

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

No. 18-9521

NATIONAL LABOR RELATIONS BOARD)	
)	
Petitioner)	
)	
v.)	Enforcement of an
)	Agency Matter
WOLF CREEK NUCLEAR OPERATING)	
CORPORATION)	
)	
Respondent)	

CERTIFIED ADMINISTRATIVE RECORD

Volume V - Pleadings

NATIONAL LABOR RELATIONS BOARD

Petitioner

V.

WOLF CREEK NUCLEAR OPERATING CORPORATION

Respondent

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EMPLOYER'S MOTION TO DISMISS PETITION

Wolf Creek Nuclear Operating Corporation (“the Employer”), for the reasons stated below, hereby moves to dismiss the Petition in 14-RC-168543 due to the Region’s previous, final and binding decision in Case 17-UC-210, in which the Acting Regional Director determined that the petitioned-for employees, in the instant Petition, are managerial employees under the Act and therefore excluded from representation for the purposes of collective bargaining by International Brotherhood of Electrical Workers, Local 225 (“the Petitioner” or “the Union”).¹

I. Statement of Facts

1. Petitioner represents approximately 400 of the Employer’s 1,100 employees.

2. On January 28, 2016, Petitioner filed Case 14-RC-168543, petitioning to represent “All full-time and part-time Buyers I, II, III and Lead Buyer employed by the Employer at its facility near Burlington, Kansas to be included in a separate unit.”

3. On May 4, 2000, the Acting Regional Director issued a Decision, Order and Clarification of Bargaining Unit (“Order”), in Case 17-UC-210, finding the Employer’s Buyers to be managerial employees under the National Labor Relations Act, and thereby excluded from coverage of and representation under the Act. *See* Decision attached hereto as **Exhibit A**.

II. Standard of Review

4. NLRB Rules and Regulations §102.63(a) require that “[a]fter a petition has been has been filed ... if it appears to the regional director that there is reasonable cause to believe that a question of representation affecting commerce exists, the regional director shall prepare and cause to be served upon the parties ... a notice of hearing.”

¹ International Brotherhood of Electrical Workers, Local 304 is now known as International Brotherhood of Electrical Workers, Local 225.

5. Section 9(c)(1) of the Act states that when a representation petition has been filed, “the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice.”

6. Here, under the unique circumstances presented by the case, Petitioner has provided no evidence that a hearing or an election is appropriate, nor can it. Accordingly, there is no question concerning representation. As a result the Petition should be summarily dismissed without a hearing.

III. NLRB Rules and Regulations §102.67(g) Precludes Relitigating the Regional Director’s Prior Action

7. Under the NLRB Rules and Regulations §102.67(g) “the regional director’s actions are final unless a request for review is granted. *See Maphis Chapman Corp.*, 151 NLRB 73, 84-85 (1965) (holding regional director’s decision final and binding).

8. Petitioner failed to file a Request for Review in 17-UC-210, or in any way manifest its disagreement with the Acting Regional Director’s May 4, 2000, decision preventing Petitioner from representing the Buyers.

9. Furthermore, the Buyers’ current duties and job assignments are substantially identical to those described in the Order.

10. The Regional Director should enforce Rule 102.67(g) and his prior decision by dismissing the instant Petition for Certification.

IV. The Petition Should be Dismissed Under the Doctrine of *Res Judicata*

11. *Res Judicata* bars relitigation of a claim that a party raised in a prior adjudication. Embodied in the doctrine of *res judicata*, is that a “right, question or fact distinctly put in issue

and directly determined by a court of competent jurisdiction... cannot be disputed in a subsequent suit between the same parties or their privies..." *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49 (1897). Under the doctrine of *res judicata*, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. *Cromwell v. Cty. of Sac*, 94 U.S. 351, 352 (1877); *Lawlor v. Nat'l Screen Svc. Corp.*, 349 U.S. 322, 326 (1955). The Supreme Court has determined that agency proceedings bar future proceedings through operation of the doctrine of *res judicata*. *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966). For a future claim to be barred the parties must have had a full and fair opportunity to litigate the matter at issue in the prior proceeding. *Kremer v. Chemical Constr. Co.*, 456 U.S. 461, 480-81 (1982).

12. Petitioner filed both Case 17-UC-210 and the instant Petition. In both cases Petitioner sought (and seek) to represent Employer's Buyers. It can hardly be disputed that the formal hearing in Case 17-UC-210 provided Petitioner a full and fair opportunity to participate in the adjudication process, including present evidence and engage in the formal hearing process (and to appeal the result). This process, of which resulted in a final judgment on the merits of the case and the issues therein.

V. Remedy Sought and Conclusion.

13. The Regional Director should dismiss the instant Petition because under Rules and Regulations §102.63(a) as there is no question concerning representation. The Regional Director has already found the Employer's Buyers to be managerial employees under the Act. Therefore there is no question concerning representation. The Region's previous decision should not be disturbed. Were the Regional Director to hold otherwise, any party could continue to relitigate issues taking multiple "bites at the apple" until it achieved the result it wanted. That

waste of resources and disregard for the administrative process is exactly what the rules and reviewing courts prohibit.

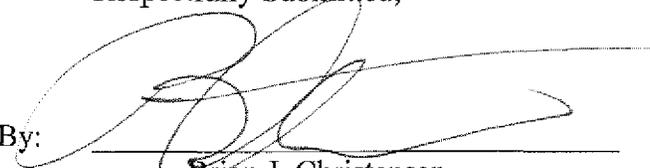
14. Given that Rules and Regulations §102.67(g) holds the Regional Director's actions are final unless a request for review is granted, the Order issued in 17-UC-210, must be considered final and binding as no Request for Review was granted. Therefore, the instant Petition must be dismissed.

15. The doctrine of *res judicata* applies. Any question concerning representation of the Buyers was resolved in 17-UC-210, which included participation by the same parties to the instant Petition, the same Buyer classification, a formal hearing, and a final decision on the merits of the question concerning representation

16. For the foregoing reasons, the Regional Director should dismiss the Petition.

Respectfully Submitted,

By:



Brian J. Christensen

Dated: February 1, 2016
Overland Park, KS

Exhibit A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTEENTH REGION

WOLF CREEK NUCLEAR OPERATING
CORPORATION

Employer-Petitioner,

and

Case 17-UC-210

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 304,
AFL-CIO,

Union

DECISION, ORDER AND
CLARIFICATION OF BARGAINING UNIT

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned Acting Regional Director.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer-Petitioner, Wolf Creek Nuclear Operating Corporation, is a corporation with an office and place of business near Burlington, Kansas, where it is engaged in the operation of a nuclear power plant and the non-retail sale of

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electricity generated by the power plant. The record shows that the Employer-Petitioner is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Union, International Brotherhood of Electrical Workers, Local 304, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act and is recognized as the collective bargaining representative for employees identified in Case 17-RC-1160J and others "later covered" by Article 1.5 of the parties' 1994-1997 contract.

4. The original petition sought to clarify the existing bargaining unit by excluding as managerial employees the following classifications of employees: Quality Specialists I, II, III, and Senior; and Buyers I, II, and III. At the hearing, the Employer-Petitioner amended the scope of its proposed exclusion to the following employees: all "Internal Quality Specialists"¹ in the Performance Improvement and Assessment Department who perform audits under the supervision of quality evaluations supervisor, Steven Koenig; all "External Quality Specialists"² in the Purchasing and Material Services Department

¹ At the time of the hearing, these employees were identified as D.A. Birk; R.L. Denton; D.L. Donhoe; C.J. Holman; M.L. Litch; G.A. McClelland; and C.B. Stone.

² At the time of the hearing, these employees were identified as E.D. Booth; T.H. Douglas; and T.L. Krause.

who perform audits under the supervision of purchasing and material services supervisor Victor Canales; and all "Buyers"³ employed by the Purchasing and Contracts Department under the supervision of purchasing and contracts supervisor, James Kitchens. The amendment clarifies the disputed employees by the type of work they perform, rather than by their job classifications.⁴ Consequently, the terms "Quality Specialist" and "Buyer" will hereinafter be used to describe, without differentiation, a group comprised of Quality Specialists I, II, III, and Senior, and Buyers I, II, and III, respectively, as described above.

BARGAINING HISTORY

In 1994, the Union was certified as the exclusive collective-bargaining representative of a unit of employees employed by the Employer-Petitioner in certain departments and classifications identified in Case 17-RC-11603. The parties negotiated a collective-bargaining agreement effective September 7, 1994 through September 6, 1997 covering the employees

³ At the time of the hearing, these employees were identified as B.I. Saylor; T.L. Sipe; S.J. Somerhelder; and C.S. Wells.

⁴ The Employer-Petitioner does not seek to exclude employees classified as Quality Specialists who do not perform audit functions. At the time of the hearing, these employees included B.G. Stennett, who is supervised by quality control supervisor E.M. Peterson, and N.S. Rumold and J.W. Schopper, who are supervised by V.J. Canales.

identified in that case, as well as others "later covered" by Article 1.5 of the parties' 1994-1997 contract. The disputed Quality Specialists and Buyers were not originally covered by the parties' 1994-1997 contract.

In August 1996, the parties negotiated a memorandum of understanding regarding "Target 900 Organization," which was a management program seeking the redesign of the Employer-Petitioner's workforce to address changes in competition in the electric utility industry resulting from regulatory changes. The parties agreed that certain employees not covered by the parties' 1994-1997 contract would be allowed to vote on whether to be included in the bargaining unit by an in-house, secret ballot election.⁵

Prior to the vote, the Employer-Petitioner prepared a list of eligible voters, which included the names of the disputed employees. The Employer-Petitioner did not challenge any employees' voting eligibility. A majority of the employees in each job grouping, including the Quality Specialists and Buyers, voted for inclusion in the bargaining unit.

Subsequent to the election, the parties entered negotiations for the terms and conditions of employment for the

⁵ Article 9.1 of the 1994-1997 contract specifically provided for the addition of employees into the existing unit by an in-house, secret ballot election.

employees newly added to the unit. During these negotiations, the Employer-Petitioner asserted that Quality Specialists and Buyers were managerial employees and should be excluded from coverage. The Union disagreed.

PROCEDURAL HISTORY

On August 22, 1997, the Employer-Petitioner filed a unit clarification petition in Case 17-UC-207, seeking to exclude as managerial employees Quality Specialists and Buyers. On October 16, 1997, due to the Employer-Petitioner's scheduling conflicts and upon the Region's request, the petition was withdrawn without prejudice.

On April 7, 1998, the Employer-Petitioner refiled its unit clarification petition under Case 17-UC-210, the basis of the instant proceeding. During the interim months, the parties negotiated a successor contract effective for the period September 24, 1997 until September 23, 2002, which covered the terms and conditions of employment of the disputed employees.

On July 9, 1998, the Regional Director dismissed the petition as untimely filed. On November 9, 1999, upon review of the Regional Director's Decision and Order, the Board found that the petition was timely filed. The Board further found that the petition would not be precluded from consideration merely because the disputed employees were included in a prior contract, as the Employer-Petitioner alleges that these are

managerial employees whose exclusion may be required. See Washington Post Co., 254 NLRB 168, 169 (1981). The Board remanded the matter for further consideration by the Regional Director.

QUALITY SPECIALISTS

The Employer Petitioner operates a nuclear power facility, regulated by the Nuclear Regulatory Commission (NRC). NRC regulations, as reported in 10 C.F.R. Part 50, Appendix B, mandate nuclear power facilities to establish and execute "quality assurance" programs, which are comprised of "all those planned and systematic actions necessary to provide adequate confidence that a structure, system, or component will perform satisfactorily in service." To comply with the federal regulation, the Employer-Petitioner set up a system of audits and inspections designed to ensure that activities within the Employer's operations are correctly and safely performed (i.e., internal audits) and that contractors who provide material, equipment and services meet quality and reliability standards (i.e., external audits). Such audits and inspections are performed by the disputed Quality Specialists.

The Employer-Petitioner's Performance Improvement and Assessment Department employs Quality Specialists to conduct audits of the Employer-Petitioner's operations. The Quality Specialists report to Quality Evaluations Supervisor, Steven

Koenig, who in turn reports to the Manager of Performance Improvement and Assessment, W.B. Norton. Norton ultimately reports to Chief Operating Officer, Clay Warren.

Audits are generally initiated by a schedule that identifies the areas to be audited and the frequency for such audits. Pursuant to the schedule, Koenig assigns audits to teams comprised of Quality Specialists and technical specialists, who are not necessarily part of the quality evaluations department.⁶ For each team, Koenig designates a "lead auditor," generally a Quality Specialist certified by the American National Standard Institute (ANSI),⁷ who is responsible for developing a written plan describing the scope of the audit and creating a checklist of questions to guide the team in its investigation.

In drawing up the plan, the lead auditor/Quality Specialist reviews various documents, including past audits, ANSI standards, written procedures for the area being audited, etc. The lead auditor/Quality Specialist then discusses the scope and nature of the proposed audit plan with the Nuclear Safety Review

⁶ These specialists can be comprised of undisputed bargaining unit employees, such as mechanics, but they have the same input into the audit as Quality Specialists.

⁷ At the time of the hearing, all but one of the disputed Quality Specialists were certified as lead auditors.

Committee (NSRC) Interface, and where necessary, incorporates the NSRC recommendations into the written plan. In crafting the checklist, the lead auditor/Quality Specialist receives guidance and input from pre-prepared checklists and from the team members. Prior to the audit, the lead auditor/Quality Specialist submits the plan and checklist for approval by Koenig.

Upon the audit's conclusion, the lead auditor/Quality Specialist conducts an "exit meeting" with the management of the audited area to discuss the results of the audit. Thereafter, the lead auditor/Quality Specialist, with input received from team members, creates a report of findings. Prior to its issuance, the report is submitted to Koenig for his review. Koenig describes this review as editorial in nature; he makes changes only for the purpose of contributing to the understandability of the report, without altering its accuracy. A lead auditor/Quality Specialist is not required to sign a report that he does not feel accurately communicates the substantiated facts of the evaluation.⁸

In addition to the audit process, Quality Specialists also perform surveillance, which is defined as a "narrow scoped investigation which determines by direct observations that

⁸ The record is silent as to whether a Quality Specialist has ever refused to sign a report.

activities are being performed with applicable procedures, drawings, specifications, etc." Similar to an audit, surveillance is conducted in teams that can be comprised of personnel from both within and outside of the quality evaluations department. For each team, Koenig designates a "surveillance leader," who is generally a Quality Specialist.⁹ The surveillance leader is responsible for extracting requirements from codes, standards, technical specifications, procedures, etc. for reference and criteria during the surveillance activity. The team thereafter conducts surveillance by collecting "objective evidence through direct observation, documentation review and/or personal interviews." If the surveillance leader determines that an exit meeting is warranted, the team may meet with management of the surveyed organization to discuss its findings.

The surveillance leader creates a report of findings. If the surveillance leader is a certified auditor or if the report is reviewed and accepted by the audit leader/Quality Specialist, then the report can be incorporated in an audit. Prior to its issuance, the report is submitted to Koenig for approval. Koenig reviews the written report to insure that the conclusions

⁹ Unlike the audit leader, the surveillance leader need not be certified by ANSI.

drawn are accurate and that the evaluator is supportive of those conclusions. Prior to issuance, the report is also reviewed by the manager of performance assessment. A surveillance leader need not sign a report that he does not feel accurately communicates the substantiated facts of the evaluation.

As a result of negative findings in the audits or surveillance, team leaders can issue Performance Improvement Requests (PIR) pursuant to a corrective action program. PIRs document the deficiency found and request that corrective action be taken. Any person, including a non-employee, who sees a problem can initiate a PIR. The Corrective Action Review Board determines what, if any, action is to be taken to correct the deficiency. Issues identified as problematic in the audit or surveillance are scheduled for a follow-up audit to ensure that corrective action has been taken and that the issues have been resolved.

Negative findings and PIRs are discussed with the audited area. Generally, the discussion is led by the team leader or the team member who wrote the finding, but any team member, including bargaining unit members, can lead the discussion. It is not unusual for negative findings to be challenged by the audited area. Where there is a disagreement between the Quality Specialist's conclusions and the audited organization's conclusions, Koenig attempts to resolve the conflict. But,

regardless of the resolution, the finding would still issue.

Koenig explained that the results of the reports and PIRs are reviewed and discussed at quarterly meetings with NSRC, which are attended by the manager of the audited organization and team leaders. According to Koenig, team leaders do not lead the discussions but, rather, answer questions directly put to them and give perspective to the reports, issues and findings. It is unclear from the record whether any other persons attend or participate in the meetings.¹⁰

The Employer-Petitioner's Purchasing and Material Services Department also employs Quality Specialists to conduct audits of entities that supply goods and services to the Employer-Petitioner. These Quality Specialists report to Supplier/Materials Quality Supervisor, Victor Canales, who in turn reports to the Manager of Purchasing and Material Services, Ed Schmotzer. Schmotzer ultimately reports to Chief Administrative Officer, G.C. Boyer.

External audits are scheduled according to established procedures that identify the types of suppliers to be audited and the frequency for such audits. According to the written procedures, Canales assigns audits to teams comprised of Quality

¹⁰ Koenig testified that he had not attended a meeting "lately," but then stated that he has "never attended an NSRC meeting." (The record is silent as to whether anyone else attends these meetings.)

Specialists and technical specialists, who are not necessarily part of the quality evaluations department. These technical specialists can be comprised of non-Quality Specialists. For each team, Canales designates a "lead auditor," generally a Quality Specialist certified by ANSI.¹¹

The lead auditor/Quality Specialist is responsible for establishing the nature, scope and objective of the audit. The lead auditor/Quality Specialist also crafts a checklist to be used by team members during the investigation to insure sufficient depth, continuity and adequate coverage of the audit scope. To guide the Quality Specialist in crafting the checklist, the Quality Specialist can refer to pre-prepared checklists. Prior to the audit, the Quality Specialist submits the audit plan and checklist for approval by Canales.

Quality Specialists travel nationally to the on-site operations of the manufacturers and suppliers of products to audit the quality and reliability of the products manufactured and the processes used to create them. To achieve this end, Quality Specialists communicate with external quality assurance managers and evaluate their quality assurance manuals to ensure that they meet regulatory requirements and to see whether their procedures are being effectively implemented.

¹¹ AT the time of the hearing, all of the disputed Quality Specialist were certified as lead auditors.

The Quality Specialist discusses the results of the audit with the audited entity and creates a report of findings. Prior to its issuance, the report is submitted to Canales for his review. The results of the audit are thereafter shared, via an Internet network, with others in the industry who rely upon the audits for use at their own plants. (Tr. 197)

In addition to conducting independent audits, the Quality Specialists participate in audits conducted by the Nuclear Utility Procurement Issues Committee (NUPIC), a group of utilities that qualifies nuclear industry suppliers and shares the results of its audits with members of the industry. NUPIC holds tri-annual meetings in which the group determines which utilities will lead and/or participate in particular audits. The sole Employer-Petitioner representative at these meetings is Quality Specialist, Ed Booth.¹²

The Employer-Petitioner's Quality Specialists are, at times, part of the NUPIC audit team, sometimes as leaders and sometimes as participants. NUPIC provides the checklist to be used in such audits. Each team member reports the results of the audit to its own utility. For the Employer-Petitioner, the report and results are reviewed by Canales, who ensures that there is a basis for the conclusions reached by the auditor and

¹² The record does not discuss Booth's role at the meetings.

ensures the clarity of the report. Canales explained that there has never been a situation where he has disagreed with the findings of a Quality Specialist, because "it's based on regulatory requirements and is very specific to those regulatory requirements."

