructs the Board to Defer to the Regional Director’s Findings

USC begins its argument by placing Professor Levin’s testimony from the pre- and post-election hearings side-by-side and then concluding, with no further analysis or explanation, that these statements are “*irreconcilable*” and the RD’s finding otherwise is “plain error.” Req. for Rev. at 5 (emphasis in original). USC’s interpretation of Professor Levin’s testimony is tortured, to say the least, and the RD’s finding that her testimony was not inconsistent – and certainly was not so inconsistent as to clearly demonstrate “extraordinary circumstances” – is well-supported.

After reviewing the two sets of testimony, the RD correctly concluded that “[n]one of Professor Levin’s testimony relied upon by the Employer is directly contradictory to her pre-election testimony.” Order Denying Mot. to Reopen, p. 2. This finding makes sense because 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 managerial control in critical areas, including curriculum, such that they should be excluded from coverage under the Act. In the post-election 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. The RD correctly found no support for the Employer's assertion that these differing testimonies were, in any meaningful way, inconsistent.

The Employer ignores this reasoning. On pages 4-5 of its brief, the Employer places Professor Levin's testimony from each hearing side-by-side in a table, as if the simple act of doing so demonstrates contradiction. To the contrary, the table underscores the strength of the RD's reasoning: the pre-election testimony focuses on the details of Professor Levin's work on the UCOC committee and the degree to which she provided substantive input into decisions regarding curriculum, while the post-election testimony discusses in a general manner the work of the committee and Professor Levin's subjective feelings about her committee service. *See* Req. for Rev. at 4-5. Indeed, the following table, included in the Union's Opposition to the Employer's Motion to Reopen the Record, underscores the consistency in Professor Levin's testimony across the two hearings:

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Subject of Testimony	Found in Pre-Election Transcript	Found in Post-Election Transcript
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

While Professor Levin’s testimonies address different aspects of her experience serving on the UCOC committee, they are not contradictory. The Employer has presented no persuasive argument as to why the RD’s explanation for the difference in the testimonies is “clearly erroneous,” and therefore the Board should decline its Request for Review.

Moreover, the Board ought to defer to the RD’s interpretation of Professor Levin’s testimony. The Employer’s argument is, at base, an attack on Professor Levin’s credibility: the Employer not-so-subtly implies that Professor Levin’s testimony was dishonest, and that it conformed to what would be “helpful” to the Union’s position, rather than to the truth. *See* Req.

for Rev. at 6 (“It was the Union’s change in purpose that led to the change in Professor Levin’s testimony. Given that, no amount of *additional* cross-examination at the pre-election hearing would have changed anything.”) (emphasis in original). In reviewing representation cases, the Board will not overrule a Regional Director’s “resolutions with respect to credibility unless a clear preponderance of all the relevant evidence convinces [the Board] that the resolutions are clearly in error.” *Delchamps, Inc.*, 210 NLRB 179, 180 n.4 (1974) (citing *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950)). Here, the Regional Director concluded that Professor Levin’s pre- and post-election testimony was consistent, and the Employer has failed to demonstrate that finding was “clearly in error.” The RD’s determination is based on the sound reasoning that Professor Levin’s testimonies were different, but not contradictory, because the two hearings focused on distinct legal theories. That determination is entitled to deference.²

²The purpose to which the Employer intends to use Professor Levin’s post-election testimony also weighs in favor of denial of the Employer’s Request for Review. 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, 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) (emphasis added), *cert. denied*, 355 U.S. 818 (1957); *accord 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 post-election testimony solely for the purpose of discrediting her testimony in the pre-election hearing. This objective is not a basis to reopen the record.

B. The Regional Director Correctly Applied the Standard for a Motion to Reopen the Record

In considering USC’s Motion to Reopen the Record and for Reconsideration, the Regional Director applied the standard set forth in Section 102.65(e)(1) of the NLRB Rules and Regulations, which 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). Here, the Employer requests review of an order in which the Regional Director found that such extraordinary circumstances were not present.

