UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF ADMINISTRATIVE LAW JUDGES

INGREDION, INC. d/b/a PENFORD PRODUCTS CO. and BAKERY, CONFECTIONARY, TOBACCO WORKERS & GRAIN MILLERS LOCAL 100G	Case 18-CA-209797

COUNSEL FOR THE GENERAL COUNSEL'S MOTION TO APPLY COLLATERAL ESTOPPEL TO THE BOARD'S FACTUAL FINDINGS AND CONCLUSIONS OF LAW IN *INGREDION, INC., d/b/a PENFORD PRODUCTS CO.*, 366 NLRB NO. 74 (May 1, 2018)

Counsel for the General Counsel (Counsel) respectfully requests that, at the administrative hearing in the above-referenced case, the parties be precluded from re-litigating the facts and findings made by the National Labor Relations Board in *Ingredion, Inc., d/b/a Penford Products Co.*, 366 NLRB No. 74 (May 1, 2018). Specifically, in support of this Motion, Counsel avers:

1. On April 18–21 and April 27–28, 2016, the parties to the instant dispute participated in an unfair labor practice trial before Administrative Law Judge Mark Carissimi. At this trial, the parties comprehensively litigated the conduct of Ingredion, Inc., d/b/a Penford Products Co. (Respondent) and Bakery, Confectionary, Tobacco Workers & Grain Milles Local 100G (Union) during collective-bargaining negotiations in 2015.

2. Among other allegations, the parties litigated whether Respondent engaged in overall surface bargaining and whether it had unlawfully implemented its last, best, and final offer prior to reaching impasse during these 2015

negotiations. By virtue of the nature of these allegations, the parties comprehensively litigated what occurred at the bargaining table in 2015, including examining the parties' discussions regarding health insurance. Over the course of this hearing, the parties created a record of over 3500 pages.

3. On August 26, 2016, ALJ Carissimi issued his decision in the above-referenced case, finding in relevant part that Respondent had engaged in overall surface bargaining and that it had unlawfully implemented its alleged last, best, and final offer prior to impasse. In his decision, ALJ Carissimi made thorough and detailed factual findings regarding the parties' bargaining in 2015, including capturing the parties' discussions about health insurance. Among other findings on this topic, ALJ Carissimi found that there "had [] been relatively little discussion regarding other important economic issues such as health insurance" at the time of Respondent's unilateral implementation in 2015. Slip op. at 29.

4. On October 14, 2016, Respondent filed its Exceptions to the Board regarding ALJ Carissimi's decision.[1] These Exceptions, which were over 250 pages in length, squarely presented the issue of the parties' bargaining regarding health insurance before the Board. (*See, e.g.,* Exceptions # 72, 168, 289, 290, 624, 844, 992, and 993.)

5. On May 1, 2018, the Board issued its decision, cited at 366 NLRB No. 74. In its decision, the Board chose to affirm, in relevant part, Judge Carissimi's rulings and findings. While the Board found it unnecessary to determine whether Respondent had engaged in overall surface bargaining, it found that

[1] Counsel requests that the Administrative Law Judge take administrative notice of Respondent's Exceptions. Here is a link for the convenience of the parties: Exceptions to ALJD

"Respondent's [unilateral implementation] was unlawful because the parties had not reached an *overall impasse in bargaining*." Slip op. at 1 (emphasis added). The Board further noted that, as part of its rationale for this finding, it was relying on the factual findings of ALJ Carissimi. *Id.*

6. The doctrine of collateral estoppel is designed to prevent "the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. U.S.,* 440 U.S. 147, 154 (1979). In furtherance of these well-established principles, the Board has held that collateral estoppel applies when the same parties are involved in a subsequent proceeding, and the issue(s) were or could have been litigated in the prior proceeding. *See Wynn Las Vegas,* 358 NLRB 690, 692–93 (2012), and cases cited therein.

7. It is undisputed that the same parties are involved in this proceeding as in the first Ingredion matter. And, by nature of the expansive bargaining allegations at issue in the first case, each party had ample opportunity, which they exercised, to present their evidence of discussions regarding health insurance in 2015. Thus, the principles of collateral estoppel clearly apply to the circumstances of the instant case, and for the reasons listed below, the parties should be prevented from re-litigating the parties' bargaining in 2015.

8. As explained by the Board in *Harvey's Resort,* 271 NLRB 306 (1984), "we have consistently refused to permit relitigation of an issue decided in an earlier case." *Id.* at 306. Here, by virtue of the allegations at issue in the first Ingredion matter, the entirety of the parties' bargaining in 2015 was placed before

the Board. This includes, of course, the parties' bargaining regarding an essential term and condition of employment such as health insurance. As such, relitigation of the parties' bargaining regarding health insurance in 2015 should not occur.

9. The circumstances of the instant case reveal both the benefits of applying collateral estoppel, and the pitfalls that could occur if the parties are *not* collaterally estopped from re-litigating the issues decided in the previous case.

Judicial economy dictates that the Board's findings be allowed to stand, uninterrupted. The parties have already devoted weeks of litigation to determining what occurred during the parties' bargaining in 2015. They have presented thousands of pages of evidence and hundreds of pages of briefing. And the issues related to this bargaining have now been addressed by two separate decision makers. As such, it would be extremely wasteful to re-open discussions about what occurred almost three years ago during bargaining.

Perhaps even more importantly, allowing relitigation of what occurred at the bargaining table in 2015 will invariably create inconsistencies with what was already decided by the Board. There are literally dozens of findings made by the Board regarding the parties' 2015 discussions over health insurance. These include findings regarding what specific individuals stated at specific bargaining sessions regarding this subject. *See, e.g.,* Slip op. at 11 (finding that Respondent's chief negotiator spent 5-10 minutes reviewing Union's proposal, which included information about health insurance, during parties' June 29, 2015 bargaining); *id.* at 14 (findings regarding specific remarks made by Union

negotiator in response to Employer's health insurance proposal during July 30, 2015 bargaining). It will be virtually impossible, as a fact finder, to police whether evidence presented about 2015 bargaining in these proceedings is consistent with the prior findings of the Board. As these findings are binding on the Administrative Law Judge in this proceeding,[2] the practical difficulties of determining which evidence is admissible therefore become enormous. The only avenue for avoiding such difficulty is to preclude the parties from entering evidence regarding their bargaining in 2015.

10. In considering the appropriateness of the instant Motion, it is important to recognize its limited scope. If collateral estoppel were to be applied here, it would be limited solely to those issues that were litigated in the prior case. It would not preclude Respondent from, for example, introducing evidence about what occurred in the parties' bargaining *after* the period of time covered by the Board's decision in the first Ingredion matter.

11. As aptly summarized by the administrative law judge in *Wynn Las Vegas, LLC,* "Respondent's opportunity to convince a fact finder . . . has passed. The parties had an adequate opportunity to litigate th[ose] very issue[s]." 358 NLRB at 962. Similarly, the parties have had an opportunity to fully litigate what

[2] Based on prior remarks made by Respondent's counsel, the undersigned counsel anticipates that reference will be made to the fact that the Board's decision in Ingredion is currently on appeal to the United States Court of Appeals for the District of Columbia. Respondent's appeal has no impact on the present proceedings, as the Board's decision remains binding on administrative law judges, regardless of the fact that it is being considered on appeal. *Western Cab Co.*, 365 NLRB No. 78, slip op. at 1 n. 4 (2017).

occurred at the bargaining table in 2015. They should not be allowed to revisit this issue.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion was served on the parties via electronic mail at the email addresses listed below, and was filed using the Board's e-filing system:

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Dated: June 16, 2018

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