As a result of negative findings, a Quality Specialist can generate a Report on Noncompliance (RON), which requires a supplier to remedy the problem. If a supplier refuses to act on a RON, depending upon the severity of the issue, the Employer-Petitioner may cease to qualify the supplier, effectively ceasing to do business with it. The record is silent as to who ultimately makes this decision.

A Quality Specialist can also recommend that a supplier be put "on hold." In most situations where this occurs, Canales determines through discussions with management up the chain of command, whether such recommendation will be approved. In limited situations, where a Quality Specialist has a high concern and believes the work should be stopped immediately, the Quality Specialist can order work stoppage and advise Canales of the action after the fact.

On the basis of the foregoing and on the record as a whole, I conclude that the disputed Quality Specialists are not managerial employees.

The Board defines managerial employees as persons who formulate, determine, and effectuate an employer's policies with discretion independent of established policy. General Dynamics Corp., 213 NLRB 851, 857 (1974). The disputed Quality Specialists do not engage in managerial decision-making, nor do they effectuate management decisions utilizing independent discretion. Rather, their jobs are performed in compliance with pre-determined standards established by the plant's quality assurance programs.

The disputed Quality Specialists' primary responsibility is to perform audits and surveillance, which occur on a planned regular basis. Although the Quality Specialists can draft audit plans and checklists, and even consult with the NSRC Interface regarding the plans, these drafts must be submitted through a chain of approval prior to their implementation. And, while the Quality Specialists are not restricted from investigating questions that are not specifically included in the checklist, the record does not suggest that the audit can diverge from its pre-approved scope. The judgments and decisions made by the disputed Quality Specialist appear to be technical in nature and limited by preexisting established policy. Bechtel, Inc., 225 NLRB 197, 198 (1976).

The reports generated by the Quality Specialist similarly do not reveal independent discretion, as they report the

findings resulting from facts adduced by the team audit. To ensure that the findings are supported by the facts, the reports are reviewed and approved by Quality Specialist supervisors prior to their issuance. While a Quality Specialist need not sign a report if he disagrees with the finding, there is no record evidence that this has ever occurred. The question of whether a particular employee is managerial must be answered in terms of the employee's actual duties. Eastern Camera and Photo Corp., 140 NLRB 569, 571 (1962).

Consistent with the nature of the audit/surveillance process to ensure compliance with quality standards, negative findings are recorded in the reports, PIRs and RONS. Such action does not demonstrate independent discretion, as any employee, or even non-employee, can initiate corrective action based upon his/her perceived problem. Moreover, the Quality Specialists have no independent authority to order corrective action themselves. The Corrective Action Review Board, comprised of the Employer's senior management, reviews the recommendation for corrective action and determines what, if any, corrective action is required.

Further, a conflict of interest is not created by a Quality Specialist's reporting of a negative finding. The purpose of this reporting is to identify deficiencies for correction, not to point out who made a mistake. The record does not reflect

any negative action taken against an employee or manager, based upon the audit/surveillance report. Nor does the record suggest that placing Quality Specialists in the bargaining unit would result in Quality Specialists ignoring mistakes or insufficiencies. In light of the potential deadly consequences of such action, it can be assumed that the Quality Specialist would not be callously irresponsible. See Iowa Electric Light and Power Company, 717 F.2d 433, 436 (8th Cir. 1983). Moreover, the fact that no conflict of interest is created by the participation of undisputed non-managerial bargaining unit employees in the audit process bolsters this holding. See Bechtel, Inc., 225 NLRB 197 (1976).

Negative findings can result in a work-hold or the disqualification of a vendor from providing goods or services to the Employer. As a general rule, the Quality Specialist's supervisor must approve such an occurrence. In the extraordinary situation where something is of such high concern that a Quality Specialist feels compelled to immediately stop work without prior approval, the Quality Specialist reports his action to managers after the fact. The Employer provided only one example of a vendor being disqualified by a Quality Specialist without prior approval, based upon an audit report prepared by a third party. The record is silent regarding the nature of the relationship between this vendor and the Employer

(i.e., whether the vendor had a contractual relationship with the Employer or was merely a potential vendor). The record, on balance, simply does not allow this singular event to have conclusive weight in determining whether or not the Quality Specialists are managerial employees.

Finally, NCRC regulations do not require Quality Specialists to be deemed managers. The regulations require persons performing quality assurance functions to have "sufficient authority and organizational freedom" to effectuate quality assurance objectives and that such authority and freedom be achieved by having those persons "report to a management level." The regulations also recognize that "because of the many variables involved . . . the organizational structure for executing the quality assurance program may take various forms." The form of structure chosen by the Employer relegates total executive control with Norton and Schmotzer, the managers of performance improvement and assessment and purchasing and material services, respectively. Supervisors Koenig and Canales are responsible for assuring that the procedures are executed. Quality Specialists merely implement the audit process. Thus, the Employer's own organizational structure belies the contention that it was bound by law to afford Quality Specialists managerial authority.

BUYERS

The Employer-Petitioner's Purchasing and Material Services Department employs Buyers to procure all goods and services, except fuel, for the Employer.¹³ The Buyers report to Purchasing and Contracts Supervisor, Jim Kitchens, who in turn reports to the Manager of Purchasing and Material Services, E.W. Schmotzer. Schmotzer ultimately reports to Chief Administrative Officer, G.C. Boyer.

Purchases are initiated by a purchase requisition, a document that describes the materials or services sought by the requesting department. Typically, a request for goods will specify a particular manufacturer, model number, and indication of whether the goods are safety-related.

Each requisition is approved by a manager's signature. The amount authorized for expenditure depends upon the level of management who approves the requisition. For example, a superintendent or section manager can authorize spending up to \$25,000, a division manager can authorize spending up to \$50,000, and the COO can authorize spending up to \$150,000. The spending authority of the signatory requisition manager limits the amount that can be expended on any particular requisition.

¹³ Annually, the four disputed Buyers commit between \$10 to \$12 million on the total purchase of supplies and services requisitioned.

After a requisition has been authorized, it is sent to the Purchasing Department, where the Buyers are located. Kitchens assigns each requisition to a Buyer, depending upon the request and the Buyer's familiarity and expertise with the commodities and suppliers.

Upon receiving the requisition, the Buyer first determines whether the request will be competitively bid. Where the value of goods or services is expected to exceed \$5,000, the Employer's written policy requires the Buyer to issue a competitive bid for the goods/service.¹⁴ In limited situations, such as where there are limited sources or where the same item was recently competitively bid and the supplier would be willing to sell the same item for a lower price, the request need not be competitively bid.

When a request is to be competitively bid, the Buyer compiles a list of potential suppliers from whom he will seek a bid. This list may be comprised of past successful bidders, suppliers of other commodities who have informed the Buyer of their desire to competitively bid, suppliers listed in trade journals, or suppliers found from Internet sources. For safety-related items, which comprise approximately 15 percent of the requisitions, the Buyer is limited to a prescribed list of

¹⁴ In practice Buyers issue competitive bids for lesser dollar amounts. The exact amount was not specified in the record.

suppliers. The Buyer determines how many suppliers will be placed on the list but, pursuant to the Employer-Petitioner's written policy, there must be minimally three bidders. The Buyer then issues to the potential suppliers a request for a quote, which identifies the requirements of the goods/services sought and a bid due date selected by the Buyer.

Sometimes, potential vendors will submit exceptions to the bid's requirements. To assess whether these exceptions would exclude the vendor from contention or not affect the awarding of the bid, the Buyer may seek the assistance of the Employer-Petitioner's departments to evaluate whether the exception is acceptable.

Upon receiving the bids, the Buyer performs a commercial evaluation to determine the most beneficial bid based on price, delivery, performance schedule, payment terms, warranties, exceptions, etc. Kitchens describes cost to be the most important factor in making this decision, but cost alone is not determinative, as factors such as scheduling or the cost of freight may result in the award being given to someone other than the lowest bidder. With the aid of a bid evaluation template, the Buyer is able to list all of the pertinent bid attributes side-by-side and evaluates the best option. Without seeking prior approval, the Buyer determines who is awarded a bid. Where a Buyer awards a bid contract to someone other than

the lowest bidder or the sole source supplier, he must document the reason for selecting that vendor.

The Buyer issues a purchase order (i.e., a contract) to the selected supplier. Kitchens does not review purchase orders prior to their issuance; however, he does periodically review the orders after the fact. If he disagrees with the Buyer's selection of vendor, Kitchens can cancel the order, as each purchase order reserves the right to cancel the order without the supplier's agreement.

The Employer-Petitioner has existing contracts with 40 different carriers. With the aid of a software program, the Buyer determines which carrier will be used for delivery of particular products. The Buyer inputs relevant information (e.g., the origin zip code, weight, number of packages) and the program outputs all the carriers that can handle the run, the contract price cost for delivery, and the number of days in transit. From that limited list, the Buyer selects the carrier. On rare occasions, where the Employer needs use of an expedited service, the Buyers may seek competitive bids and award a contract for that kind of freight. Once an order is placed, the Buyer tracks the order and ensures delivery according to the purchase order.

On the basis of the foregoing and on the record as a whole, I conclude that the disputed Buyers are managerial employees.

The Buyers exercise independent discretion when they locate vendors without reliance upon pre-approved lists.¹⁵ The Buyers can select a vendor without prior supervisory approval. The Buyers can negotiate a purchase price for the goods/services. And, without prior approval or necessarily subsequent review, the Buyer can initiate purchase orders committing the Employer's credit in amounts that are substantial. Concepts and Designs, Inc., 318 NLRB 948, 957 (1995) Although the Buyer cannot expend more on any particular requisition than the spending authority of the signatory requisition manager, the Buyer has discretion to spend any amount within the authority.

ORDER

IT IS HEREBY ORDERED that the Employer-Petitioner's petition for unit clarification is granted in part, and denied in part. I shall clarify the bargaining unit to exclude the Buyer position, but I shall dismiss the remainder of the petition.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the

¹⁵ With the exception of safety-related items, in which the Buyer is limited to a list of approved suppliers, but not bound to select any particular supplier from the list.

Executive Secretary, 1099 14th Street N.W., Washington, D.C.

20570. This request must be received by the Board in Washington
by May 18, 2000.

Dated: May 4, 2000

(SEAL)

/s/ Louis V. Cimmino
Louis V. Cimmino
Acting Regional Director
National Labor Relations Board
Seventeenth Region
8600 Farley, Suite 100
Overland Park, Kansas 66212

177-2401-6750-6700

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 17**

**WOLF CREEK NUCLEAR OPERATING
CORPORATION**

Employer

and

Case 14-RC-168543

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 225**

Petitioner

**ORDER DENYING EMPLOYER'S
MOTION TO DISMISS PETITION**

On January 28, 2016, the International Brotherhood of Electrical Workers, Local 225 (the Petitioner) filed a petition in the above-captioned case. On February 1, 2016, Wolf Creek Nuclear Operating Corporation (the Employer) filed a Motion to Dismiss Petition (Employer's Motion) in this matter. In its Motion, the Employer advised that, based on a May 4, 2000 decision by the Acting Regional Director in Case 17-UC-210, the petitioned-for employees, the Employer's employees classified as Buyers, had been excluded from the historic bargaining unit because they were found to be managerial employees under the Act. The Employer contends that the current duties and job assignments of the petitioned-for Buyers remain substantially identical to those described in the Acting Regional Director's May 2000 Order and argues that because the Petitioner has failed to present any evidence or offer of proof to establish that the Buyers' duties have substantially changed, that there can be no question concerning representation necessitating a hearing pursuant to the NLRB Rules and Regulations §102.63(a). The Employer further argues that NLRB Rules and Regulations §102.67(g) requires that the Regional Director dismiss the petition based on the fact that the prior Acting Regional Director's decision was final and binding. Finally, the Employer contends that allowing a hearing on the

matter is contrary to the doctrine of *Res Judicata* that bars relitigation of a claim that has been previously raised and adjudicated.

Having duly considered the matter, it appears that the dispute raises material issues of fact and law, including whether or not the duties and job assignments of the petitioned-for Buyers have changed, thereby warranting reconsideration of their earlier determined status. As such, absent any stipulated election agreement reached between the parties, a pre-election hearing is warranted for the purpose of receiving testimony and evidence relevant to the issues raised regarding a question concerning representation in order to develop a full and complete record.

Accordingly,

IT IS HEREBY ORDERED that the Employer's Motion to Dismiss is denied. Pursuant to the Notice of Hearing previously issued on January 28, 2016, the hearing in this matter is scheduled for Friday, February 5, 2016, and on consecutive days thereafter until concluded.

Dated at Overland Park, Kansas, this 3rd day of February 2016.

Daniel L. Hubbel
Regional Director
National Labor Relations Board
Region 14, By

/s/ Mary G. Taves

Mary G. Taves
Officer-In-Charge
National Labor Relations Board
Subregion 17
8600 Farley Street, Suite 100
Overland Park, KS 66212-4677



United States of America
National Labor Relations Board
NOTICE OF ELECTION



PURPOSE OF ELECTION: This election is to determine the representative, if any, desired by the eligible employees for purposes of collective bargaining with their employer. A majority of the valid ballots cast will determine the results of the election. Only one valid representation election may be held in a 12-month period.

SECRET BALLOT: The election will be by SECRET ballot under the supervision of the Regional Director of the National Labor Relations Board (NLRB). A sample of the official ballot is shown on the next page of this Notice. Voters will be allowed to vote without interference, restraint, or coercion. Electioneering will not be permitted at or near the polling place. Violations of these rules should be reported immediately to an NLRB agent. Your attention is called to Section 12 of the National Labor Relations Act which provides: ANY PERSON WHO SHALL WILLFULLY RESIST, PREVENT, IMPEDE, OR INTERFERE WITH ANY MEMBER OF THE BOARD OR ANY OF ITS AGENTS OR AGENCIES IN THE PERFORMANCE OF DUTIES PURSUANT TO THIS ACT SHALL BE PUNISHED BY A FINE OF NOT MORE THAN \$5,000 OR BY IMPRISONMENT FOR NOT MORE THAN ONE YEAR, OR BOTH.

ELIGIBILITY RULES: Employees eligible to vote are those described under the VOTING UNIT on the next page and include employees who did not work during the designated payroll period because they were ill or on vacation or temporarily laid off, and also include employees in the military service of the United States who appear in person at the polls. Employees who have quit or been discharged for cause since the designated payroll period and who have not been rehired or reinstated prior to the date of this election are *not* eligible to vote.

SPECIAL ASSISTANCE: Any employee or other participant in this election who has a handicap or needs special assistance such as a sign language interpreter to participate in this election should notify an NLRB Office as soon as possible and request the necessary assistance.

PROCESS OF VOTING: Upon arrival at the voting place, voters should proceed to the Board agent and identify themselves by stating their name. The Board agent will hand a ballot to each eligible voter. Voters will enter the voting booth and mark their ballot in secret. **DO NOT SIGN YOUR BALLOT.** Fold the ballot before leaving the voting booth, then personally deposit it in a ballot box under the supervision of the Board agent and leave the polling area.

CHALLENGE OF VOTERS: If your eligibility to vote is challenged, you will be allowed to vote a challenged ballot. Although you may believe you are eligible to vote, the polling area is not the place to resolve the issue. Give the Board agent your name and any other information you are asked to provide. After you receive a ballot, go to the voting booth, mark your ballot and fold it so as to keep the mark secret. **DO NOT SIGN YOUR BALLOT.** Return to the Board agent who will ask you to place your ballot in a challenge envelope, seal the envelope, place it in the ballot box, and leave the polling area. Your eligibility will be resolved later, if necessary.

AUTHORIZED OBSERVERS: Each party may designate an equal number of observers, this number to be determined by the NLRB. These observers (a) act as checkers at the voting place and at the counting of ballots; (b) assist in identifying voters; (c) challenge voters and ballots; and (d) otherwise assist the NLRB.



United States of America
National Labor Relations Board
NOTICE OF ELECTION



VOTING UNIT

EMPLOYEES ELIGIBLE TO VOTE:

Those eligible to vote are: All full-time and regular part-time Buyers I, II, III and Lead Buyer employed by the Employer at its facility near Burlington, Kansas, who were employed by the Employer during the payroll period ending January 29, 2016.

EMPLOYEES NOT ELIGIBLE TO VOTE:

Those not eligible to vote are: All office clerical employees, professional employees, managerial employees, guards and supervisors as defined by the Act, and all other employees

DATE, TIME AND PLACE OF ELECTION

Wednesday, February 24, 2016	9:00 a.m. to 10:00 a.m.	William Allen White Skills Center Room 149 Employer's facility 1550 Oxen Lane, Burlington, KS
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	<p>UNITED STATES OF AMERICA National Labor Relations Board 14-RC-168543</p> <p>OFFICIAL SECRET BALLOT</p> <p>For certain employees of WOLF CREEK NUCLEAR OPERATING CORPORATION</p>	
<p>Do you wish to be represented for purposes of collective bargaining by INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 225?</p>		
<p>MARK AN "X" IN THE SQUARE OF YOUR CHOICE</p>		
<p>YES</p> <div style="border: 1px solid black; width: 40px; height: 40px; margin: 0 auto;"></div>	<p>NO</p> <div style="border: 1px solid black; width: 40px; height: 40px; margin: 0 auto;"></div>	
<p>DO NOT SIGN THIS BALLOT. Fold and drop in the ballot box. If you spoil this ballot, return it to the Board Agent for a new one.</p> <p>The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.</p>		

WARNING: This is the only official notice of this election and must not be defaced by anyone. Any markings that you may see on any sample ballot or anywhere on this notice have been made by someone other than the National Labor Relations Board, and have not been put there by the National Labor Relations Board. The National Labor Relations Board is an agency of the United States Government, and does not endorse any choice in the election.



United States of America
National Labor Relations Board
NOTICE OF ELECTION



RIGHTS OF EMPLOYEES - FEDERAL LAW GIVES YOU THE RIGHT TO:

- **Form, join, or assist a union**
- **Choose representatives to bargain with your employer on your behalf**
- **Act together with other employees for your benefit and protection**
- **Choose not to engage in any of these protected activities**
- **In a State where such agreements are permitted, the Union and Employer may enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the Union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the Union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustment).**

It is the responsibility of the National Labor Relations Board to protect employees in the exercise of these rights.

The Board wants all eligible voters to be fully informed about their rights under Federal law and wants both Employers and Unions to know what is expected of them when it holds an election.

If agents of either Unions or Employers interfere with your right to a free, fair, and honest election the election can be set aside by the Board. When appropriate, the Board provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with the rights of employees and may result in setting aside of the election:

- **Threatening loss of jobs or benefits by an Employer or a Union**
- **Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises**
- **An Employer firing employees to discourage or encourage union activity or a Union causing them to be fired to encourage union activity**
- **Making campaign speeches to assembled groups of employees on company time where attendance is mandatory, within the 24-hour period before the mail ballots are dispatched**
- **Incitement by either an Employer or a Union of racial or religious prejudice by inflammatory appeals**
- **Threatening physical force or violence to employees by a Union or an Employer to influence their votes**

The National Labor Relations Board protects your right to a free choice.

Improper conduct will not be permitted. All parties are expected to cooperate fully with this Agency in maintaining basic principles of a fair election as required by law.

Anyone with a question about the election may contact the NLRB Office at (913)967-3000 or visit the NLRB website www.nlrb.gov for assistance.

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

**WOLF CREEK NUCLEAR OPERATING
CORPORATION**

Employer,

and

Case No. 14-RC-168543

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 225**

Petitioner.