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1. The Regional Director Correctly Found That the Alleged “New” Evidence Was Available to the Employer Prior to the Close of the Pre-Election Hearing

Applying the standard to the facts, the Regional Director correctly found that the Employer’s Motion to Reopen the Record failed the first prong of the test because the alleged “new evidence” was available to the Employer during the pre-election hearing. In the Order, the RD noted that the Employer “has not provided an explanation as to why this evidence was not adduced in the pre-election hearing. . . . The Employer was given the opportunity to cross-examine Professor Levin about her experiences on UCOC and did so. The Employer could have questioned her further or asked the same specific questions asked of her in her post-election examination, but it did not do so when it had the opportunity. Thus, Professor Levin’s testimony does not constitute newly discovered evidence.” Order at 2. Indeed, during the pre-election hearing the Employer had the burden of supporting its claim that faculty in the petitioned-for unit were excluded from the Act’s coverage. 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. The Employer failed to do so.

The RD’s conclusion on this factor are supported by Board precedent. 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).

The Employer contends that further cross-examination of Professor Levin would not have elicited the supposedly damaging testimony. “[N]o amount of *additional* cross-examination at the pre-election hearing would have changed anything. It certainly would not have caused her [Professor Levin] to admit the importance and caliber of her work on the UCOC – after all, that would have been totally contrary to the sworn testimony she had just given. The RD’s suggestion that USC could have uncovered Professor Levin’s post-election testimony just by cross-examining her harder at the pre-election hearing is just wrong.” Req. for Rev. at 6 (emphasis in original). This argument is wildly speculative and utterly unsupported by anything in the record. There is no evidence that the Region, which is in the best position to determine the credibility of a witness, considered any part of Professor Levin’s testimony to have been untruthful, including her testimony on cross-examination. Nor is there any evidence that Professor Levin would have answered the Employer’s questions dishonestly. To sweep away its failure to attempt to obtain what the Employer now argues is vital evidence by implying that the witness was dishonest and surely would have been dishonest during cross examination is reprehensible.

Equally important, as the RD correctly noted, during the pre-election hearing, the Employer took the position that Professor Levin’s subjective opinions regarding the value of her service on the UCOC committee were inadmissible. “Furthermore, as the Employer correctly argued during the pre-election hearing, Professor Levin’s subjective opinions or valuations of the

work she does on UCOC are irrelevant to the question of managerial status.” Order at 2.

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. In a complete about-face, the Employer now argues that this evidence is not only admissible, but “*case-dispositive*” [Req. for Rev. at 5 (bold and italics in original)]. Although the Employer now asserts that the RD committed prejudicial error in denying its motion to reopen the record to admit Professor Levin’s testimony regarding her subjective opinions about the value of committee work, its took the complete opposite position during the pre-election hearing, even blocking the Union’s attempts to develop that line of testimony.

2. The Regional Director Correctly Found That Reopening the Record to Admit Professor Levin’s Testimony Would Not Compel a Different Result

USC contends that Professor Levin’s testimony at the pre-election hearing was the “*case-dispositive*” foundation for the Regional Director’s holding that NTT faculty are nonmanagerial. Req. for Rev. at 5 (emphasis in original). To the contrary, the RD’s determination that petitioned-for faculty are covered by the Act was based on the record evidence – or lack thereof – and not substantially on Professor Levin’s testimony. The Employer’s contention that Professor

Levin’s testimony in the post-election hearing compels a different result in the representation case misrepresents the Board’s standard for determining whether faculty are managerial, misunderstands the burden of proof, and misreads the Regional Director’s decision.

In 1980, the United States Supreme Court addressed the application of the managerial exception to faculty in higher education in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). Nearly thirty-five years later, the Board revisited the issue in *Pacific Lutheran University*, 361 NLRB No. 157 (2014). The *Pacific Lutheran* test examines the “breadth” of faculty decision-making authority, and the “depth” of such authority by examining faculty decision-making in five general areas: (1) academic programs, (2) enrollment management, (3) finance, (4) academic policies, and (5) personnel policies and decisions. The Board indicated greater weight should be given to the first three areas (which it designates as “primary”) than the last two (“secondary”). *Id.*, slip op. at 17. To determine the “depth” of authority, *Pacific Lutheran* instructs “the party asserting managerial status must demonstrate that faculty actually exercise control or make effective recommendations.” *Id.*, slip op. at 18.

