

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18**

INGREDION, INC. d/b/a PENFORD)	
PRODUCTS CO.)	
)	
Employer,)	
)	
and)	CASE NO. 18-CA-209797
)	
BAKERY, CONFECTIONARY,)	
TOBACCO WORKERS & GRAIN)	
MILLERS LOCAL 100G)	
)	
Union.)	

**RESPONSE IN OPPOSITION TO COUNSEL FOR THE GENERAL COUNSEL’S
MOTION TO APPLY COLLATERAL ESTOPPEL**

Pursuant to § 102.24 of the National Labor Relations Board’s (“NLRB”) Rules and Regulations, Ingredion Incorporated (“Ingredion”), by counsel, submits this response in opposition to Counsel for the General Counsel’s Motion to Apply Collateral Estoppel to the Board’s Factual Findings and Conclusion of Law in Ingredion, Inc., d/b/a Penford Products Co., 366 NLRB No. 74 (May 1, 2018). In support of its response in opposition, Ingredion states as follows:

For collateral estoppel to apply, the issue must have been actually litigated in the prior proceeding. Wynn Las Vegas, LLC, 358 NLRB 690, 690 fn. 2 (2012), citing Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 fn. 5 (1979). As the Supreme Court in Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 601-02 (1948), explained the doctrine of collateral estoppel: “But if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues that recur in the second case. Thus, the second proceeding may involve an instrument or transaction identical with, but in a form

separable from, the one dealt with in the first proceeding. In that situation, the Court is free in the second proceeding to make an independent examination of the legal matters at issue.” See SCNO Barge Lines, Inc., 287 NLRB 169, 184-85 (1987) (collateral estoppel does not apply where the second action involves a separate set of facts, even though they be similar or identical to the facts in the earlier case).

The issue in the current case is entirely new and differs from those in the previous proceeding, and it was not litigated in the first proceeding. In the first proceeding, the allegations were focused on surface bargaining and whether the parties reached impasse prior to implementation of Ingredion’s last best offer. Specifically, in Ingredion, Inc. d/b/a Penford Products Co., 366 NLRB No. 74 (May 1, 2018), the Board observed that the principal issue in the case was whether there was an unlawful implementation of a last contract offer on September 14, 2015. Slip op. at 1.¹ In this proceeding, the sole issue is whether there were unilateral, material and substantial changes made to the employees’ health insurance plans with respect to deductibles, copays, and out-of-pocket expenses. This is an entirely different and new claim, and changes to the employees’ health insurance plans were not at issue in the first proceeding.

While Ingredion does not intend to re-litigate the issues of the prior proceeding regarding surface bargaining and implementation, Ingredion should be permitted to fully litigate and present evidence regarding particular proposals and discussions about health insurance that occurred in 2015 as they relate to the new allegation regarding unilateral change of the employees’ health insurance plan. Ingredion’s defenses in this proceeding include that the Union clearly and unmistakably waived its right to bargain over the health insurance plan and that the contract covered the changes to the health insurance plan. When the Board evaluates possible

¹ The Board found it unnecessary to pass on the judge’s finding regarding implementation based on surface bargaining because of the Board’s determination regarding impasse.

waivers of bargaining rights, the Board looks to an amalgam of factors, including the parties' past dealings and relevant bargaining history. See Southwest Ambulance, 360 NLRB No. 109, slip op. at 11 (2014). It is Ingedion's position that the Union agreed at the bargaining table to participate in Ingedion's salaried health insurance plans, that the contract and related documents permit Ingedion's right to make changes to those plans, and that the Union was well aware of Ingedion's right in this regard both during and after the parties' bargaining.

In the first proceeding, waiver and contract coverage were not at issue and not litigated. The first proceeding did not go into specific details about the health insurance plan and instead covered dozens of issues in bargaining. Now that Ingedion has the burden to prove the Union's waiver and contract coverage specifically with regard to employee health insurance, Ingedion should be allowed to fully present its evidence in order to satisfy this burden, including Ingedion's and the Union's past dealings and bargaining history in 2015 regarding health insurance. Detail about the health care plan discussions is required now so that Ingedion may satisfy its burden to prove waiver and contract coverage. Holding otherwise would deprive Ingedion of full due process. See Operating Engineers Local 400, 273 NLRB 226, 228 (1984) (denying application of collateral estoppel because it would preclude employer from raising facts in support of its defense and would violate employer's fundamental right to due process of law).

Furthermore, Ingedion anticipates that testimony about previous bargaining in 2015 about health insurance should not exceed more than one hour of testimony and would not hamper judicial economy in this case.

WHEREFORE, Ingedion respectfully requests that the Administrative Law Judge deny Counsel for the General Counsel's Motion to Apply Collateral Estoppel and allows the presentation of evidence relating to Ingedion and the Union's 2015 discussions about health

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Response has been served by electronic mail and U.S. mail, on this 18th day of June, 2018, upon the following:

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