**PETITIONER'S STATEMENT IN OPPOSITION TO EMPLOYER'S
REQUEST FOR REVIEW**

The International Brotherhood of Electrical Workers, Local 225, (hereinafter "Petitioner" or "IBEW 225"), by its undersigned counsel, submits this Statement in Opposition to Employer's Request for Review of the Decision and Direction of Election by the Regional Director, dated February 16, 2016. There are no compelling reasons for the National Labor Relations Board (hereinafter the "Board") to grant review of the Regional Directors Decision and Direction of Election ("D&DE"). For the reasons stated herein, the Petitioner respectfully requests the Board deny the Employer's Request for Review.

I. Introduction

On January 28, 2016, IBEW 225 filed a petition with Region 14, Sub-Region 17, of the Board under Section 9(c) of the National Labor Relations Act (hereinafter "Act") seeking to represent the following unit of employees:

All full-time and part time Buyers I, II, III and Lead Buyer employed by the Employer at its facility near Burlington, Kansas to be included in a separate unit, EXCLUDING all office clerical employees, all other professional employees, all managerial employees, all guards and supervisors as defined by the Act, and all other employees.

A hearing was held on February 5, 2016, to determine whether the job classifications of Buyer I, Buyer II, Buyer III and Lead Buyer (collectively the "Buyers") were managerial employees

within the meaning of the Act. The Employer opposed the Petition on the grounds that on May 4, 2000, the Acting Regional Director of then Region 17 found Buyers to be managerial employees in a “Decision, Order and Clarification of Bargaining Unit” issued in Case 17-UC-210 (“*2000 Decision*”). The Petitioner maintained that there have been substantial changes in the duties and job assignments of the Buyers since 2000 and, as such, the Buyers are not managerial employees and the Petitioner should be allowed to represent them in a separate unit.¹

On February 16, 2016, the Regional Director issued a Decision and Direction of Election finding that the Employer’s reliance on the doctrine of *Res Judicata* was inapplicable to this case due to substantial changes to the Buyers’ job duties rendering them non-managerial employees within the meaning of the Act. This decision was based on the factual record made at the February 5, 2016, hearing and well supported by the established facts and governing Board case law. He further ordered an election for the Buyers to take place on February 24, 2016, at the Employer’s facility. The election was held and, on a 3-1 vote, the Petitioner was selected as the representative for the Buyers.

On March 1, 2016, the Employer filed its Request for Review of Regional Director’s Decision and Order of February 16, 2016 (“Employer’s Request”). The Employer’s Request fails to meet its burden of establishing compelling reasons for review of the Regional Directors decision. While the Employer may desire a different outcome, its request does not establish a substantial

¹ At the February 5, 2016 hearing, the Petitioner agreed to present its case-in-chief first despite the fact that procedurally the Petitioner maintained that, while it must show there have been substantial changes to the Buyers working conditions, the Employer had the burden to prove that the Buyers are still managerial employees under the Act. Well established Board precedent holds that the party seeking to exclude an individual as managerial bears the burden of proof. *LeMoyné-Owen College*, 345 NLRB 1123, 1128 (2005); *Waste Management de Puerto Rico*, 339 NLRB 262, 279 (2003).

While the Employer attempts to argue that Hearing Officer Coffman stated the burden was solely on the Petitioner, such a statement was never made and would fly in the face of established Board precedent. Hearing Officer Coffman stated that it was incumbent on both parties to establish a record that shows whether or not substantial changes had occurred that created doubt as to their managerial status as determined in the *2000 Decision*.

question of law or policy due to a departure from officially reported Board precedent nor does it establish a clearly erroneous decision on substantial factual issues that prejudicially affect the rights of the Employer. Additionally, the Employer's arguments are logically flawed and based on evidence² that is highly uncredible, unreliable that was subject to rigorous objections by the Petitioner. The fact that such evidence was not given any weight by the Regional Director does not establish any compelling reason for review. For those reasons, none of the assertions made by the Employer warrant review by the Board.

II. Standard for Review

29 C.F.R. § 102.67(c) allows for parties to file a request for review of regional director actions at "any time following the action until 14 days after a final disposition of the proceeding by the regional director." The Board only grants requests for review where "compelling reasons exist therefor." § 102.67(d). One or more of the following grounds must exist for review to be granted: (1) that a substantial question of law or policy is raised because of (i) the absence of; or (ii) a departure from, officially reported Board precedent; (2) that the 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; (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error; or (4) that there are compelling reasons for reconsideration of an important Board rule or policy." *Id.*

The Employer asserts that the Regional Director's decision both raises substantial questions of law or policy because of a departure from officially reported Board precedent and that the

² At the hearing, the Employer sought to introduce a pdf of a screenshot taken on February 3, 2016 purporting to show a stock item being created in EMPAC in 1998, two years prior to the *2000 Decision*. However, the Employer was unable to establish that this screenshot conclusively meant that EMPAC was being used then and that the stock item hadn't been created in 1998 in a different computer program and then later ported in to EMPAC. Additionally, it was never established that the Buyers were using EMPAC prior to the *2000 Decision*. Petitioner objected multiple times to this evidence as it was substantially more prejudicial than probative.

Regional Director made decisions on substantial factual issues that are clearly erroneous on the record and such error prejudicially affects the rights of the Employer. First, it must be noted that the Employer attempts to rely on officially reported Board precedent that is inapplicable to this case. Second, where the cases cited by the Employer do apply, the decision of the Regional Director does not depart from officially reported Board precedent in a way that raises a substantial question of law or policy. The Regional Director applied the governing Board case law, including *Concept & Designs, Inc.*, to the facts of the underlying case and reached a just and proper conclusion. It is not enough to simply disagree with the outcome of the analysis to meet the standard for review. There is little question that the Employer disagrees with the results, but it has failed to make a compelling argument that establishes a substantial departure from officially reported Board precedent.

The Employer has also failed to establish that any decisions on substantial factual issues are clearly erroneous on the record and such error prejudicially affects the rights of the Employer. The “clearly erroneous” standard is significantly deferential and requires a “definite and firm conviction that a mistake has been committed.” *Easley v. Cromartie*, 532 U.S. 234, 242 (2001). It is not enough for the Employer to disagree with the finding. If the Regional Director’s account of the evidence is plausible in light of the entire record, the Board should not grant review even if it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.

That burden has not been met here by the Employer. The Regional Director’s decision is based on, and supported by, the factual record established at the February 5, 2016, hearing and there were no objections made by the Employer as to the conduct of the hearing or any ruling made in connection with the proceedings indicating prejudicial error. The Employer argues that the Regional Director’s decision to ignore “dispositive” evidence that EMPAC was in operation prior to the *2000 Decision* does not establish clear error. The Employer’s own witness testified that most of the key

aspects of EMPAC that substantially changed the Buyers' jobs were written into EMPAC's code well after it was initially installed at Wolf Creek. Additionally, the Employer's evidence that supposedly establishes when EMPAC began operation at Wolf Creek is highly unreliable. Therefore, there are no compelling reasons for the Board to grant the Employer's Request for Review.

III. Relevant Facts

In the *2000 Decision*, issued on May 4, 2000, the Acting Regional Director of then Region 17 found the Buyers to be managerial employees under the Act and removed them from the existing bargaining unit. No request for review was made by the Union³ at the time in regards to the Buyers determination. (2/16/2016, D&DE, pg. 1). The Regional Director, in his decision in the instant case noted, that "the *2000 Decision* was issued almost 16 years ago, and it is incumbent on the Regional Director to create a record documenting how circumstances have changed with regard to Buyers and their duties and responsibilities." (2/16/2016, D&DE, pg. 3). The Regional Director also noted that the transcript from the 2000 proceedings was not available and the *2000 Decision* does not contain a detailed description of the Buyers' job duties and **did not address those duties in relation to computer software used by the petitioned-for employees.** (*Id.*)

At the hearing, the Petitioner spent a great deal of time introducing specific detailed evidence detailing how the EMPAC computer system impacts the employee status of the Buyers. (*Id.*) The facts established at the hearing included:

- Purchases are initiated when the Purchasing Department receives a requisition, which are created through the Employer's EMPAC computer system by the requesting department. (2/16/2016, D&DE, pg. 4).

³ The Employer points out in its Request for Review that IBEW 304 is now known as IBEW 225. For purposes of clarity, this is incorrect. IBEW 304 continues to be known as IBEW 304 and represents more than 2,000 members across the state of Kansas. IBEW 225 was established by the employees at Wolf Creek in 2008 and took over the jurisdiction maintained by IBEW 304. IBEW 225 represents approximately 400 employees at the Employer's facility.

- The requisition lists the items that are being requested; how many of the items are needed; the commodity code; whether the item is engineered or safety-related; the item's price; and whether the item has been bought before and, if so, the price the Employer paid in the past. The Buyers are not involved in the initial requisition process. (*Id.*)
- Not all employees are allowed to submit a requisition. The Purchasing Department trains employees on how to submit requisitions, and David Sullivan (Manager of Purchasing and Supply Chain Services) approves individuals so they can be entered into EMPAC and allowed to submit requisitions. (*Id.*)
- Requisitions must be authorized by a supervisor or manager in the requesting department prior to submission through EMPAC. The Buyers are not involved in the requisition authorization process. (*Id.*)
- The level of purchasing authority that a Buyer has correlates with the purchasing authority that the signatory requestor has. For example, if a requisition has \$50,000 in purchasing authority, the Buyer then has up to \$50,000 to use to purchase the requested item. (*Id.*)
- Once a requisition is received by the Purchasing Department, Everett Weems (Supervisor of Purchasing and Contracts) assigns each requisition to a Buyer depending on the type of items being requested. (*Id.*)
- After being assigned the requisition, the Buyer first determines whether the procedure requires the item be competitively bid. Where the value of goods and services is expected to exceed \$50,000, the Employer's written policy requires the Buyers to issue a competitive bid for goods/services. In practice, the Buyers also competitively bid items that cost well under \$50,000 on a regular basis. (2/16/2016, D&DE, pg. 5).
- A new competitive bidding procedure was established on or about January 21, 2016. Under the new procedure, the \$50,000 limit over which items must be competitively bid increased from \$5,000 to \$50,000. The Buyers were not involved in the decision to raise the minimum competitive bidding amount. (*Id.*, fn. 2).
- According to the Employer's procedures, to begin the competitive bidding process, "the Buyer determines the suppliers from whom to solicit bids based on commercial, technical and/or quality considerations." In practice, the Buyer first compiles a list of potential suppliers from which to seek a bid using EMPAC. EMPAC provides the Original Equipment Manufacturer ("OEM") and the price of any previous orders. (*Id.*)
- To select suppliers, the Buyers go to the item's OEM or other Employer-authorized distributors. The Buyer also may find suppliers using the internet (e.g., Google searches). For safety items, Buyers are required to use suppliers on a specific list. Sometimes, there is only a single supplier for a certain product, so there are no other companies from which to seek bids. (*Id.*)

- Once the Buyer has compiled a list of potential suppliers, the Buyer uses EMPAC to generate a Request for Quotation (“RFQ”) to send to those suppliers. EMPAC allows the Buyer to tailor the RFQ to match the requisition by using established request clauses and information. For example, if the requisition states delivery must be expedited, the Buyer will use EMPAC to include a clause with this request in the RFQ. The Buyer determines the bid due date, which is set based on the requested dates in the original requisition. (D&DE, pg. 4-5).
- Sometimes suppliers will request an exception to the RFQ. If the product is safety-related or engineered, the Buyer sends the exception to the Procurement Engineer who determines whether the exception is acceptable. If the product is non-safety related, Buyers will typically go back to the requisitioner for input on the exception. (D&DE, pg. 6).
- Upon receiving the bids from suppliers, the Buyer will enter the bids into EMPAC and then EMPAC performs a bid analysis. Typically, the Buyer will select the lowest bidder. If a Buyer does not make the purchase with the lowest bidder, the Buyer is required to enter into EMPAC the reason why the supplier was chosen. (*Id.*).
- The Employer’s witness, Betty Sayler, testified in regards to how EMPAC automatically calculates the low bidder. “As a general rule, I’ll enter them into our EMPAC database. We’ve got – on the request for quotation, there is an area for reply per supplier. You put all your data in and then you hit bid analysis. Automatically, it’s going to calculate low bidder, it’s going to give me FOB terms and it’s going to give me payment terms. (Tr. 184: 20-25).
- When deciding to select a more expensive bidder, the Buyer gives consideration to when the Employer needs the item, the cost of freight and the type of deliver (e.g., whether there are safety concerns). When determining to whom the bid will be awarded the Buyers rely on their background, experience, training, certifications and knowledge. Buyers also discuss the bids with their peers and the suppliers to see how these types of bids were handled in the past. (*Id.*).
- Once a supplier is selected, the Buyer drafts a Purchase Order in EMPAC. EMPAC allows the Buyer to select different clauses regarding terms and conditions to use in the Purchasing Order and will then issue the Purchasing Order. EMPAC has a mechanism to notify a Buyer if the forgot to include terms and conditions in the Purchasing Order. (*Id.*).
- If bids come back and are more than \$1,000 per line item than what was on the original requisition, the Buyer will go back to the requisitioner for funding approval before issuing the Purchase Order. If a bid comes back and is still above the original requisition price, but less than \$1,000 per line item, the Employer’s procedure provides that a Buyer can make the purchase. (D&DE, pg. 6-7).

- EMPAC will specifically ask the Buyers if they received funding approval before the system creates the Purchasing Order. Once the Purchasing Order is issued, the Buyer has committed Employer funds for the purchase of requisition funds. (D&DE, pg. 7). When EMPAC was originally installed at the Employer's facility, it did not include this notification. It was added after the fact by management and the Buyers were not involved in that decision. (*Betty Saylor*, Tr. 195: 3-11).
- On cross-examination, Ms. Saylor confirmed that once the requisition gets to the Buyers, it has already been through the approval process and it is locked in. The Buyer can't make any changes without approval from someone else. (Tr. 196: 19-25).

The Buyers also testified in specific detail as to how their job duties changed from pre-2000 *Decision* to today with EMPAC and how the nuclear industry is much more restrictive when it comes to purchasing:

- When asked what has changed in how Ms. Somerhalder does her work as a Buyer with the addition of EMPAC, Ms. Somerhalder stated that there are "more checks and balances with the EMPAC system. There's --- again, if we're typing a PO, there's flags that will pop up, a pop-up barrier that will say -- you know, if it exceeds the funded amount on the requisite, the amount that's funded on the requisition, it will pop up and remind you and say, hey, check your -- or in essence, check your procedure for -- do you need to go back for an email for approval of additional funds or do you need a CASF form?" (Tr. 145: 8-16).
- Additionally, Ms. Somerhalder testified that "there's audit trails of everything." When asked if these audit trails existed in 1996, she testified that they did not. She stated that "after the Sarbanes-Oxley Act, our owner companies started auditing us. So they would ask for POs and the request for quote package, which everything's filed in curator now for perpetuity. (Tr. 145: 16-25).
- Mr. Sean Nelson testified that, as an individual who worked as a Buyer in both the nuclear and non-nuclear industry that "nuclear is completely different, much more restrictive. When I was doing refinery projects, I would write the descriptions and could make changes and all that and it wasn't a big deal, but we weren't dealing with a nuclear power plant. (Tr. 167: 18-22).
- On direct, Employer's witness Betty Saylor was asked about what functional difference EMPAC brought to her job as a Buyer. Ms. Saylor testified that "EMPAC just gave us automation, it gives us more tools, it's a difference of day [and] night actually." (Tr. 186: 10-12); 194: 5-13). This confirmed what the Buyers stated in their testimony. (*Tracy Beard*, Tr. 88: 20-25; 89: 1-6 ("there is just really no comparison."); *Sandra Somerhalder*, Tr. 140: 19-25 (in comparing MAPPER to EMPAC, it was a very "manual process. Everything had to be entered manually. It did not have the sophistication as compared to EMPAC. It did not have the functionalities.")).

- The Employer’s witness, Betty Saylor, testified in regards to how EMPAC automatically calculates the low bidder. “As a general rule, I’ll enter them into our EMPAC database. We’ve got – on the request for quotation, there is an area for reply per supplier. You put all your data in and then you hit bid analysis. Automatically, it’s going to calculate low bidder, it’s going to give me FOB terms and it’s going to give me payment terms. (Tr. 184: 20-25). Ms. Somerhalder confirmed in her testimony that MAPPER did not have this type of functionality. (Tr. 140: 19-25).

IV. Argument and Authorities

A. Both Parties Had a Burden in this Case. The Petitioner Welcomed, and Met, Theirs. The Employer Ignored, and Thus Failed to Meet, Theirs.

The Employer raises the Regional Director’s application of the burden in this case as a clear error requiring the Board to grant review of this case. That arguments, however, ignores what occurred at the February 5th hearing and well-established Board precedent. The Petitioner was asked to present its evidence first as it had the burden to establish substantial changes to the Buyers working conditions causing them to no longer be managerial within the meaning of the Act. However, this did not relieve the Employer of its duty to show that the Buyers were still managerial employees. It is well-settled that the party seeking to exclude an individual as managerial bears the burden of proof. *LeMoyné-Owen College*, 345 NLRB 1123, 1128 (2005); *Waste Management de Puerto Rico*, 339 NLRB 262, 279 (2003).

The Petitioner agreed to present its case-in-chief first and spent nearly five hours, of the seven hour hearing, presenting specific and detailed evidence on the record of the Buyers job duties and, specifically, how EMPAC impacted and changed their duties, limited their discretion and authority to go beyond the Employer’s established procedures. The Petitioner also introduced evidence of changes to the procedures governing the Buyers and the fact that the Buyers were not consulted⁴ in the changes that were made. The Petitioner also confirmed the same evidence through

⁴ On January 21, 2016, one week prior to the petition being filed in this case, the Employer changed the amount of funds that triggered whether or not an item had to be competitively bid by the Buyers. This was raised from \$5,000.00 to \$50,000.00. The record establishes that the Buyers were not consulted by the Employer before making this change.

the Employer's witnesses. The Employer focused its entire case on the application of the *2000 Decision* and did not attempt to show that the Buyers were still managerial employees despite the changes to the Buyers working conditions.

The record establishes that the Petitioner embraced its responsibility to establish the changes involved in the Buyers jobs. The record also establishes that the Employer did not embrace its burden. The Employer's argument that the Regional Director improperly shifted the burden to the Employer is incorrect. The Employer always had a burden. That burden essentially kicked in once the Petitioner established the substantial changes reflected in the record. The Employer rolled the dice in focusing solely on the Petitioner's burden and ignoring its own. That choice does not constitute clear error by the Regional Director. It reflects the decision, whether strategic or not, of the Employer. That is not a compelling reason for review by the Board.

B. The Regional Director Was Correct in Finding the Doctrine of *Res Judicata* Does Not Apply to the Current Case.

The Employer relies heavily on § 102.67(g) as a basis for its argument that the *2000 Decision* precludes the determination made by the Regional Director in the instant case. However, that reliance is misplaced and is logically flawed when compared to established Board case law, including cases cited by the Employer in its own Request for Review. As the Employer points out, "it is well-settled that the petitioner seeking to relitigate the certification of a unit bears the burden of establishing 'a material change in circumstances since the prior case was decided.'" (Employer's Request, pg. 13 (citation omitted)). The Petitioner agrees that it is well-settled that representation cases and unit clarification cases, as proceedings under 9(c) of the Act, allow for relitigation where substantial changes to the job duties exist. *See e.g., Goddard Riverside Community Center*, 351 NLRB 1234 (2007); *Kaiser Foundation Hospitals*, 337 NLRB 1061 (2002); *Rock-Tenn Co.*, 274 NLRB 772 (1985).

Additionally, § 102.67(g) states that “[f]ailure to request review shall preclude such parties from relitigating, **in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding.**” (Emphasis added). The Board could have chosen to establish a blanket bar to relitigation of any issues previously decided by a regional director or by the Board. However, it specifically chose to only bar relitigation in cases where an unfair labor practice charge rests on the propriety of determinations made in an earlier related representation case. Logically speaking, this prevents an Employer who loses in a representational hearing from intentionally committing an unfair labor practice to relitigate the issues just determined in the representation case.