“The party seeking to exclude faculty as managerial,” here USC, “has the burden of coming forward with evidence necessary to establish such an exclusion.” *Lemoyne-Owen Coll.*, 345 NLRB 1123, 1128 (2005). That burden is an “exacting” one. *Point Park Univ. v. NLRB*, 457 F. 3d 42, 48 (D.C. Cir. 2006).

The Employer’s brief oversimplifies the multi-factor test set forth in *Pacific Lutheran*, improperly condensing the analysis into an inquiry only about faculty participation in decision making about curriculum at the University level. *See* Req. for Rev. at 3-4 (“After all, faculty decision-making about academic programs . . . **standing alone** . . . is enough to make faculty

managerial under *Pacific Lutheran*.”) (emphasis in original). By contrast, *Pacific Lutheran* instructs that decision-making about academic programming is just one of five factors assessed in determining managerial status. *PLU*, 361 NLRB No. 157, slip op. at 17-18. Moreover, faculty’s involvement in shaping curricula is just one of six enumerated ways to illustrate that faculty exert managerial control over academic programming; the other five being their involvement in decision-making over research, major, minor, and certificate offerings and the requirements to complete successfully those offerings. *Id.*, slip op. at 17. Even assuming *arguendo* that Professor Levin’s testimony at the post-election hearing illustrated that faculty have some managerial control over curriculum – a point that the Union contests – such a finding would not be “case-dispositive” because there are so many other factors in which the Regional Director found NTT faculty exerted no managerial control. *See* D&DE, pp. 36-41 (finding the NTT faculty exerted no managerial control over decision-making about enrollment, finances, and personnel policies and decisions, and only partial decision-making control over academic policies). Indeed, the RD’s holding that, “[e]ven if Professor Levin’s post-election testimony did constitute new evidence, I do not find that it would require me to reach a different result on the question of these faculty members’ managerial authority” [Order at 2] is well-reasoned when viewed in the context of the multi-factor test required by *PLU*.

Moreover, despite the Employer’s contention – without citation – to the contrary, the RD did not rely heavily on Professor Levin’s testimony in finding that NTT faculty are not managerial. Rather, the RD noted that the Employer’s evidence regarding the actual work of the UCOC committee was vague and that the Employer failed to offer evidence regarding administrators’ investigation and review of UCOC recommendations (important for assessing,

pursuant to *Pacific Lutheran University*, whether faculty actually control curricular offerings). D&DE, p. 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 that [UCOC or the other committees that work on academic programming issues] 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 NTT faculty in the petitioned-for units, “as they do not constitute a majority of either [the UCOC or other academic programming] committee.” *Id.* Simply put, Professor Levin’s testimony was *not* the foundation for the D&DE. Instead, it was the dearth of evidence presented by the Employer, concerning multiple committees, as well as the fact that NTT faculty do not constitute a majority on these committees.³ For this reason, the RD correctly concluded “Even if Professor Levin’s post-election testimony did constitute new evidence, I do not find that it would

³ The RD correctly noted that the evidence that the Employer wishes to admit into the record “is of little to no probative value and would not change the result I reached in my pre-election decision.” Order at 2. “Furthermore, as the Employer correctly argued in the pre-election hearing, Professor Levin’s subjective opinions or valuations of the work she does on UCOC are irrelevant to the question of managerial status,” even though they may be relevant to the question of whether committee membership is a benefit of employment, which is why Professor Levin testified about her opinions of her committee work at the post-election hearing but not at the pre-election hearing. *Id.* The RD concluded, “her enjoyment of, or the importance she places on her participation in the committee does not establish that non-tenure track faculty exercise managerial decision-making with regard to USC’s academic programs, as the Employer argues.” *Id.*

require me to reach a different result on the question of those faculty members’ managerial authority.” Order at 2.⁴