This logic is not just the opinion of the Petitioner. It is the opinion of the United States Court of Appeals for the District of Columbia who analyzed the provisions of § 102.67(g) (then § 102.67(f)), and stated that “in our opinion, the Board’s rule against relitigation ‘in a subsequent unfair labor practice proceeding’ does not give an employer sufficient notice that his failure to pursue all of his remedies in the representation proceeding means he will be disabled, regardless of the context of the subsequent proceedings, from challenging each and every issue ‘which was, or could have been, raised in the representation proceeding.’” *Amalgamated Clothing Workers of America, AFL-CIO v. N.L.R.B.*, 365 F.2d 898, 904-05 (1966). The Court then went on to find that a “subsequent unfair labor practice proceeding” meant that the unfair labor practice charge was required to be related to the representational case, i.e., a refusal to bargain with a union certified after an election. *Id.* Unfair labor practices involving the interference with rights of organizations are not sufficiently related to foreclose presentation to the Board of the underlying issue. *Id.* Thus, the relitigation bar in § 102.67(g) is extremely narrow.

All of the cases cited by the Employer in support of its position that *res judicata* “mandates” dismissal of the Petitioner’s petition call within this narrow application of § 102.67(g) which does

not apply to the instant case. This is not an unfair labor practice proceeding regarding a refusal to bargain with the Petitioner after the certification of election results. This is a request for review of a decision and direction of election finding that a substantial change in job duties has occurred and created enough doubt as to the managerial status of the Buyers to warrant reconsideration. That reconsideration resulted in a finding that the Buyers are not managerial employees under the Act. In *Serve-U-Stores, Inc.*, a case cited by the Employer, the Board cited *Amalgamated Clothing Workers* noting that:

the court also held that **the findings of the Regional Director may be accorded ‘persuasive relevance**, a kind of administrative comity’ aiding the Administrative Law Judge and the Board in reaching a just decision, **subject, however, to the power of the reconsideration** both on the record made and in light of any additional evidence that the Administrative Law Judge finds material to a proper resolution of the issue.

234 NLRB 1143, 1144 (1978) (Emphasis added).

It is also important to note that the Employer relies on § 102.67(g), which establishes that a regional director’s decision that goes unreviewed is a final decision, to assert its *res judicata* claim. However, that misunderstands the doctrine. The fact that a decision is final does not mean it automatically has preclusive effect on later decisions. While a decision of the regional director is final under the regulations, the finding appropriate of a proposed unit and certification of a bargaining unit representative does not constitute a final decision upon which judicial review can be taken. Only proceedings under Section 10 of the Act have been explicitly authorized by Congress to be reviewed by the appellate courts.⁵ Representation proceedings are not subject to appellate court review. Thus, a reliance on the finality element is misplaced and incorrect.

⁵ The only time that a Section 9 proceeding may be subject to review is under Section 9(d). In essence, if a decision of the Board in a Section 10 unfair labor practice proceeding rests on the propriety of a decision made by the Board in a Section 9 representation proceeding, the latter decision is subject to review by the court of appeals before which a petition to review or enforce the Board’s unfair labor practice decision is pending. Even then, the scope of review is extremely narrow.

Second, under the doctrine of *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from re-litigating issues that were or could have been raised in that action. *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). Courts will apply *res judicata* and collateral estoppel to agency adjudicatory proceedings “[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have and an adequate opportunity to litigate. . . .” *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422, 86 S.Ct. 1545, 1560, 16 L.Ed.2d 642 (1966).

Not all administrative proceedings have a preclusive effect on subsequent litigation, however. *Healthcare Resources Corp. v. District 1199C, Nat. Union of Hosp. and Health Care Emp.*, 878 F.Supp. 732, 736 (E.D.Pa. 1995). Issue preclusion applies only when the administrative agency acts in a judicial capacity. *Id.* (citing *Utah Construction*, 384 U.S. at 422; *Durko v. OI-NEG TV Prods., Inc.*, 870 F.Supp. 1278, 1281 (M.D.Pa. 1994). An Agency acts in a judicial capacity when it provides for (1) representation by counsel, (2) pretrial discovery, (3) the opportunity to present memoranda of law, (4) examination and cross-examination at the hearing, (5) the opportunity to introduce exhibits, (6) the chance to object to evidence at hearing, and (7) final findings of fact and conclusions of law. *Healthcare Resources*, 878 F.Supp. at 736 (citing *Durko*, 870 F.Supp. at 1281 (citing *Reed v. AMAX Coal Co.*, 971 F.2d 1295, 1300 (7th Cir. 1992)).

Federal court decisions have held that an NLRB unfair labor practice proceeding under Section 10 of the Act have a preclusive effect as to fact and law in later actions. *See, e.g., Pygatt v. Painters’ Local No. 277, Int’l Brotherhood of Painters & Allied Trades*, 763 F.Supp. 1301, 1307 (D.N.J. 1991) (citing, *inter alia* *Consolidated Express, Inc. v. New York Shipping Ass’n, Inc.*, 602 F.2d 494, 503-06 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 902, 100 S.Ct. 3040, 65 L.Ed.2d 1131 (1980), *on remand*, 641 F.2d 90 (3d Cir. 1981); *Jaden Elec. V. International Brotherhood of Elec. Workers*, 508 F.Supp. 983, 988 (D.N.J. 1981)). It is clear that in unfair labor practice proceedings, the Board is acting in a

judicial capacity. The Board's procedures under Section 10 begin with the filing of a charge alleging that an unfair labor practice has been committed, and proceed through the issuance of a formal complaint, answer, pre-trial discovery, trial before an administrative law judge, a proposed decision and order by the administrative law judge and culminates with a decision by the Board. These are adversarial proceedings.

In contrast to unfair labor practice proceedings, representation proceedings under Section 9 of the Act are non-adversarial, investigatory determinations as to the appropriateness of a unit. There is no pretrial discovery in representational proceedings. There is no ability, absent special permission, to submit post-hearing briefs. The "purpose of a hearing conducted under Section 9(c) of the Act is to determine if a question of representation exists." § 102.64(a). The filing of a petition under 9(c) of the Act triggers an investigation of a question concerning representation of employees. § 102.60(a).

This was the conclusion in *Healthcare Resources* where the Federal District Court for the Eastern District of Pennsylvania was tasked with determining whether the decision of the Regional Director in an election proceeding finding the parties' collective-bargaining agreement was a valid agreement was preclusive of the District Court's consideration of the same issue between the same parties and based upon the same facts. 878 F.Supp. at 736. The District Court concluded that representation proceedings do "not constitute agency action in a judicial capacity, and as a result, we hold that the conclusion reached by the Regional Director does not have a preclusive effect over the instant proceedings." *Id.* The Board has long, well-established precedent finding the same. *See, e.g., Thalheimer Brothers, Inc.*, 93 NLRB 106 (1951)(stating "[t]he Board, moreover, has repeatedly held that a prior determination as to the appropriate bargaining unit does not preclude a redetermination of the unit appropriate for the employees when a later petition may be filed.)(Citations omitted).

C. The Regional Director's Determination that the EMPAC Computer System Established Substantial Changes to the Employee Status of the Buyers Was Not Clearly Erroneous

In order for review to be granted, a requesting party must show that the regional director's decision on a substantial factual issue was **clearly erroneous** on the record and such error prejudicially affects the rights of that party. § 102.67(d). This is not a minor burden placed upon the Employer in its request in this case. The "clearly erroneous" standard requires a "definite and firm conviction that a mistake has been committed." *Easley*, 532 U.S. at 242. If the regional director's account of the evidence is plausible in light of the entire record, the Board should not grant review even if it would have weighted the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

The Employer makes two arguments that it believes warrant review by the Board. However, neither argument is compelling it only establishes that the Employer's view is one of two equally plausible views based on the established record. First, the Employer insists that it conclusively proved that EMPAC was in existence at the Employer's facility prior to the *2000 Decision*. This is simply incorrect. The Employer attempted to prove that EMPAC was in operation and being used by the Buyers prior to the *2000 Decision* by inserted into the record a screen shot purporting to show that a stock item had been created in EMPAC in 1998. However, the Employer's witness could not testify as to whether or not the stock item had actually been created in EMPAC or was actually created in another computer system and later downloaded into EMPAC. At best, this screenshot established that this stock item was created at Wolf Creek in 1998. Nothing established who it was created by or that it was not created in another computer program or by someone who was not a Buyer.

The Petitioner objected to this evidence as being substantially more prejudicial than probative as the evidence was extremely unreliable without foundation to establish it was actually

created in EMPAC. The Employer has an information technology department at its facility. It could have easily brought an individual from the information technology department to lay the proper foundation and testify that EMPAC had been purchased and was being used by the Buyers in 1998. However, the Employer made the choice to, instead, attempt to back-door in extremely unreliable evidence that lacked any credibility with a witness that lacked personal knowledge to lay the proper foundation. Those reasons were placed in the record by the Petitioner's objection. The Regional Director had the discretion to decide what weight to give the evidence from the Employer. He chose to not afford it any weight. This was not clearly erroneous.

Second, the Employer grossly mischaracterizes Board case law in regards to technology and substantial changes to job duties. For example, in *John P. Scripps Newspaper Corp.*, which the Employer cites, it was established in the record that the employees in question still completed almost all of their analysis in the same manner and that even though there was new technology, it did not impact that analysis or discretion of the involved employees. 329 NLRB 854, 861 (1999). That is far different than what the record establishes here. The Employer's own witness testified that EMPAC automatically calculates the low bidder by doing a bid analysis for the Buyers. She stated:

As a general rule, I'll enter them into our EMPAC database. We've got – on the request for quotation, there is an area for reply per supplier. You put all of your data in and **then you hit bid analysis. Automatically, it's going to calculate low bidder, it's going to give me FOB terms and it's going to give me payment terms.**

(Tr. 184: 20-25) (Emphasis added). This confirmed testimony from the Petitioner's witnesses who stated that the previous MAPPER program, which was not discussed or considered in the *2000 Decision*, did not have this type of functionality. (*Somerhalder*, Tr. 140: 19-25). The Buyers were required to do a manual bid analysis to determine bids prior to EMPAC.

Additionally, EMPAC now provides all previous transactions with suppliers with each requisition. Something that was not previously available. The Employer had the procedures governing the Buyers written into EMPAC as code to make sure the Buyers did not go beyond the

procedures. When it was discovered that they did go around or outside of the procedures, code was written to prevent that. According to the Employer's witness:

[t]hose blocks were put in based on condition reports written because of errors made by the buyers. In other words, we **bypass getting the correct funding approvals before issues a PO and it was discovered after the fact.** CRs were written, documented and then IAS was able to write code in to help us with that. Same thing with omission of many quality requirements. Those were two big flags I know that we had built into it so we didn't make that same mistake again.

(Tr. 195: 3-11) (Emphasis added). These "flags" were written into EMPAC after it was purchased and implemented at Wolf Creek and are based upon procedures which the Buyers are required to follow. These changes were much more than simply making the Buyer's job more efficient. It limited the discretion the Buyers once had and was installed to prevent them from going outside of the established procedures.

EMPAC also established audit trails for all of the Buyers work which is kept and maintained in a program called Curator. Ms. Somerhalder testified for the Petitioner that prior to the *2000 Decision*, these audit trails did not exist. She stated that "after Sarbanes Oxley Act, our owner companies started auditing us. So they would ask for POs and the request for quote packages, which everything's filed in curator now for perpetuity." (Tr. 145: 16-25). Tracy Beard testified in regards to a situation where her purchase order was recently off by a nickel and she received a phone call asking her to explain the difference. (Tr. 79: 22-25; 80: 1-7). There is little question that the Buyer's work is reviewed, scrutinized, and only exercised within established procedures.

Regardless of whether or not the Employer agrees with the outcome, it is clear that the Regional Director's factual determinations are plausible based on the entire record and was a reasonable outcome based on the facts in the record. In the nearly sixteen years after the *2000 Decision*, EMPAC was established, updated and re-tooled in ways that created substantial changes to the Buyers work at the Employer's facility. These changes were more than simply creating efficiencies in the Buyers work. The changes removed discretion and were intentionally installed to

prevent the Buyers from going beyond what the procedures allowed. This is well supported by the record.

D. The Regional Director's Determination that the Buyers are Not Managerial Employees Under the Act was not Clearly Erroneous and Does Not Depart from Officially Reported Board Precedent in a Way that Creates a Substantial Question of Law or Policy

The Regional Director reviewed and applied multiple different cases which stand as applicable and on point officially reported Board precedent. The Employer seems to believe that *Concept & Designs* is the only applicable case regarding Buyers under Board case law. That is simply not the case. In fact, some of the Board case law relied upon by the Regional Director was cited in *Concept & Designs* and instructive on determining when buyers or employees with purchasing authority may or may not be managerial employees. *Concept & Designs* stands for the concept that employees who make routine purchases for an employer, within and not independent of Employer procedures, are not managerial employees while those who commit substantial amounts of an employer's credit *without review or approval* are managerial employees. 318 NLRB at 957. However, where review or pre-approval is required, the commitment of substantial amounts of an employer's credit, alone, does not establish managerial status.

However, *Lockheed-California Co.*, establishes that although a buyer can commit company's credit up to \$50,000 and also negotiates prices with suppliers, does not have discretion independent of established policy since higher authority must review and approve much of their recommendations. 217 NLRB 573 (1975). *Solartec, Inc. & Sekeby Indus.* found employees to be not managerial even though they had authority to recommend purchase and use equipment and negotiate with supplier. 352 NLRB 331, 336 (2008). In *Eastern Camera and Photo Corp.*, the Board found that:

Managerial status is not necessarily conferred upon employees because they possess some authority to determine, within established limits, prices and customer discounts. In fact, the determination of an employee's managerial status depends upon the extent of his discretion,

although even the authority to exercise consideration discretion does not render an employee managerial where his decisions must conform to the employer's established policy.

140 NLRB 569 (1962) (cited and relied upon in *Concept & Designs*, 318 NLRB at 957).

The Employer also cited *Swift & Co.* as a basis for review of the Regional Director's decision. 115 NLRB 752 (1956) While it is true that the Board has found that the ability of an employee to commit an employer's credit in amounts which are substantial is strong evidence of managerial status, that fact alone is not dispositive. *Swift* also required the commitment of the substantial amount of credit to be unreviewed, not pre-approved, and subject to the discretion of the employee committing the credit. 115 NLRB at 753.

While the Employer argues that the fact that the Buyers collectively committed \$21 Million of the Employer's credit last year means they are conclusively managerial employees, the fact is that practically none of that \$21 Million was committed without prior approval or review by the Employer. This was expressly noted and discussed by the Regional Director. (D&DE, pg. 11). The Petitioner put on substantial evidence through its witnesses, and confirmed the same with the Employer's witnesses, that if the Buyer solicits bids for an item in a requisition which exceeds to authorized amount in the requisition, unless it is less than \$1,000, the Buyer must go back and get approval to make the purchase. The Regional Director's decision in regards to the commitment of funds is plausible and not clear error. It also does not depart from officially reported Board precedent in a way that raises a substantial question of law or policy.

The Employer asserts in its request for review that the Buyers exercise significant discretion because they make the ultimate determination to whom to award the bid. However, as the Regional Director correctly pointed out, the Board has established officially reported precedent holding that "technical expertise in administrative functions involving the exercise of judgment an discretion does not confer managerial status upon the performer." *Case Corp.*, 304 NLRB 939, 948 (1991); *Connecticut Human Society*, 358 NLRB No. 31, slip op. at 23 (2012). There is ample evidence in the

record by all three of the Petitioner's witnesses establishing that the Buyers rely on their technical expertise acquired through education and training to perform their work. They have ISM certifications that require undergraduate degrees to obtain and require continuing education to maintain. The certifications are obtained through courses and exams teaching the science behind procurement of goods and services by employees such as the Buyers. Thus, they are not exercising discretion that confers managerial status. They are exercising their technical skills.

Finally, the Employer asserts that the Regional Director erred in determining that the Buyers are aligned with management. However, the Employer made no attempt to establish any facts showing that the managerial interests outlined in *Concept & Designs* were present here. In fact, the opposite was established. While the Employer sought to argue that the increase from \$5,000 to \$50,000 for the amount at which an item must be competitively bid further indicated managerial status, the Buyers were not included in this decision. Additionally, the Buyers were not consulted in other changes to their job duties that were established in the record. Thus, they do not formulate or effectuate any employer policies or represent management's interest in a way that would align them more with management than their fellow employees.

The Employer claims in its request for review that the Board has consistently found buyers and employees with purchasing authority to be managerial employees. However, this is simply not the case and ignored roughly half of the body of Board case law regarding such employees that currently exist and apply to this case. The Regional Director applied the governing case law in regards to the Buyers' classification and made a decision based on an application of the established facts to the governing case law. The Employer may not like the outcome of the case. But that does not go far enough to meet its burden of establishing clear error or departure from established and officially reported Board case law in a way that raises a substantial question of law or policy. Due to the Employer's failure, there are no compelling reasons to grant the Employer's request for review.

V. Conclusion

For the reasons stated herein, the Petitioner respectfully requests the Board deny the Employer's Request for Review as no compelling reason for granting such review exists under 29 C.F.R. § 102.67(d).

Respectfully Submitted

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CERTIFICATE OF SERVICE

The foregoing, Petitioner's Response in Opposition to Employer's Request for Review, filed by IBEW 225 in Case No. 14-RC-168543 was served upon the Employer and Region 14 by electronic mail on March 8, 2016, to the following:

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I. INTRODUCTION

Pursuant to the National Labor Relations Board’s April 7, 2017, Decision on Review and Order granting in part Wolf Creek Nuclear Operating Corporation’s (“Wolf Creek” or “Employer”) Request for Review, the Regional Director reopened the record in the instant case. The April 25, 2017, hearing provided the International Brotherhood of Electrical Workers, Local 225 (“Petitioner” or “Union”) a second opportunity to present evidence demonstrating material change to the Buyers’ job duties. Petitioner presented no evidence to support any material change to the Buyers’ job duties. Petitioner convoluted the record with evidence of minor policy changes and software improvements not rising to the level of material change. These minor changes, in no form, demonstrate any material change to the Buyers job duties. In fact, the evidence demonstrates that between 2000 and 2016, no material change has taken place with regard to the Buyers’ job functions. Accordingly, as Petitioner failed to present even a modicum of evidence demonstrating material change to the Buyers’ job duties, the Buyers remain managerial employees, and the Petition should be dismissed.

II. BACKGROUND FACTS AND PROCEDURAL HISTORY

Wolf Creek operates a nuclear power facility located in Burlington, Kansas. There are approximately 1,100 employees employed at the facility, 400 of whom are represented by the International Brotherhood of Electrical Workers Local Union 225. At issue is the Union’s petition to represent Buyers I, II, III and Lead Buyer—the *same* issue addressed by the Region in its May 4, 2000, Decision and Order and Clarification of Bargaining Unit in Case 17-UC-210. (“2000 Decision”). In that Decision, the Acting Regional Director found the *same* Buyers to be “managerial employees,” and thereby excluded from coverage of the Act. (*Id.*).

On January 28, 2016, Petitioner filed the instant petition, petitioning to represent “All full-time and part-time Buyers I, II, III and Lead Buyer employees employed by the Employer at its facility near Burlington, Kansas to be included in a separate unit.” (Regional Director’s Decision and Order dated February 16, 2016, hereinafter “D&O”). (D&O at 1). On February 1, 2016, the Employer filed a motion to dismiss the instant petition, as barred, pursuant to Section 102.67(g) of the Board’s Rules and Regulations and under the doctrine of *res judicata*. The Regional Director denied this motion and the matter was heard before Hearing Officer Carla K. Coffman on February 5, 2016.

Significantly, at the February 5, 2016 hearing, Hearing Officer Coffman noted that because “there has been a previous determination that *these same job classifications were found to be managerial*, in Case 17-UC-210 . . . I am taking judicial notice of the Acting Regional Director’s Decision, Order and Clarification of Bargaining Unit, that issued on May 4th, 2000, in Case 17-UC-210.” (Tr. 2016 12:1-19)¹ (emphasis added). Consistent with this finding, Hearing Officer Coffman explained that although both parties were tasked with presenting a complete record for review, the Petitioner had the burden to establish a material change in the Buyers’ job duties, sufficient to disturb the Acting Regional Director’s previous findings and conclusions. (*Id.* at 19:19-20:9).

On February 16, 2016, the Regional Director issued his Decision and Order, finding *res judicata* inapplicable, and finding that the “[b]uyers are not managerial employees and are entitled to the protection of the Act” (D&O at 12-13).

On March 1, 2016, the Employer filed a Request for Review of the Regional Director’s February 16, 2016, Decision and Order. The Employer requested the Board’s review on two

¹ Reference to the February 5, 2016 hearing transcript will be identified as “Tr. 2016.” Reference to the April 25, 2017, hearing transcript will be identified as “Tr.”

separate grounds: (1) that the Regional Director erred in not applying the doctrine of res judicata, based on the prior decision in 17-UC-210; and (2) that the Regional Director clearly erred in determining that the buyers are not managerial employees.

On April 7, 2017, the three member Board issued its Decision on Review and Order granting in part and denying in part Employer's Request for Review.² The Board, affirming the Employer's argument, found the Regional Director misapplied the doctrine of *res judicata* in that he failed to give preclusive effect to the 2000 decision, and he failed to recognize the 2000 decision as final. "[A] decision such as the 2000 decision . . . one that has not been appealed and that resolves the disputed issues in a manner that is binding upon the parties—is final for preclusion purpose." *Wolf Creek Nuclear Operating Corporation*, 365 NLRB No. 55 (April 7, 2017 *1).

While the Regional Director suggested that changed circumstances may be present, he "did not articulate in sufficient detail the nature of such changes or their materiality to the question of the buyers' managerial status." (*Id.* at *2). The Board remanded the case to the Regional Director to consider "whether the record demonstrates [material] changed circumstances sufficient to allow the reconsideration of the buyers' managerial status." (*Id.* at *3). "It is of particular importance that the Regional Director examine any factual changes in context and in light of the relevant statutory question." (*Id.*).

In light of the Board's Decision, on April 18, 2017, the Region issued an Order Reopening Record and Notice of Further Hearing. A formal hearing was held on April 25, 2017, before Hearing Office Carla K. Coffman. At the conclusion of the hearing the Regional Director granted the parties the opportunity to file briefs.

² The Board granted Employer's Request for Review with regard to the Regional Director's misapplication of the doctrine of res judicata because it raises a substantial issue warranting review. Employer's remaining requests were denied without prejudice.

a. Buyer's Duties

The fundamental issue in this case is whether the buyers' duties have materially changed since the 2000 Decision. To determine whether a material change has impacted the Buyers' job, it is important to understand the Buyers' duties. At a high level, the Buyer's primary role is to procure all goods and services for the Employer, excluding nuclear fuel. (Tr. 2016 53:15-54:3; 177:11-14). The purchasing process is initiated when the Purchasing Department receives a requisition, which is generated through the Employer's EMPAC computer system. (*Id.* at 42:23-43:19; 97:12-18; 125:14-23). Upon receipt, the Purchasing and Contracts Supervisor assigns the requisition to a Buyer. (*Id.* at 94:13-96:1; 103:6-18; 179:16-180:4). The Buyer then determines whether the item should be competitively bid. (*Id.* at 105:12-23). The Buyer then compiles a list of potential suppliers for the competitive bid, and generates a Request for Quotation ("RFQ") to send to the potential suppliers. (*Id.* at 109:15-110:14; Employer Ex. 1). Upon receipt of the suppliers' bids, the Buyer conducts a comparative analysis of the bids and determines which bid most appropriately fits the Employer's needs. (*Id.* at 134:11-16; 166:8-18). Once the Buyer selects a supplier, the Buyer prepares a purchasing order indicating that the Buyer has committed the Employer's funds for the purchase of the requisitioned item. (*Id.* at 124:22-125:2; 125:5-11; 169:6-24; Employer Ex. 2). Thereafter, the Buyer is responsible to arrange for shipping and to ensure the items reach the Employer. (*Id.* at 120:9-122:9).

III. ARGUMENT

a. Petitioner Has the Burden of Proof in This Case.

"It is appropriate to place the burden on the party opposing preclusion—here, the Petitioner—to demonstrate that material changes have occurred since the prior decision." (*Id.* *3). "[R]equiring the party asserting preclusion also to show the absence of material changes is

inconsistent with preclusion cases generally.” (*Id.*; *Whole Women’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2306 (2016) (holding that the party opposing preclusion must produce evidence of new facts); *Harvey’s Resort Hotel*, 271 NLRB 306, 307 (the party opposing application of collateral estoppel must introduce “evidence that [the disputed classification’s] job has changed significantly since the earlier litigation.” (*Id.*)).

Here, because Petitioner opposed preclusion, Petitioner bears the burden of proof. Petitioner’s burden is not limited to establishing *any* change to the Buyers’ duties since the 2000 decision. Instead, Petitioner is charged with demonstrating whether those changes “are *material* to the managerial status of the Buyers.” (*Id.* *n.7) (emphasis added). Without question, the burden of establishing a material change is Petitioner’s alone.

b. Petitioner Failed to Meet its Burden.

i. Petitioner Stipulated that the Buyers Began Using EMPAC in 1998.

At the February 2016 hearing, Petitioner outlined its case in chief in that “the Buyer’s position has gone through monumental changes since the year 2000. Many of these changes are driven by advances in technology.” (Tr. 2016 13:13-15). “The switch to EMPAC [is] substantial and [has] brought out the discretion from the Buyers’ work.” (*Id.* at 18:13-14.). “EMPAC has fully automated the procurement process at the Employer’s facility.” (*Id.* at 14:22-15:1) “There were no audit trails that were contained in any of these computer system[s] to check to make sure that everything was being done correctly.” (*Id.* at 13:25-14:3). “In early 2000, Wolf Creek started trying to bring some technology into the procurement process.” (*Id.* at 14:14-15). This technology was not present in the procurement process leading up to and during the time of the 2000 Decision.” (*Id.* at 13:17-18).

In fact, at the April 25, 2017, hearing, Petitioner completely abandoned its previous argument and conceded that Petitioner’s central argument at the 2016 hearing—the implementation of EMPAC after 2000 decision—actually occurred two years prior to the 2000 decision. Petitioner stipulated that the Buyers had been using EMPAC since at least November 1998. (Tr. 250:17-21).

Petitioner’s concession completely dismantles its argument that the Buyers’ job duties underwent material changes since the 2000 Decision. Because the Buyers began using EMPAC in November 1998, Petitioner cannot argue that the implementation of EMPAC changed the Buyers’ job duties. The Buyers used EMPAC before, during, and after the 2000 decision. Accordingly, Petitioner has failed to meet its burden by establishing a material change to the Buyers’ job duties.

ii. Petitioner Presented No Evidence to Substantiate Any Material Change Since the 2000 Decision; Petitioner failed to Meet its Burden.

Petitioner has had not one, but two opportunities to present evidence of material change to the Buyers’ job duties. Instead of presenting any such evidence at the April 25, 2017 hearing, Petitioner relied on Company-wide policies that fall far short of a change. In fact, Petitioner’s exhibits indicate that “procurement functions and processes remain the same” (Petitioner Ex. 7); that policies were revised with “minor changes for clarity in responsibility section for Purchasing and Contracts” (Petitioner Ex. 9); and policies were reviewed for “2-year divisional relevancy review” and not for the purpose of making changes to the job functions. (Petitioner Ex. 10).

In his dissent, Acting Chairman Miscimarra, outlined how the Union might meet its burden. Miscimarra called upon Petitioner to establish “a new set of facts—facts which significantly differ from those detailed in the Acting Regional Director’s 2000 Decision” to prove material change to the buyers’ job duties. In fact, the 2000 Decision enumerates the Buyers’ responsibilities, of

which, nothing material has changed. Indeed, as evidenced by the testimony and exhibits in the 2016 and 2017 hearings, the Buyers' duties remain the same.

1. The Buyers procure goods and services (except fuel) for the ER. (Tr. 2016 92:20-24; 177:11-14; Tr.415:11-15; Petitioner Ex. 8 p. 19 at 6.2.2).
2. The Buyers report to the Purchasing and Contracts Supervisor. (Tr. 2016 93:7-11; 177:15-118; Tr. 424:9-12; 415:21-23; Petitioner Ex. 8 p. 19 at 5.7.2).
3. Purchases are initiated by a purchase requisition. (Tr. 2016 97:12-18; 157:11-13; 175:15-20; 177:25-178:1; Tr. 331:9-14; 338:24-339:7; 343:8-9; Petitioner Ex. 8 p. 19 at 6.0).
4. The purchase requisition is approved by a manager's signature. (Tr. 2016 102:18-23; 178:12-179:2 Tr. 416:13-15; Petitioner Ex. 8 p. 19 at 6.1.1).
5. The amount authorized for expenditure depends upon the level of management who approves the requisition. (Tr. 2016 158:4-9; 179:9-15 Tr. 416:16-20; 356:17-25; 364:9-15; 270:16-24; Petitioner Ex. 9 at 42).
6. The spending authority of the signatory requisition manager limits the amount that can be expended on any particular requisition. (Tr. 2016 98:19-100-11; 146:10-147:4; 179:9-15; Tr. 270:16-24; 356:17-25; 364:9-15; 416:16-20; Petitioner Ex. 9 at 42).
7. After a requisition has been authorized, it is sent to the purchasing department. (Tr. 2016 102:24-103:1; 179:16-19; Tr. 339:15-25; Petitioner Ex. 9 at 42).
8. The Purchasing and Contracts Supervisor assigns each requisition to a Buyer, depending on the request and the Buyer's expertise and familiarity with the commodities and suppliers. (Tr. 2016 103:6-18; 179:16-180:4; Petitioner Ex. 8 p. 18 at 5.1).
9. Once the Buyer receives the requisition, the buyer determines whether it will be competitively bid. (Tr. 2016 103:19-104:12; 105:12-110:14; 130:20-131:9; 180:5-8; Tr. 325:11-326:4).
10. Where the value of the goods or services exceeds \$5,000, the Buyer is to issue a competitive bid.³ (Tr. 2016 132:16-25; 180:9-20; Tr. 437:11-438:15).
11. A competitive bid is not required for limited source items or recently purchased items. (Tr. 2016 181:18; Tr. 437:11-438:15).
12. When a request is to be competitively bid, the buyer compiles a list of potential suppliers from whom he will seek a bid. (Tr. 2016 151:20-152:6; 166:4-18; 175:15-20; 180:24-181:3; Tr. 399:21-25; 375:18-25; Petitioner Ex. 8 p. 17 at 4.0).

³ Since the 2000 Decision, Wolf Creek, with input from the Buyers, increased the amount of the value of the goods or services requiring a competitive bid to \$50,000. (Tr. 437:11-438:15).

13. The competitive bid list may be comprised of past successful bidders, suppliers of other commodities who have informed the Buyer of their desire to competitively bid, suppliers listed in trade journals, or suppliers found on internet sources. (Tr. 2016 150:9-151:19; 166:19-23; 181:4-160).
14. For safety related items, buyers are limited to a prescribed list of suppliers. Buyers can seek to expand this list. (Tr. 2016 181:17-182:12; Tr. 413:18-414:13; 400:5-11 Petitioner Ex. 8 p. 20 at 6.3, 6.5.2; Petitioner Ex. 9 p. 21 at 5.7.2.4).
15. Buyers determine how many suppliers are placed on the competitive bid list. A minimum of three suppliers are to be included in the bid. (Tr. 2016 182:13-15).
16. Buyers issue a request for quote to potential suppliers. (Tr. 2016 175:15-20; 182:16-21; 190:21-25).
17. The request for quote identifies the requirements of the goods or services and a bid date, which the Buyer selects. (Tr. 2016 182:16-21).
18. Potential vendors may submit exceptions to the bid's requirements. (Tr. 2016 110:15-113:14; 116:13-117:23; 182:24-183:1).
19. The Buyer evaluates whether the exception is acceptable and may seek the assistance of the Employer's departments. (Tr. 2016 183:2-21; Petitioner Ex. 9 p. 44 at B.1.1-B.2).
20. The Buyer performs a commercial evaluation to determine the most beneficial bid based on price, delivery, performance schedule, payment terms, warranties, exceptions, etc. (Tr. 2016 175:15-20; 183:15-184:3; Tr. 400:16-20).
21. Cost is the most important factor in determining which vendor is awarded the bid, but cost alone is not determinative. Factors such as scheduling or the cost of freight may result in the bid being awarded to a supplier other than the lowest cost bidder. (Tr. 2016 118:18-14; 152:22; 153:4-154:12; 184:4-11; Tr. 327:23-25; 400:12-14).
22. Buyers use a bid evaluation template. (Tr. 2016 184:12-185:11; Petitioner Ex. 8 p. 17 at 4.2-4.3).
23. When the bid is not awarded to the lowest bidder, or the sole source supplier, the Buyer must document the reason for selecting that vendor. (Tr. 2016 118:25-119:5; 185:12-186:5; Tr. 328:1-9).
24. Without seeking prior approval the Buyer determines to whom the bid is awarded. (Tr. 2016 186:25-187:3; Tr. 328:10-15; 367:10-24)
25. Buyers issue purchase orders. (Tr. 2016 102:1-6; 118:15; 158:10-17; 175:15-20; 186:25-187:3; 190:21-25; Tr. 331:2-5; 336:1-3; Petitioner Ex. 8 p. 19 at 6.0).

26. Purchase Orders are not reviewed by the Purchasing and Contracts Supervisor prior to their issuance. (Tr. 2016 187:4-7; Petitioner Ex. 8 p. 19 at 6.2).
27. If the Purchasing and Contracts Supervisor reviews the purchase order and disagrees with it, he can cancel the order without the suppliers' agreement. (Tr. 2016 187:8-13).
28. With the aid of a software program, Buyers determine which carrier will be used for delivery of products. (Tr. 2016 119:6-122:8; Tr. 330:12-16).
29. Buyers input relevant information (e.g., zip code of origin, weight, number of packages, etc.) into the software program, and the program outputs all of the carriers that are able to handle the run, the contract price cost for delivery, and the number of days for transit. (Tr. 2016 187:19-188:5).
30. Buyers select the carrier from the output list. (Tr. 2016 119:24).
31. Buyers may seek competitive bids when expedited delivery service is needed. (Tr. 2016 188:6-24).
32. Buyers track the purchase and ensure delivery according to the purchase order. (Tr. 2016 189:16-190:3; Tr. 336:4-14).
33. Buyers negotiate the purchase price for goods and services. (Tr. 2016 161:13-18; Tr. 326:24-326:1; 327:9-13; Petitioner Ex. 8 p. 19 at 6.2).
34. Without prior approval or necessarily subsequent review, the Buyers initiate purchase orders committing the Employer's credit in amounts that are substantial. (Tr. 2016 102:7-17; 124:22-125:2; 169:6-17; Tr. 337:1-5; Petitioner Ex. 8 p. 19 at 6.2).
35. Although the Buyer cannot expend more on any particular requisition than the spending authority of the signatory requisition manager, the Buyer has discretion to spend any amount within that authority. (Tr. 2016 67:7; 179:9-15; Tr. 331:15-333:18; 382:15-20; 401:6-12).

Without question, the evidence demonstrates that since the 2000 decision, no material change has taken affect with regard to the Buyers' job duties.

iii. **Any Changes Made to EMPAC Since 2000 Have Not Material Changed the Functions of the Buyer's Duties; Petitioner failed to Meet its Burden.**

Wolf Creek has made changes to EMPAC since the 2000 Decision. Like any software system, EMPAC requires upgrades, updates, and patches. Such updates to the system have not

changed the manner in which Buyers perform their job duties and therefore are not material. Petitioner seeks to establish material change by proffering a number of exhibits that have no impact the Buyers' job duties.

1. **Petitioner's Exhibit 7.**

Petitioner Exhibit 7, a Wolf Creek "Document Revision Request,"⁴ allegedly demonstrates evidence of material change to the Buyers' job duties. However, Exhibit 7 only references the following minimal changes that do not even pertain to the Buyer job:

- "Delete step no longer needed, result of EMPAC 8.5 revision." (Petitioner Ex. 7 at 5.1.5.2).
- "New step added, Material Engineering has responsibility to initiate, approve, and issue EPR for both Engineered and Non-Engineered ASME material. This will ensure the procurement of ASME items will meet the Kansas Broiler Safety Act. Action item of PIR 2001-2888." (*Id.* at 5.4.2.1).
- "Deleted step, financial information for new stock items is now performed by Material Control." (*Id.* at 5.5.1.2).
- "Revised to direct Originator to initiate a non-stock requisition for services, result of EMPAC 8.5 revision." (*Id.* at 6.1.1.6).

It is unclear why Petitioner points to these four revisions to establish any change relating to the Buyers. The policy in Petitioner Exhibit 7 existed long before 2000. (Tr. 313:8-314:3). The information contained in Exhibit 7 does not apply to the buyers. (Tr. 314:9-20). In fact, Exhibit 7 specifically states that "procurement functions and processes remain the same." (Petitioner Ex. 7).

⁴ Exhibit 7 is a Wolf Creek "Document Revision Request," ("DRR") (Petitioner Ex. 7 at 1). Simply stated, a DRR is issued when a policy is revised. Pages 1-8 of the DRR outline the exact revisions to the policy. The remaining pages enumerate the entire policy.

2. Petitioner's Exhibit 8.

Similarly, Petitioner's Exhibit 8,⁵ allegedly supports the argument that Wolf Creek made material changes to the Buyers' job duties after the 2000 decision. The alleged material changes are:

- A 2004 policy requiring employees to send copies of purchase orders and supporting documentation to Document Services. (Petitioner Ex. 8 p. 6 at 6.2.8).⁶
- Two years later, in 2006, Wolf Creek updated the 2004 policy to reflect that “[a] copy of the purchase order and applicable supporting documents are filed in Curator.”⁷ (*Id.* at 9).

Changing where the Buyers save or send purchase orders does not constitute a material change to the Buyers' job duties. Prior to Curator, Buyers manually stored purchase orders in filing cabinets and sent copies to the Document Services Department. (Tr. 306:13-15; 323:1-8; 323:12-16). The goal of the Curator software system was to provide a more efficient, effective, and faster way to save documents. (Tr. 323:22-324:3). Curator made it easier to save and retrieve documents—the same documents saved and retrieved before, and after, the implementation of EMPAC and Curator. (Tr. 306:16-22; 307:4-9). Forwarding documents to Document Services versus saving documents to a computer system does not rise to the level of material change necessary to alter the Buyers' managerial status.

3. Petitioner's Exhibit 9.

Like Petitioner's other exhibits, Exhibit 9⁸ had no direct affect on the Buyers' job duties. Exhibit 9 did the following:

⁵ Petitioner Exhibit 8, the policy governing purchase orders, includes the 2004, 2006, and 2008 version of AP 24C-007 “Purchase Order.”