3. The Regional Director Correctly Applied Governing Law in Holding that USC’s Motion to Reopen the Record Was Not Timely

The Regional Director further found that the Employer’s motion failed to meet the final prong of the standard: “Finally, I do not find that the Employer’s motion was filed promptly on discovery of the evidence sought to be adduced.” Order at 2 (quoting NLRB Rules and Regulations § 102.65(e)(2)). Here, the Regional Director noted that the Employer failed to file its motion seeking to reopen the record until more than a month after Professor Levin’s testimony in the post-election hearing. *Id.* “The Employer provides no explanation for the month-long delay, and I see no basis for it.” *Id.*

In its Request for Review, the Employer attempts to sidestep its untimely filing by reciting the procedural history of the case and to Board cases granting motions to reopen the record. Req. for Rev. at 7-8. This selective re-telling is unpersuasive.

⁴After declaring that Professor Levin’s testimony at the representation case hearing is “*irreconcilable*” [emphasis in original] with her testimony at the objections hearing, USC poses this question to the Board: “How can it be irrelevant that the union’s *sole* witness on a *case-dispositive* issue, and on whom the RD *expressly relied* in ruling against USC at the pre-election hearing, *changed* her testimony in a later *Board* proceeding in a way that *proves USC’s pre-election case*?” Req. for Rev. at 5 (emphasis in original). Beyond the assumption disposed of above that Professor Levin’s testimony was contradictory, this question relies on four completely inaccurate assumptions: (1) that it was the Union’s burden to present witnesses demonstrating the NTT faculty to be nonmanagerial – it was not; (2) that the sole factor the RD relied upon in determining managerial status was an examination of faculty’s role on the UCOC committee – it was not; (3) that the RD expressly relied on Professor Levin’s testimony in her D&DE – she did not; and (4) that the “newly discovered evidence” proves USC’s pre-election case – it does not. The Employer’s question reveals the lengths to which it will go to recast the facts and the law into a light that favors its position.

USC presents a time line to show all of the deadlines it had to meet before it could compare Professor Levin's testimony from the pre- and post-election hearings to file its motion to reopen the record. This argument omits the fact that the same attorneys represented the Employer at the pre-election and post-election hearings, and were present for Professor Levin's testimony at both. Having been present at both hearings, the attorneys had knowledge about the potential for contradiction in testimony, were in possession of the transcript of the pre-election hearing during the post-election hearing, and could have impeached Professor Levin at the post-election hearing itself or noted in the record their concern that her testimony contradicted that given during the pre-election hearing. The Employer's failure to cross-examine Professor Levin during the post-election hearing or to review the pre-election transcript in a timely fashion do not excuse their late filing.

Further, the Employer presents the motion to strike that it filed in response to the Union's post-hearing brief – allegedly the reason that from March 7, 2016 to March 15, 2016, the Employer's attorneys could not analyze Professor Levin's testimony – as a valid and necessary part of this case. In fact, the hearing officer who ruled on that motion to strike denied it because it concerned a portion of the Union's post-hearing brief that constituted legal argument, “and striking legal argument serves no purpose.” Hearing Officer's Report on Objections, 31-RC-164864, pp. 29-30 (April 4, 2016). In other words, USC's motion to strike was frivolous, and the Employer's reliance on the time its spent on that motion to explain its delay in filing its motion to reopen the record is unpersuasive.

After reciting the list of tasks that allegedly prevented the Employer from comparing Professor Levin's testimony from the post-election hearing to her testimony from the pre-election

hearing, the Employer then contends that “even if USC *had* just sat on its hands for the month between the close of the [post-election] hearing and the filing of its motion, that would not make the motion untimely,” and cites three cases in which the Board supposedly granted motions to reopen the record months after the record had been closed. The Employer’s reliance on these cases is completely misplaced. In its stringcite regarding these three cases, the Employer writes:

See, e.g., C.F. Taffe Plumbing Co., Inc., 2011 WL 3898011 at *1 (NLRB Sept. 1, 2011) . . . (granting motion to reopen and directing ALJ to admit new evidence where motion to reopen was filed more than two months after the close of the hearing, and finding that was sufficiently prompt); *YWCA of Metro. Chicago*, 235 NLRB 788 (1978) (Petitioner’s motion for reconsideration and to reopen the record was sufficiently prompt when filed one month after new evidence – contrary witness testimony – was presented in a later, separate Board proceeding). *See also J.P. Stevens & Co., Inc.*, 246 NLRB 1164 (1979) (motion to reopen the record filed more than 2 months after issuance of Decision was timely where Respondent had alerted the parties three days before the Decision was issued that a motion would be filed, and where there was no prejudice to the other party).