⁶ Document Services is an internal Wolf Creek department, charged with storing and retrieving documents. (Tr. 282:15-18). The department was in existence prior to the 2000 decision and employees continued to send items for storage to document services after the 2000 decision. (*Id.* at 282:19-283:2).

⁷ Wolf Creek began using Curator, an electronic data storage system, in 1998. (Tr. 305:17-306:10; 323:9-11).

⁸ Petitioner Exhibit 9 is a 2006 DRR for the “Requisition and Procurement Process.”

- Made minor changes to the responsibilities of the Supervisor of Purchasing and Contracts, not the Buyers. (Petitioner Ex. 9 at 5.7.2).
- Deleted the title of Director and Outage Shift Manager and added a new step for the Outage Shift Manager. (*Id.* at A.2, A.2.d, A.5; Tr. 287:21-288:1).
- Step 5.7.2.1 previously stated that the Supervisor of Purchasing and Contracts was to “[d]etermine requirements for competitive bids.” (Petitioner Ex. 9 at Step 5.7.2.1). The revision provided that the Supervisor of Purchasing and Contracts was to “[p]rocess and administer requests for quotation (RFQ) in accordance with AP 24C-009, Request for Quotation.” (*Id.*).

As with Petitioner’s other exhibits, these minor changes did not affect the Buyers. Of importance is the cover page of Exhibit 9. The cover page specifically explains that Exhibit 9 was reviewed in order to make “[m]inor changes for clarity in responsibility section for Purchasing and Contracts.” Such changes include “[o]ther *minor changes* for clarity in responsibility section 5.7 due to organizational change of Administrative Services . . . and minor changes to Attachment A.” (Petitioner Ex. 9 at 1) (emphasis added).

As for the alleged material change in section 5.7.2.1, Buyers were required to seek competitive bids prior to 2000 and the Buyers continue to do so today. (Tr. 325:13-326:8). The clarification offered in section 5.7.2.1 did not change the way the Buyers seek competitive bids, nor did it change the Buyers’ job duties. (Tr. 325:11-326:4).

Petitioner cannot establish that even one of these “minor changes,” made for the purposes of “clarity” had any bearing on the Buyers’ job duties. (Petitioner Ex. 9 at 1; Tr. 324:8-14).

4. Petitioner’s Exhibit 10.

Like Petitioner’s prior exhibits, Exhibit 10⁹ does not establish a material change to the Buyers’ job duties. Petitioner argues that the 2008 upgrade to EMPAC, version 8.6 (the version

⁹ Petitioner Exhibit 10, like Petitioner Exhibit 7 and 9, is a Wolf Creek DRR. Exhibit 10 is the 2008 DRR for the “Requisition Procurement Process,” reviewed for the purpose of Wolf Creek’s “2-year divisional relevancy review” All three exhibits are subject to the Employer’s “2-year divisional relevancy review” in which Wolf Creek reviews certain policies every two years. (Petitioner Ex. 10 at 1; Tr. 341:4-8; 427:19-428:4; 431:12-18).

still used today), made changes to the Buyers' job duties, as enumerated in Petitioner's Exhibit 10. (Tr. 289:20-290). However, Petitioner's own witness, Buyer Sandy Somerhalder ("Somerhalder") could not identify how 8.6 changed the Buyers' job. (Tr. 291:1-2). In fact, while version 8.6 did make small changes to EMPAC, those changes did not affect the Buyers' job duties.

Instead, version 8.6 limited who could create a requisition. (Petitioner Ex. Exhibit 10, at Step 4.2; Tr. 291: 21-24). This limitation did not impact the Buyers' duties because Buyers have never created requisitions. (Tr. 293:23-294:6; 343:8-9). Petitioner also argues that the implementation of 8.6 introduced commodity codes. (Petitioner Ex. Exhibit 10 at Step 4.6). To the contrary, Buyers have been using commodity codes since 1998, when they began using EMPAC. (Tr. 345:13-19; 428:17-24). Revising Step 4.6 "Commodity Code" "for clarity," did not change the Buyers' duties, as alleged by Petitioner. (Petitioner Ex. 10 p. 2 at 4.6).

Lastly, Exhibit 10, specifically states the purpose of the document. The "[d]escription of and justification for change: Revision result of 2-year divisional relevancy review for clarity. . . ." (Petitioner Ex. 10 p. 1). In fact, the entire procedure is required to be reviewed every two years, whether or not a change is made. (*Supra* fn. 7; Tr. 327:19-328:4; 341:6-8; 426:5-24). Exhibit 10 provides no evidence supporting of material change to the Buyers' job duties.

5. Petitioner's Exhibit 11.

In its effort to demonstrate material change, Petition submitted a "condition report." A condition report, is an internal report that "bring[s] awareness to a problem or issue and make[s] it better." (Tr. 351:9-10). Simply stated, if an employee identifies a work-related problem or has a suggestion for improvement, the employee will complete a condition report. Why Petitioner introduced this exhibit is unexplained. Wolf Creek began using this type of form long before the 2000 Decision. (Tr. 351:11-352:14; 354:15-18). Condition reports can be completed by any Wolf

Creek employee. (Tr. 297; 350:24-351:6; 352:15-19; 352:23-353:7). Neither Exhibit 11, nor any of Petitioner's testimony demonstrate that the use of condition reports, or the implementation of any suggestions generated from such reports, have changed the Buyers' job duties.

6. Petitioner's Exhibit 12.

Petitioner's final, yet unpersuasive effort to establish material change, is the 2009-2010, addition of "pop up boxes" to the EMPAC operating system. (Petitioner Ex. 12 at 1; Tr. 300:16). "Pop up boxes" provide Buyers with purchase order related reminders that "pop up" on the Buyers' computer screen as the Buyers work their way through the purchase order process. A box may pop up on a Buyer's computer screen to remind the Buyer of funding approval (Tr. 298:15-16) or to remind her of certain procedures related to safety items, among other reminders. (Tr. 298:20-299-2). In fact, the Buyers are able to bypass the pop ups by simply clicking on them. (Tr. 389:23-390:4).

Petitioner fails to recognize that the use of the pop up boxes has not changed the way Buyers perform their job duties or the Buyers' level of discretion. Indeed, changes to technology, or increased efficiency such as those here, do not constitute a material change. The Board repeatedly has found that an increase in efficiency is wholly insufficient as a matter of law to significantly alter the fundamental characteristics of an employee's job duties. *See e.g., Constellation Power Source Generation, Inc.*, 2000 NLRB LEXIS 942, *104-05 (2000) (concluding that although the job has become more computerized since 1996, it has otherwise not changed); *United Technologies Corp.*, 287 N.L.R.B. 198, 204 (1987) (finding technological advancements did not significantly alter job duties); *John P. Scripps Newspaper Corp.*, 329 NLRB 854, 861 (1999) (finding "differences in the methodology or the manner in which they perform their job, including use of technology . . . [] however, do not change the fundamental character

of their job duties or their primary function of making advertisements ready for insertion into the newspaper.”).

The pop up boxes simply provide the Buyers with a reminder of certain requirements that were in place prior to the 2000 decision. For example, prior to the implementation of the pop up boxes, Buyers were required to have funding approval (Tr. 2016 158:49-; 179:9-15; 311:8-312:11), and follow certain guidelines for safety related items. (Tr. 2016 181:17-182:12; 358:17-24). A pop up box reminding the Buyers of these longstanding requirements is not a change to the Buyers’ job duties, material or otherwise. (Tr. 361:15-18; 359:15-20).

7. Other Considerations.

Through both exhibits and witness testimony, Petitioner fails to produce any evidence demonstrating material change to the Buyers’ job duties. Somerhalder failed to demonstrate that any procedural changes proffered in Petitioner’s Exhibits materially changed her job. (Tr. 281:18-282:10; 308:7-10). Of importance is that Somerhalder, who has been a Buyer since 1996 (Tr. 2016 136:8-12) testified that the basic functions of the Buyer job had remained the same since 2000. (Tr. 310:9-15). The one, single, limited change identified by Somerhalder is the minor change from Buyers manually creating a purchase order package, to creating a computerized purchase order package in EMPAC. (Tr. 309:6-21). Unquestionably, EMPAC did not change whether Buyers had to complete the package. (*Id.*).

The Buyers have always been required to follow procedures—that has not changed since 2000. (Tr. 330:19-331:1; 340:2-6). The purchase order used by the Buyers today is the same purchase order used in 2000.¹⁰ (Er. Ex. 4-5; Tr. 337:25-338:5). Additionally, the Buyers are still

¹⁰ In fact, the third party supplier does not see the requisition. (Tr. 333:19-334:5). The supplier sees the Buyer’s electronic signature at the end of the purchase order, committing the Employer to a legal contract, acting and signing the contract as an agent of the Employer. (*Id.*).

responsible for ensuring that the purchase order is correct. (Tr. 362:22-363:1). The longstanding requirement to seek funding approval still applies today as well. (Tr. 417:13-418:5). In fact, prior to increasing the cap on items requiring a competitive bid from \$5,000 to \$50,000, the Employer solicited the Buyers' input on the increase and used the Buyers' suggestions to determine the new cap. (Tr. 437:11-438:15).

Moreover, commodity codes did not change the Buyers' job duties. Commodity codes have been used since the genesis of EMPAC. (Tr. 428:17-24). Audit trails¹¹ did not change the buyers' job duties either; MAPPER audit trails predate EMPAC. (Tr. 425:1-20). Lastly, Buyers are still responsible for committing funds in the company's best interest. (Tr. 366:4-18). Such actions demonstrate that the Buyers are still managerial employees.

IV. CONCLUSION

As demonstrated in the record, including the transcripts and exhibits, there is no evidence to demonstrate any material change to the Buyers job duties. Accordingly, the Buyers remain managerial employees, excluded from protections of the Act.

Respectfully submitted,

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¹¹ An audit trail is an "electronic date . . . and timestamp" indicating that an electronic item has been touched or changed by a user."

CERTIFICATE OF SERVICE

The foregoing Employer's Brief on Review of Regional Director's Decision and Order, was electronically served on the following on May 2, 2017:

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

**WOLF CREEK NUCLEAR OPERATING
CORPORATION**

Employer,

and

Case No. 14-RC-168543

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 225**

Petitioner.

PETITIONER'S POST HEARING BRIEF

I. Introduction and Summary of Position

The issue before the Regional Director is “whether circumstances have changed in a way that would materially alter the analysis of the buyers’ managerial status?” While this burden is on the Petitioner, the Board made clear that the threshold to meet this burden is particularly low requiring the Petitioner to show only “one material differentiating fact” in order to relitigate the buyers’ managerial status. The record established from the February 16, 2016, hearing as well as the record from the April 25, 2017, hearing have provided more than ample evidence of material changes to the buyers’ work at Wolf Creek justifying relitigation of their managerial status. Additionally, those changes make clear that the buyers are not managerial employees under the Act.

While the parties stipulated that MPAC came into existence in late 1998 at Wolf Creek, it is clear that MPAC itself underwent material changes between 1998 and 2016. The Petitioner established undisputed evidence that MPAC was not functioning in 1998 as well as it did when it was upgraded from revision 7.7 to 8.5 in 2002 and from revision 8.5 to 8.6 in 2008. There was also undisputed evidence that when MPAC came into existence at Wolf Creek, the buyers’ were still using the old MAPPER system for a period of time before they became solely reliant on MPAC.

The evidence presented also shows that as MPAC was installed, updated, and changed, the procedures that all employees, including the buyers', are required to follow, were changed, and updated to reflect those changes.

Evidence also establishes that Wolf Creek's information technology "IT" department continued to make changes and updates with MPAC, including installing the "pop-up boxes" alerting the buyers' when they may be missing a clause or an approval to ensure that they follow the established procedures. It is also notable that as recently as 2006 the procedures governing the buyers' work transferred the responsibility of reviewing the purchase orders from the manager of supply chain services to the buyers. At first glance, this appears to be evidence that they were being given more discretion. However, evidence established that because of all of the controls, checks and balances, built into MPAC, there was no need for the manager of supply chain services to review purchase orders before they went out. MPAC did that for him.

The record also establishes that over time the buyers have done less and less competitive bids due to the negotiation of additional Alliance Agreements, the need for safety and engineered items, and less suppliers making the necessary parts needed to be purchased by Wolf Creek. The record also establishes that when the buyers' do complete a competitive bid, MPAC actually does the bid analysis for the buyers. MPAC also stores all of the clauses that are required to be included in purchase orders.

In the end, it is clear that the record includes ample evidence of substantial and material changes in the buyers' work through MPAC, procedures and passage of time in the nuclear industry that warrant relitigation of the buyers' managerial status. Additionally, it is clear that the buyers are not managerial employees under the Act. The most persuasive argument that the Employer has is that the buyers' commit the funds of the Employer in sometimes substantial amounts. However, it is abundantly clear from the record that the buyers' actually have not ability or authority to commit

credit on their own. They may only do so based on approvals of other pre-approved Wolf Creek employees including the plant manager. They also have no ability to work independently from the established procedures and what little discretion they once had, has been eroded by the increased enhancements of MPAC and procedural controls over time.

For those reasons, the Petitioner believes that it has met its burden in this case and that the buyers' are not managerial employees under the Act and respectfully request the Regional Director find the same.

II. Statement of the Issue

On April 7, 2017, the Board issued a decision remanding this case back to the Regional Director for "further and appropriate action consistent with this decision."¹ The Board stated that the issue on remand is:

1. Whether the record demonstrates changed circumstances sufficient to allow reconsideration of the buyers' managerial status?²

III. Standard of Law

The Board made clear that while the doctrine of claim preclusion applies to representation decisions in Board proceedings, a party seeking relitigation of a previously decided issue may do so if it satisfies the burden of "presenting new factual circumstances that would vitiate the preclusive effect of the earlier ruling."³ To meet this burden, the party seeking relitigation must establish that "circumstances have changed in a way that would materially alter the analysis of the buyers' managerial status."⁴ The Board noted that "**the Petitioner's burden** to prove changed circumstances . . . **is not an onerous one. The Petitioner need only point to 'one material**

¹ April 7, 2017, Board Decision, pg. 4.

² *Id* at pg. 3.

³ *Carry Cos. Of Illinois*, 310 NLRB 860 (1993); *Harvey's Resort Hotel*, 271 NLRB 306, 306-307 (1984)

⁴ Board Decision at pg. 3.

differentiating fact in order to relitigate the issue of the buyers' managerial status." (Emphasis added).⁵

IV. Statement of Relevant Facts

A. Finding of Facts in the February 16, 2016 Hearing

On May 4, 2000, the Acting Regional Director of then Region 17 found the Buyers to be managerial employees in a "Decision, Order and Clarification of Bargaining Unit" issued in Case 17-UC-210 ("*2000 Decision*"). (2/5/2016, D&DE, pg. 1). The Regional Director, in his decision in the instant case noted, that "the *2000 Decision* was issued almost 16 years ago, and it is incumbent on the Regional Director to create a record documenting how circumstances have changed with regard to Buyers and their duties and responsibilities." (2/5/2016, D&DE, pg. 3). The Regional Director also noted that the transcript from the 2000 proceedings was not available and the *2000 Decision* does not contain a detailed description of the Buyers' job duties and **did not address those duties in relation to computer software used by the petitioned-for employees.** (*Id.*)

At the hearing, the Petitioner spent a great deal of time introducing specific detailed evidence detailing how the EMPAC computer system impacts the employee status of the Buyers. (*Id.*) The facts established at the hearing included:

- Purchases are initiated when the Purchasing Department receives a requisition, which are created through the Employer's EMPAC computer system by the requesting department. (2/5/2016, D&DE, pg. 4).
- The requisition lists the items that are being requested; how many of the items are needed; the commodity code; whether the item is engineered or safety-related; the item's price; and whether the item has been bought before and, if so, the price the Employer paid in the past. The Buyers are not involved in the initial requisition process. (*Id.*)
- Not all employees are allowed to submit a requisition. The Purchasing Department trains employees on how to submit requisitions, and David Sullivan (Manager of

⁵ *Id.* (citing *Miller's Ale House, Inc. v. Boynton Carolina Ale House, LLC*, 702 F.3d 1312, 1319 (11th Cir. 2012) (quoting *CSX Transp. Inc. v. Brotherhood of Maintenance of Way Employees*, 327 F.3d 1309, 1317 (11th Cir. 2003)).

Purchasing and Supply Chain Services) approves individuals so they can be entered into EMPAC and allowed to submit requisitions. (*Id.*)

- Requisitions must be authorized by a supervisor or manager in the requesting department prior to submission through EMPAC. The Buyers are not involved in the requisition authorization process. (*Id.*)
- The level of purchasing authority that a Buyer has correlates with the purchasing authority that the signatory requestor has. For example, if a requisition has \$50,000 in purchasing authority, the Buyer then has up to \$50,000 to use to purchase the requested item. (*Id.*)
- Once a requisition is received by the Purchasing Department, Everett Weems (Supervisor of Purchasing and Contracts) assigns each requisition to a Buyer depending on the type of items being requested. (*Id.*)
- After being assigned the requisition, the Buyer first determines whether the procedure requires the item be competitively bid. Where the value of goods and services is expected to exceed \$50,000, the Employer's written policy requires the Buyers to issue a competitive bid for goods/services. In practice, the Buyers also competitively bid items that cost well under \$50,000 on a regular basis. (2/5/2016, D&DE, pg. 5).
- A new competitive bidding procedure was established on or about January 21, 2016. Under the new procedure, the \$50,000 limit over which items must be competitively bid increased from \$5,000 to \$50,000. The Buyers were not involved in the decision to raise the minimum competitive bidding amount. (*Id.*, fn. 2).
- According to the Employer's procedures, to begin the competitive bidding process, "the Buyer determines the suppliers from whom to solicit bids based on commercial, technical and/or quality considerations." In practice, the Buyer first compiles a list of potential suppliers from which to seek a bid using EMPAC. EMPAC provides the Original Equipment Manufacturer ("OEM") and the price of any previous orders. (*Id.*)
- To select suppliers, the Buyers go to the item's OEM or other Employer-authorized distributors. The Buyer also may find suppliers using the internet (e.g., Google searches). For safety items, Buyers are required to use suppliers on a specific list. Sometimes, there is only a single supplier for a certain product, so there are no other companies from which to seek bids. (*Id.*)
- Once the Buyer has compiled a list of potential suppliers, the Buyer uses EMPAC to generate a Request for Quotation ("RFQ") to send to those suppliers. EMPAC allows the Buyer to tailor the RFQ to match the requisition by using established request clauses and information. For example, if the requisition states delivery must be expedited, the Buyer will use EMPAC to include a clause with this request in the RFQ. The Buyer determines the bid due date, which is set based on the initiating organization needs and detailed as requested dates in the original requisition. (D&DE, pg. 4-5).

- Sometimes suppliers will request an exception to the RFQ. If the product is safety-related or engineered, the Buyer sends the exception to the Procurement Engineer who determines whether the exception is acceptable. If the product is non-safety related, Buyers will typically go back to the requisitioner for input on the exception. (D&DE, pg. 6).
- Upon receiving the bids from suppliers, the Buyer will enter the bids into EMPAC and then EMPAC performs a bid analysis. Typically, the Buyer will select the lowest bidder. If a Buyer does not make the purchase with the lowest bidder, the Buyer is required to enter into EMPAC the reason why the supplier was chosen. (*Id.*)
- The Employer's witness, Betty Saylor, testified in regards to how EMPAC automatically calculates the low bidder. "As a general rule, I'll enter them into our EMPAC database. We've got – on the request for quotation, there is an area for reply per supplier. You put all your data in and then you hit bid analysis. Automatically, it's going to calculate low bidder, it's going to give me FOB terms and it's going to give me payment terms. (Tr. 184: 20-25).
- Once a supplier is selected, the Buyer drafts a Purchase Order in EMPAC. EMPAC allows the Buyer to select different clauses regarding terms and conditions to use in the Purchasing Order and will then issue the Purchasing Order. EMPAC has a mechanism to notify a Buyer if the forgot to include terms and conditions in the Purchasing Order. (*Id.*)
- If bids come back and are more than \$1,000 per line item than what was on the original requisition, the Buyer will go back to the requisitioner for funding approval before issuing the Purchase Order. If a bid comes back and is still above the original requisition price, but less than \$1,000 per line item, the Employer's procedure provides that a Buyer can make the purchase. (D&DE, pg. 6-7).
- EMPAC will specifically ask the Buyers if they received funding approval before the system creates the Purchasing Order. Once the Purchasing Order is issued, the Buyer has committed Employer funds for the purchase of requisition funds. (D&DE, pg. 7). When EMPAC was originally installed at the Employer's facility, it did not include this notification. It was added after the fact by management and the Buyers were not involved in that decision. (*Betty Saylor*, Tr. 195: 3-11).
- On cross-examination, Ms. Saylor confirmed that once the requisition gets to the Buyers, it has already been through the approval process and it is locked in. The Buyer can't make any changes without approval from someone else. (Tr. 196: 19-25).

The Buyers also testified in specific detail as to how their job duties changed from pre-2000 *Decision* to today with EMPAC and how the nuclear industry is much more restrictive when it comes to purchasing:

- When asked what has changed in how Ms. Somerhalder does her work as a Buyer with the addition of EMPAC, Ms. Somerhalder stated that there are “more checks and balances with the EMPAC system. There’s --- again, if we’re typing a PO, there’s flags that will pop up, a pop-up barrier that will say – you know, if it exceeds the funded amount on the requisite, the amount that’s funded on the requisition, it will pop up and remind you and say, hey, check your – or in essence, check your procedure for – do you need to go back for an email for approval of additional funds or do you need a CASF form?” (Tr. 145: 8-16).
- Additionally, Ms. Somerhalder testified that “there’s audit trails of everything.” When asked if these audit trails existed in 1996, she testified that they did not. She stated that “after the Sarbanes-Oxley Act, our owner companies started auditing us. So they would ask for POs and the request for quote package, which everything’s filed in curator now for perpetuity. (Tr. 145: 16-25).
- Mr. Sean Nelson testified that, as an individual who worked as a Buyer in both the nuclear and non-nuclear industry that “nuclear is completely different, much more restrictive. When I was doing refinery projects, I would write the descriptions and could make changes and all that and it wasn’t a big deal, but we weren’t dealing with a nuclear power plant. (Tr. 167: 18-22).
- On direct, Employer’s witness Betty Sayler was asked about what functional difference EMPAC brought to her job as a Buyer. Ms. Sayler testified that ‘EMPAC just gave us automation, it gives us more tools, it’s a difference of day [and] night actually.’ (Tr. 186: 10-12); 194: 5-13). This confirmed what the Buyers stated in their testimony. (*Tracy Beard*, Tr. 88: 20-25; 89: 1-6 (“there is just really no comparison.”); *Sandra Somerhalder*, Tr. 140: 19-25 (in comparing MAPPER to EMPAC, it was a very “manual process. Everything had to be entered manually. It did not have the sophistication as compared to EMPAC. It did not have the functionalities.”)).
- The Employer’s witness, Betty Sayler, testified in regards to how EMPAC automatically calculates the low bidder. “As a general rule, I’ll enter them into our EMPAC database. We’ve got – on the request for quotation, there is an area for reply per supplier. You put all your data in and then you hit bid analysis. Automatically, it’s going to calculate low bidder, it’s going to give me FOB terms and it’s going to give me payment terms. (Tr. 184: 20-25). Ms. Somerhalder confirmed in her testimony that MAPPER did not have this type of functionality. (Tr. 140: 19-25).

B. Facts Established in the April 25, 2017 Hearing

The parties stipulated at the hearing that MPAC came into existence in November 1998 at Wolf Creek. (Tr. 250:17-21). However, Petitioner established undisputed evidence that when MPAC came into existence MPAC really “limped along” and the buyers’ were continuing to use the old MAPPER program in addition to MPAC. (*Rogers*, Tr. 257: 9-16; 259: 14-23; *Somerhalder*, Tr. 281:

5-9). Additionally, in 2002, MPAC went through an upgrade from revision 7.7 to 8.5. This caused major changes to the policies and procedures that the buyers and other Wolf Creek employees were required to follow. (Tr. 262: 11-14; Exhibit P7). Numerous revisions listed in the “DRR” indicate that the changes made were required by the upgrade in MPAC to revision 8.5. (Exhibit P7, pgs. 1-10). Ms. Somerhalder also testified that AP-24-002 is the buyers’ “mother procedure” and the more changes made to this procedure, the more it impacted and controlled the buyers work. (Tr. 282:1-10).

One of the most important changes that came with the 8.5 revision in 2002 was the addition of curator. (*Somerhalder*, Tr. 280: 18-23). According to Ms. Somerhalder, the first requisition available in curator for review came in 2002. Curator also brought with it the ability to conduct detailed audit trails as identified in Exhibit P13. (Tr. 280: 18-23). However, it was not until 2006 that MPAC became an entirely automated program. This brought with it key changes to the Employer’s procedures and the buyers’ work. First, the process of sending purchase orders and all related documents to document services for processing and storage was eliminated. (Exhibit P8; Tr. 284: 18-25; 285: 1-4). These documents began being placed in curator. This allowed for MPAC to have direct access to these documents and be able to pull those documents for use in future purchase orders. Second, the main procedure AP 24-002 was changed with specific application to procedures for competitive bids by requiring adherence to an entire other procedure, AP 24C-009 which governs the process for “requests for quotation.” (Exhibit P9; Tr. 288: 15-25). These changes occurred in March 2006. (Tr. 286: 8-10).

Another major change that occurred in 2008 is that MPAC was again upgraded to revision 8.6 which is the revision currently in place today. (Tr. 291: 18-23). Ms. Somerhalder indicated that one of the major changes with the 2008 revision was that the commodity code, while used

previously, was added to MPAC which helped ensure for automatic routing of requisitions for approvals. (Tr. 372: 17-25).

One of the most crucial changes to MPAC came sometime after 2010 according to Ms. Somerhalder. Exhibit P11 contains a number of “condition reports” created in 2009 and 2010 by former Lead Buyer Betty Saylor. Ms. Saylor created these condition reports because the buyer completing the requisition in those documents had failed to obtain the required approvals or failed to include required information. These condition reports, according to the testimony of Ms. Somerhalder, led to the creation of the dialogue “pop-up” boxes contained in Exhibit P12. These dialogue boxes are key because they were designed by the Employer’s IT department based on condition reports such as those in P11 to stop those errors from happening. These dialogue boxes pop up anytime a buyer attempts to process a purchase order without having certain required approvals or if they are missing certain required clauses or terms. MPAC now tells the buyers when something is missing. Before these post-2010 changes in MPAC, the buyers were on their own to ensure these mistakes didn’t happen.

Additionally, the buyers’ purchase order procedure was changed in 2006 to put the responsibility on reviewing and ensuring the accuracy of the purchase orders on the buyers as opposed to the supply chain manager. Ms. Somerhalder and Ms. Beard both testified that this was not due to management trying to give the buyers’ more discretion. It was instead, an indication that MPAC’s capabilities in overseeing and checking the buyers’ work grew to a point that the supervisors review was not necessary. Mistakes were routinely caught and fixed through the use of MPAC. According to Ms. Somerhalder and Ms. Beard, MPAC incrementally became the de-facto supervisor of the buyers’.

Evidence was also established through Exhibit P13 that the buyers’ do not have access to any management reports filed in supply chain services by their managers. The record also

establishes that the buyers' are not even listed in the document that lists which employees have the power to commit certain levels of expenditures through their approvals. (Exhibit P14). It is also important to note that the PAR bonus program, which is paid to employees based on a hierarchy of their employment status, classifies the buyers' in the general employees section above bargaining unit employees but below that of supervisors and managers. (Vickrey, Tr. 433: 18-25; 434: 1-23).

Tracy Beard also testified that her job duties changed substantially in 2011 when the service labor contract work that she was completing was removed from the buyers' department and transferred to the contract services department. She went from actually drafting agreements revolving around software licensing to doing buyers work 100 percent of the time using MPAC. (Tr. 396: 19-25; 397: 1-20).

V. Argument

As the Board indicated in its April 7, 2017, decision, while it is the Petitioner's burden to prove that there has been a material change in the buyers' circumstances which would justify relitigation of the buyers' managerial status, that burden is not an onerous one. In fact, pointing to "one material differentiating fact" would be sufficient to justify such relitigation.⁶ According to *Black's Law Dictionary*, something is "material" if it is "[o]f such a nature that knowledge of the item would affect a person's decision-making."⁷ Thus, the Petitioner has met its burden if it has established one factual change in circumstances for the buyers' which would affect the buyers' decision-making process at Wolf Creek.

Once the Petitioner meets its burden of establishing a material change in circumstances justifying relitigation of the buyers' managerial status, the question becomes whether the buyers' are in fact managerial under the Act. The date that MPAC came into existence at Wolf Creek is no

⁶ Board Decision, April 7, 2013, pg. 3.

⁷ See *Black's Law Dictionary*, Tenth Edition, Bryan A. Gardner, pg. 1124.

longer relevant. It is undisputed that the *2000 Decision* never contemplated any use of technology. It simply looked globally at the buyers' work in the requisition and procurement process. Thus, whether the features of MPAC limited the buyers' discretion in 1998, 2002, 2008, 2010 or later, the fact that its features did so and continues to do so is dispositive of the buyers' managerial status.

A. The Circumstances Surrounding the Buyers' Job Duties has Changed Materially over the last 16 Years Justifying Reconsideration of the Buyers' Managerial Status

The *2000 Decision* finding that the Buyers were managerial failed to take into consideration the computer equipment the buyers' use in their day to day operations. While it is not known why this occurred and no one testified directly as to why this occurred, the evidence in this record may shed some light on what was going on 16 years ago. It is now undisputed that MPAC was in existence in November 1998 at Wolf Creek. However, it was also established that while MPAC was being used at Wolf Creek, it was not functioning as well as it was intended. Many of the modules didn't work which left the buyers' to rely on old processes and procedures at the time. It wasn't until after the *2000 Decision* that the Buyers started using MPAC entirely and stopped relying on MAPPER and old processes.

The record also establishes that a major upgrade in MPAC occurred in 2002 when MPAC went from revision 7.7 to 8.5. This upgrade brought many changes with it including the ability of curator to track and store requisitions electronically. This allowed for a more robust and comprehensive audit trail system to ensure accuracy and reliability of the requisition process. While the Employer seems to believe this only changed where files are stored, it completely ignores the functionality of curator. First, this began the process of eliminating paper and made these documents easily accessible. This led to the filing of purchase orders in curator beginning in 2006 which allowed for MPAC and curator to interact and store information about previous purchases, including supplier information. In 2006, evidence also establishes that the commodity code was

changed so that the third letter in the code would be used to automatically route the requisition to each department for approval before it came to the buyers.

2006 was also the year that the buyers' procedures were changed to shift the responsibility for the accuracy of the purchase orders from the manager of supply chain services to the buyers themselves. At first blush, this appears to mean that the buyers' were being given more responsibilities and discretion. However, the opposite was actually true. MPAC was continuing to become more sophisticated overtime and due to those changes, MPAC eliminated the need for supervisors to review purchase orders. Everyone was done within MPAC. It now had fully functioning audit trails so everything could be reviewed within MPAC by management. MPAC was continuing to grow into being the shadow of the buyers. In 2008, MPAC saw another upgrade from revision 8.5 to 8.6. This continued MPAC's refinement and sophistication.

In addition to upgrades and revisions in the software, MPAC was being changed on the inside by Wolf Creek's IT department. Initially, testimony from Sandy Somerhalder established that IT was working to fix the bugs and just make MPAC function in the early 2000s. However, once MPAC became a more fully functioning program, IT's role shifted to building in more controls, checks and balances for the buyers. This was demonstrated through exhibits P11 and P12. Condition Reports in P11 established that certain buyers had bypassed certain procedures and protocols in the process of completing purchase orders. This included leaving out essential terms and clauses and failing to get proper approvals and reviews before issuing purchase orders. This was a problem because the buyers' were being found to have bypassed their procedures. According to Sandy Somerhalder, sometime after 2010, IT began designing and installing dialogue boxes that would pop up to tell the buyers when they were missing certain required clauses or were missing certain approvals. These checks on the buyers' work were so sensitive that in the first dialogue box on page one of P12, it is questioning an expenditure for \$25.00. The addition of these dialogue

boxes certainly impacted the buyers' decision-making process in their job. It added more checks and balances, it made sure that the buyers' were doing their job correctly. It limited the buyers' discretion and automated their work even further.

MPAC was not the only substantial change to the buyers' jobs over the past 16 years. Ample testimony established that over time, the buyers continued to do less and less competitive bids. This was due to the fact that many of the products purchased by the buyers' are safety related items and/or engineered items. This means that they can only be purchased from certain suppliers after receiving approval from the procurement engineering department. Additionally, the continued addition of agreements through the Alliance program limited where the buyers' could purchase items from due to pre-negotiated prices and rebates. The passage of time also means that certain suppliers stop making certain items which means there are less places to purchase from. This is due to the lack of new nuclear construction nationally which has caused a lack of demand on suppliers of safety related parts and supplies. All of this greatly reduced the number of competitive bids the buyers' complete as part of their jobs. This is significant because the Employer has argued that the process by which the buyers' do competitive bids makes them managerial under the Act. While the Petitioner rejects this argument for reasons addressed below, for purposes of establishing material changes, the reduction in the use of the competitive bid process without question alters the buyers' decision-making process at Wolf Creek and has changed how they do their jobs.

The Employer insists that even with these changes, the buyers' work remained the same. They continued to be part of the requisition process. They still handled purchase orders and did competitive bidding as required by the procedures. They still received the same approvals as they had before MPAC and before the *2000 Decision*. On a global view, this may be true. However, when you look at the specific details of the work they do, it is clear the work has changed. There are less people who have access to the requisition process. However, over time more approvals have

been required before the buyers' can execute a purchase order. The enhanced use of commodity codes resulted in certain parts, such as pricing of certain items, being transferred from the buyers' to the financial department and procurement engineering. The addition of the dialogue boxes wrote the procedures into MPAC to ensure the buyers' are not going outside of those procedures. There is little argument to the idea that the buyers' circumstances have not materially changed over the last 16 years.

B. The Buyers' simply are not Managerial Employees under the Act. The 2000 Decision failed to consider the use of MPAC and lack of Discretion the Buyers' have in their duties at Wolf Creek.

While the 2000 *Decision* is a final decision and found that the buyers' were, at the time, managerial employees, that decision failed to consider MPAC and the lack of discretion the buyers' have in their duties at Wolf Creek. Once the Petitioner has met its burden in establishing the material change in circumstances allowing relitigation of the buyers' managerial status, the date that MPAC came into existence is no longer relevant. Whether the features of MPAC limited the buyers' discretion in 1998, 2002, 2008, 2010 or later, the fact that its features did so and continues to do so is dispositive of the buyers' managerial status.

The Act makes no specific provisions for managerial employees; however, the Supreme Court and the Board have held that managerial employees are excluded from the protection of the Act. See, e.g., *NLRB v. Yeshiva University*, 444 U.S. 672 (1980); *Ladies Garment Workers v. NLRB*, 339 F.2d 116, 123 (2nd Cir. 1964); *Ford Motor Co.*, 66 NLRB 1317 (1946); *Palace Dry Cleaning Corp.*, 75 NLRB 320 (1948). Managerial employees are excluded from the protections of the Act because "their functions and interests are more closely aligned with management than with unit employees." *Connecticut Humane Society*, 358 NLRB No. 31, slip op. at 23 (2012). "Managerial employees" have been defined by the Supreme Court in *NLRB v. Yeshiva University*, supra at 682-683, as:

[T]hose who "formulate and effectuate management policies by expressive and making operative the decisions of their employer." *NLRB v. Bell Aerospace Co.*, supra, at 288,

94 S.Ct., at 1768 (quoting *Palace Laundry Dry Cleaning Corp*, 75 NLRB 320, 323, n.4 (1947) Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. [citations omitted] Although the Board has established no firm criteria for determining when an employee is so aligned, normally, an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.

The Board has issued decisions directly addressing whether buyers, and other employees with purchasing authority, are considered managerial employees under the Act. *See, e.g., Lockheed-California Co.*, 217 NLRB 573 (1975) (buyer, although they can commit company's credit up to \$50,000 and also negotiates prices with suppliers, does not have discretion independent of established policy since higher authority must review and approve much of their recommendations); *Washington Post Company*, 254 NLRB 168 (1981) (assistant manager not managerial employee although half the employee's time was spent determining need for stock items and ordering items, employee solicited bids from vendors and then selected the most appropriate vendor via price and quality guidelines); *Concepts & Designs, Inc.*, 318 NLRB 948 (1995) (employee was managerial based on the manner in which she exercised purchasing authority, unreviewed discretion, and magnitude of impact); *Solartec, Inc. & Sekeby Indus.*, 352 NLRB 331, 336 (2008) (employee not managerial even though he had authority to recommend purchase and use equipment and to negotiate with supplier).

The Employer relied heavily on *Concepts & Design* in its Request for Review to attempt to overturn the decision of the Regional Director. While the Employer may like the outcome in *Concepts & Design*, the facts of this case simply do not follow the facts which led to the employee being managerial there. In the initial hearing and again at the April 25, 2017, hearing, the Petitioner's witnesses testified that the change from \$5,000 to \$50,000 for competitive bids was raised without any solicitation of input from the buyers'. This was testified to consistently by the buyers'. At the April 25, 2017, hearing, Terri Anderson testified that both Sandy Somerhalder and Tracy Beard were present for a meeting prior to the implementation of this change and they had an opportunity to

give input. Oddly, Terri Anderson testified at the previous hearing and failed to testify that this occurred. Even after this evidence was presented to Ms. Somerhalder, she remained steadfast in her denial that this occurred. Regardless, this testimony failed to establish that such a type of meeting has occurred in the past or that this was somehow a routine process for the buyers’.

Additionally, overwhelming evidence had established substantial changes in procedures that govern the work of the buyers’. Testimony established that the buyers’ opinions on that changes were not solicited prior to the changes being processed. It is true that there were times where a buyer did act as the “reviewer” of the changes, however, this was not giving feedback on the substance of the changes or weighing in on the changes. Their job was only to ensure that the proposed changes had gone through the required review and had all of the necessary approvals. This is also governed by procedure and requires little more than following a checklist. Meaning, the buyers’ do not provide recommend or effectuate changes in policies or procedures on behalf of the employer. The buyers’ also do not exercise their own discretion to make any decisions about how policies or procedures are implemented or what is contained in them. They are simply required to follow the procedures put in place by their management. Thus, the facts present in *Concepts & Design* are not present here.

Additionally, *Concepts & Design’s* analysis relied heavily on *Eastern Camera and Phot Corp.* where the Board found that:

Managerial status is not necessarily conferred upon employees because they possess some authority to determine, within established limits, prices and customer discounts. In fact, the determination of an employee’s managerial status depends upon the extent of his discretion, although even the authority to exercise considerable discretion does not render an employee managerial where his decisions must conform to the employer’s established policy.

140 NLRB 569 (1962) (cited and relied upon in *Concept & Design*, 318 NLRB at 957). It is clear from the record of both hearings that the buyers’ have no ability to go beyond the established procedures in doing their job. Additionally, MPAC has been continually updated and changed to ensure

adherence to the employer's policies and procedures. Where the buyers' do have some discretion to negotiate prices, the times when that occurs is very limited and is still subject to review by the financial department at Wolf Creek and the buyers' supervisors.