Req. for Rev. at 8.

The Employer’s description of the first two cases completely distorts them. In *C.F. Taffe Plumbing Co.*, an administrative law judge had held that an employer unlawfully retaliated against a certain employee by threatening him with reprisal if he filed a charge with the Board, but also found that this employee (who was terminated after the threat was made) was not entitled to reinstatement or backpay because he engaged in post-discharge misconduct. 2011 WL 3898011 at *1. The Board granted the employee’s *pro se* request to reopen the record to admit evidence showing he did not engaged in post-discharge misconduct because “the proffered evidence was not available to [the employee] at the time of the hearing” and “neither the General Counsel nor [the employee] were put on notice that [the employee’s] post-discharge conduct . . . was an issue at the hearing” because post-discharge conduct “was neither pled as a defense by the

[Employer] in its answer, nor raised by the [Employer] in its opening statement,” and the Employer’s counsel did not assert during the hearing that the Employer would have terminated the employee for his post-discharge conduct. *Id.* at 2. The Board permitted the employee’s request to reopen the record because it came as a complete surprise that the issue of post-discharge conduct was at play in the proceedings. Here, there is no such surprise: the Employer’s counsel at the post-election hearing were the same attorneys litigating the pre-election hearing, where managerial status was the main issue being litigated. They certainly should have, and could have, considered during the post-election hearing whether Professor Levin’s testimony was relevant to the question of NTT faculty’s managerial status.

In *YWCA of Metropolitan Chicago*, also cited by the Employer, a witness who did not testify at the first Board hearing presented alleged contrary evidence at a subsequent Board hearing. *See* 235 NLRB at 788. Thus, the evidence at the second hearing truly was unavailable at the first, and on that basis, the Board granted the motion to reopen the record. *Id.* n.4. Again, this is unlike the situation here, in which the same witness presented allegedly contrary evidence at the pre- and post-election hearings, and could have been cross-examined and impeached at the second hearing. Lastly, in *J.P. Stevens & Co., Inc.*, the Board held that the motion to reopen the record was not untimely because the parties so moving alerted the administrative law judge and the opposing party before the judge’s decision was even issued that they would move to reopen the record based on newly-discovered evidence. 246 NLRB 1164, 1165 (1979). The instant situation is not comparable – the only indication that the Employer intended to move to reopen the record on the basis of Professor Levin’s testimony came when it actually filed its motion, over a month after the conclusion of the post-election hearing. Accordingly, the Regional

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 June 16, 2016, I served the foregoing document described as **PETITIONER'S OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW OF ORDER DENYING EMPLOYER'S MOTION TO REOPEN THE RECORD** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

By e-mail: allatham@paulhastings.com;
cameronfox@paulhastings.com

Al Latham
Cameron W. Fox
Paul Hastings LLP
515 South Flower Street, Twenty-Fifth Floor
Los Angeles, CA 90071

By email: mori.rubin@nlrb.gov

Mori Pam Rubin
Regional Director
National Labor Relations Board, Region 31
11500 West Olympic Boulevard, Suite 600
Los Angeles, CA 90064

(By Electronic Mail)



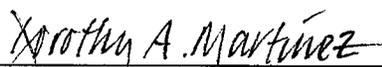
Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused such documents described herein to be sent to the persons at the e-mail addresses listed above. I did not receive, within a reasonable time after the transmission any electronic message or other indication that the transmission was unsuccessful. Executed on June 16, 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 June 16, 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 June 16, 2016, in Pasadena, California.



DOROTHY A. MARTINEZ