The Employer has also focused considerable time on the issue of committing credit. The main case put forward by the Employer in support of this argument is *Swift & Co* which states that the ability of an employee to commit an employer's credit in amounts which are substantial is strong evidence of managerial status. 115 NLRB 752 (1956). What the Employer has tried to ignore is that *Swift & Co* also stated that the commitment of substantial amounts of credit must be unreviewed, not pre-approved, and subject to the discretion of the employee committing the credit. 115 NLRB at 753. The buyers' in no way commit the credit of the Employer without pre-approval. The commitment of credit is also reviewed and not subject to the discretion of the buyers'. MPAC ensures that all required pre-approvals are obtained ahead of the issuance of the purchase order. Additionally, the buyers' testified that they obtain supervisor approval or approval of certain departments before they issue a purchase order and commit the credit of the Employer. Thus, *Swift & Co* does not apply.

C. MPAC is Much More than simply making the Buyers' Jobs more Efficient. It has greatly restricted the buyers' discretion and ability to act independently.

The Employer has also attempted to point to the changes in MPAC as being insufficient because the Board has "found than an increase in efficiency is wholly insufficient as a matter of law to significantly alter the fundamental characteristics of an employee's job duties." (Employer's Request for Review, pg. 14 citing *Constellation Power Source Generation, Inc.*, 2000 NLRB LEXIS 942, *104-05 (20002) (ALJ Shuster) (concluding that although the job has become more computerized since 1996, it has otherwise not changed)). First, the changes in MPAC is only one facet of the changes to the buyers' job since the *2000 Decision*. Another major example of changes to the duties of the buyers' is that the use of competitive bidding has significantly decreased while the reliance on

pre-negotiated Alliance agreements has increased. This certainly has eroded one of the central arguments the Employer has put forward to support its managerial argument.

Second, the changes to MPAC have been much more significant than simply making the buyers' work more automated or efficient. MPAC has essentially taken control of the buyers' work and more or less acts as the buyers' direct supervisor watching everything they do. It even goes as far as to tell the buyers' when they have made a mistake or have gone beyond their authority. This has wrung out any remaining discretion the buyers had prior to MPAC coming to Wolf Creek. Changes in procedures and the implementation of changes in MPAC which take away the ability of the buyers' to act independently goes well beyond simple efficiencies that makes work easier for the buyers'. For that reason, the Employer's argument must fall short.

VI. Conclusion

The buyers' job duties have changed over the last 16 years through the implementation and continued modification of MPAC which continued to change and limit the buyers' discretion over time. Based on the arguments above, the Petitioner respectfully requests the Regional Director find that material changes to the buyers' job duties have occurred justifying relitigation of the buyers' managerial status from the 2000 decision and that the buyers' are not managerial employees under the Act.

Respectfully Submitted

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CERTIFICATE OF SERVICE

The foregoing, Petitioner's Post-Hearing Brief, filed by IBEW 225 in Case No. 14-RC-168543 was served upon the Employer and Region 14 by electronic mail on May 2, 2017, to the following:

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

**WOLF CREEK NUCLEAR OPERATING
CORPORATION**

Employer,

and

Case No. 14-RC-168543

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 225**

Petitioner.

**PETITIONER'S RESPONSE IN OPPOSITION TO EMPLOYER'S REQUEST FOR
REVIEW OF REGIONAL DIRECTOR'S MAY 9, 2017 SUPPLEMENTAL DECISION**

The International Brotherhood of Electrical Workers, Local 225, (hereinafter "Petitioner" or "IBEW 225"), by its undersigned counsel, submits this Response in Opposition to Employer's Request for Review of Regional Director's May 9, 2017 Supplemental Decision ("5/9/17 Decision"). There are no compelling reasons for the National Labor Relations Board (hereinafter the "Board") to grant review of the 5/9/17 Decision. For the reasons stated herein, the Petitioner respectfully requests the Board deny the Employer's Request for Review. The Petitioner also requests that the Board respectfully consider expediting its review of the Employer's Request for Review given the amount of time that has passed since this case was originally filed on January 28, 2016.

I. Introduction

On April 7, 2017, the Board issued a decision granting review of the Employer's first request for review on the issue of res judicata while denying the Employer's request in all other aspects without prejudice and remanded the case to the Regional Director to "more fully consider whether changed circumstances warrant declining to give the 2000 decision preclusive effect and issue a

supplemental decision.”¹ The Regional Director was given discretion to re-open the record and take additional relevant evidence. On April 18, 2017, the Regional Director ordered the record reopened before a Hearing Officer on April 25, 2017.² On May 9, 2017, the Regional Director issued the 5/9/17 Decision finding that the evidence demonstrates that material changes warrant declining to give the decision in Case 17-UC-210 (“*2010 Decision*”) preclusive effect. The Regional Director also found that the evidence no longer supports the conclusion that the petitioned-for buyers are managerial employees. On May 23, 2017, the Employer filed a Request for Review of the 5/9/17 Decision.

The Employer’s request fails to meet its burden of establishing compelling reasons for review of the Regional Director’s 5/9/17 decision. The Employer refers to the 5/9/17 Decision as a “grave and disturbing departure” from the *2000 Decision* and claims that it “does violence to well-settled Board law and legal principles.” The Employer conveniently ignores the fact that the *2000 Decision* occurred 17 years ago. Further, the Petitioner established substantial evidence that while EMPAC was in existence in 1998 it has undergone fundamental changes since then which have greatly reduced and basically removed any ability of the Buyers’ to act independently. Most notably, the Employer took steps in 2010 and thereafter to embed its policies and procedures into EMPAC. This means that the Employer’s policies and procedures which govern the Buyers’ job duties are written into the EMPAC software and alert the Buyers’ when they may be in risk of violating those procedures. It also ensures that all required approvals from members of management are received before a purchase order is issued.

The Buyers’ also do less competitive bidding now than they did in 2000. This is because the Employer has continued to increase its use of alliance agreements which identify single-source

¹ *Wolf Creek Nuclear Operating Corporation*, 365 NLRB No. 55, slip op. at 3 (April 7, 2017).

²

suppliers for many of its purchases. The Buyers' do not play any role in those negotiations. This simply rely on those agreements to dictate who they purchase pre-approved items from.

Additionally, many of the job duties that the *2000 Decision* relied upon to find the Buyers' to be managerial employees are now mostly completed by EMPAC itself.

The record established in this case is clear. The Buyers' job duties have gone through substantial and material changes since the *2000 Decision* which justifies relitigation of the Buyers' managerial status. The record in this case also clearly establishes that the Buyers' are no longer managerial employees under the Act. This is not the question, however, for the Board to consider. The Board must consider whether the Regional Director's decision is **clearly erroneous** due to either a departure from established Board precedent or the fact established in the record. The Employer's request wholly fails to meet this burden. Even if the Board finds that the Employer's argument in favor of managerial status persuasive, that in and of itself is not enough. The Board must find that the Regional Director's decision is not plausible based on the factual record or the relevant Board precedent. Under that standard, the Employer's request for review must be denied. None of the assertions made by the Employer warrant review by the Board.

II. Standard of Review

29 C.F.R. § 102.67(c) allows for parties to file a request for review of regional director actions at "any time following the action until 14 days after a final disposition of the proceeding by the regional director." The Board only grants requests for review where "compelling reasons exist therefore." § 102.67(d). One or more of the following grounds must exist for review to be granted:

(1) that a substantial question of law or policy is raised because of (i) the absence of; or (ii) a departure from, officially reported Board precedent; (2) that the 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; (3) That the conduct of any hearing or any ruling made in connection with the

proceeding has resulted in prejudicial error; or (4) that there are compelling reasons for reconsideration of an important Board rule or policy.” *Id.*

The Employer asserts that the Regional Director’s decision both raises substantial questions of law or policy because of a departure from officially reported Board precedent and that the Regional Director made decisions on substantial factual issues that are clearly erroneous on the record and such error prejudicially affects the rights of the Employer. First, it must be noted that the Employer attempts to rely on officially reported Board precedent that is inapplicable to this case. Second, where the cases cited by the Employer do apply, the decision of the Regional Director does not depart from officially reported Board precedent in a way that raises a substantial question of law or policy. The Regional Director applied the governing Board case law, including *Concept & Designs, Inc.*, to the facts of the underlying case and reached a just and proper conclusion. It is not enough to simply disagree with the outcome of the analysis to meet the standard for review. There is little question that the Employer disagrees with the results, but it has failed to make a compelling argument that establishes a substantial departure from officially reported Board precedent.

The Employer has also failed to establish that any decisions on substantial factual issues are clearly erroneous on the record and such error prejudicially affects the rights of the Employer. The “clearly erroneous” standard is significantly deferential and requires a “definite and firm conviction that a mistake has been committed.” *Easley v. Cromartie*, 532 U.S. 234, 242 (2001). It is not enough for the Employer to disagree with the finding. If the Regional Director’s account of the evidence is plausible in light of the entire record, the Board should not grant review even if it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.

There is little question that, at a minimum, there is clearly two permissible views of the evidence established in this case. While the Employer has made it quite clear that it does not agree

with the Regional Director's 5/9/17 Decision, the Employer has failed to establish that its view is the only plausible view of the evidence in the record. This is partly due to the fact that the Employer failed to controvert crucial facts in this case such as the fact that while EMPAC was in existence in 1998, it was not fully functional. Additionally, the Employer failed to controvert the fact that EMPAC underwent substantial changes through upgrades in software in 2002 and 2008 which began to make fundamental changes in the Buyers' job duties. The Employer also failed to controvert the fact that the Employer's IT department wrote the Employer's policies and procedures into EMPAC around 2010 which resulted in "flags" popping up to alert the Buyers' when they are at risk of violating their procedure by not including required terms or not having required approvals. The Employer has also failed to controvert the fact that the Employer has negotiated Alliance Agreements which has resulted in substantial reductions in the Buyers' use of competitive bidding. All of these uncontroverted facts establish, at a minimum, that the Regional Director's view is plausible based on the record.

The Employer has also relied heavily on *Concepts & Designs* to argue that the Regional Director's decision is clearly erroneous due to a departure from established Board precedent. That argument is misplaced and falls short of the reality of the existing Board precedent. Several of the cases relied upon by the Regional Director actually rely on *Concepts & Designs* to reach their finding that the Buyers' in question are not managerial employees under the Act. Additionally, the Regional Director's reliance on *Lockheed-California Company* is certainly reasonable and plausible when looking at the facts of this case. Again, just because the Employer disagrees, does not mean the Regional Director's decision was clearly erroneous. For those reasons, the Employer has failed to establish compelling reasons for review under the applicable standard of review.

III. Relevant Facts

A. Finding of Facts in the February 16, 2016 Hearing

On May 4, 2000, the Acting Regional Director of then Region 17 found the Buyers to be managerial employees in a “Decision, Order and Clarification of Bargaining Unit” issued in Case 17-UC-210 (“*2000 Decision*”). (2/5/2016, D&DE, pg. 1). The Regional Director, in his decision in the instant case noted, that “the *2000 Decision* was issued almost 16 years ago, and it is incumbent on the Regional Director to create a record documenting how circumstances have changed with regard to Buyers and their duties and responsibilities.” (2/5/2016, D&DE, pg. 3). The Regional Director also noted that the transcript from the 2000 proceedings was not available and the *2000 Decision* does not contain a detailed description of the Buyers’ job duties and **did not address those duties in relation to computer software used by the petitioned-for employees.** (*Id.*)

At the hearing, the Petitioner spent a great deal of time introducing specific detailed evidence detailing how the EMPAC computer system impacts the employee status of the Buyers. (*Id.*) The facts established at the hearing included:

- Purchases are initiated when the Purchasing Department receives a requisition, which are created through the Employer’s EMPAC computer system by the requesting department. (2/5/2016, D&DE, pg. 4).
- The requisition lists the items that are being requested; how many of the items are needed; the commodity code; whether the item is engineered or safety-related; the item’s price; and whether the item has been bought before and, if so, the price the Employer paid in the past. The Buyers are not involved in the initial requisition process. (*Id.*)
- Not all employees are allowed to submit a requisition. The Purchasing Department trains employees on how to submit requisitions, and David Sullivan (Manager of Purchasing and Supply Chain Services) approves individuals so they can be entered into EMPAC and allowed to submit requisitions. (*Id.*)
- Requisitions must be authorized by a supervisor or manager in the requesting department prior to submission through EMPAC. The Buyers are not involved in the requisition authorization process. (*Id.*)
- The level of purchasing authority that a Buyer has correlates with the purchasing authority that the signatory requestor has. For example, if a requisition has \$50,000 in purchasing authority, the Buyer then has up to \$50,000 to use to purchase the requested item. (*Id.*)

- Once a requisition is received by the Purchasing Department, Everett Weems (Supervisor of Purchasing and Contracts) assigns each requisition to a Buyer depending on the type of items being requested. (*Id.*)
- After being assigned the requisition, the Buyer first determines whether the procedure requires the item be competitively bid. Where the value of goods and services is expected to exceed \$50,000, the Employer's written policy requires the Buyers to issue a competitive bid for goods/services. In practice, the Buyers also competitively bid items that cost well under \$50,000 on a regular basis. (2/5/2016, D&DE, pg. 5).
- A new competitive bidding procedure was established on or about January 21, 2016. Under the new procedure, the \$50,000 limit over which items must be competitively bid increased from \$5,000 to \$50,000. The Buyers were not involved in the decision to raise the minimum competitive bidding amount. (*Id.*, fn. 2).
- According to the Employer's procedures, to begin the competitive bidding process, "the Buyer determines the suppliers from whom to solicit bids based on commercial, technical and/or quality considerations." In practice, the Buyer first compiles a list of potential suppliers from which to seek a bid using EMPAC. EMPAC provides the Original Equipment Manufacturer ("OEM") and the price of any previous orders. (*Id.*)
- To select suppliers, the Buyers go to the item's OEM or other Employer-authorized distributors. The Buyer also may find suppliers using the internet (e.g., Google searches). For safety items, Buyers are required to use suppliers on a specific list. Sometimes, there is only a single supplier for a certain product, so there are no other companies from which to seek bids. (*Id.*)
- Once the Buyer has compiled a list of potential suppliers, the Buyer uses EMPAC to generate a Request for Quotation ("RFQ") to send to those suppliers. EMPAC allows the Buyer to tailor the RFQ to match the requisition by using established request clauses and information. For example, if the requisition states delivery must be expedited, the Buyer will use EMPAC to include a clause with this request in the RFQ. The Buyer determines the bid due date, which is set based on the initiating organization needs and detailed as requested dates in the original requisition. (D&DE, pg. 4-5).
- Sometimes suppliers will request an exception to the RFQ. If the product is safety-related or engineered, the Buyer sends the exception to the Procurement Engineer who determines whether the exception is acceptable. If the product is non-safety related, Buyers will typically go back to the requisitioner for input on the exception. (D&DE, pg. 6).
- Upon receiving the bids from suppliers, the Buyer will enter the bids into EMPAC and then EMPAC performs a bid analysis. Typically, the Buyer will select the lowest bidder. If a Buyer does not make the purchase with the lowest bidder, the Buyer is required to enter into EMPAC the reason why the supplier was chosen. (*Id.*)

- The Employer’s witness, Betty Saylor, testified in regards to how EMPAC automatically calculates the low bidder. “As a general rule, I’ll enter them into our EMPAC database. We’ve got – on the request for quotation, there is an area for reply per supplier. You put all your data in and then you hit bid analysis. Automatically, it’s going to calculate low bidder, it’s going to give me FOB terms and it’s going to give me payment terms. (Tr. 184: 20-25).
- Once a supplier is selected, the Buyer drafts a Purchase Order in EMPAC. EMPAC allows the Buyer to select different clauses regarding terms and conditions to use in the Purchasing Order and will then issue the Purchasing Order. EMPAC has a mechanism to notify a Buyer if the forgot to include terms and conditions in the Purchasing Order. (*Id.*).
- If bids come back and are more than \$1,000 per line item than what was on the original requisition, the Buyer will go back to the requisitioner for funding approval before issuing the Purchase Order. If a bid comes back and is still above the original requisition price, but less than \$1,000 per line item, the Employer’s procedure provides that a Buyer can make the purchase. (D&DE, pg. 6-7).
- EMPAC will specifically ask the Buyers if they received funding approval before the system creates the Purchasing Order. Once the Purchasing Order is issued, the Buyer has committed Employer funds for the purchase of requisition funds. (D&DE, pg. 7). When EMPAC was originally installed at the Employer’s facility, it did not include this notification. It was added after the fact by management and the Buyers were not involved in that decision. (*Betty Saylor*, Tr. 195: 3-11).
- On cross-examination, Ms. Saylor confirmed that once the requisition gets to the Buyers, it has already been through the approval process and it is locked in. The Buyer can’t make any changes without approval from someone else. (Tr. 196: 19-25).

The Buyers also testified in specific detail as to how their job duties changed from pre-2000 *Decision* to today with EMPAC and how the nuclear industry is much more restrictive when it comes to purchasing:

- When asked what has changed in how Ms. Somerhalder does her work as a Buyer with the addition of EMPAC, Ms. Somerhalder stated that there are “more checks and balances with the EMPAC system. There’s --- again, if we’re typing a PO, there’s flags that will pop up, a pop-up barrier that will say – you know, if it exceeds the funded amount on the requisite, the amount that’s funded on the requisition, it will pop up and remind you and say, hey, check your – or in essence, check your procedure for – do you need to go back for an email for approval of additional funds or do you need a CASF form?” (Tr. 145: 8-16).
- Additionally, Ms. Somerhalder testified that “there’s audit trails of everything.” When asked if these audit trails existed in 1996, she testified that they did not. She stated that

“after the Sarbanes-Oxley Act, our owner companies started auditing us. So they would ask for POs and the request for quote package, which everything’s filed in curator now for perpetuity. (Tr. 145: 16-25).

- Mr. Sean Nelson testified that, as an individual who worked as a Buyer in both the nuclear and non-nuclear industry that “nuclear is completely different, much more restrictive. When I was doing refinery projects, I would write the descriptions and could make changes and all that and it wasn’t a big deal, but we weren’t dealing with a nuclear power plant. (Tr. 167: 18-22).
- On direct, Employer’s witness Betty Sayler was asked about what functional difference EMPAC brought to her job as a Buyer. Ms. Sayler testified that ‘EMPAC just gave us automation, it gives us more tools, it’s a difference of day [and] night actually.’ (Tr. 186: 10-12); 194: 5-13). This confirmed what the Buyers stated in their testimony. (*Tracy Beard*, Tr. 88: 20-25; 89: 1-6 (“there is just really no comparison.”); *Sandra Somerhalder*, Tr. 140: 19-25 (in comparing MAPPER to EMPAC, it was a very “manual process. Everything had to be entered manually. It did not have the sophistication as compared to EMPAC. It did not have the functionalities.”)).
- The Employer’s witness, Betty Sayler, testified in regards to how EMPAC automatically calculates the low bidder. “As a general rule, I’ll enter them into our EMPAC database. We’ve got – on the request for quotation, there is an area for reply per supplier. You put all your data in and then you hit bid analysis. Automatically, it’s going to calculate low bidder, it’s going to give me FOB terms and it’s going to give me payment terms. (Tr. 184: 20-25). Ms. Somerhalder confirmed in her testimony that MAPPER did not have this type of functionality. (Tr. 140: 19-25).

B. Facts Established in the April 25, 2017 Hearing

The parties stipulated at the hearing that MPAC came into existence in November 1998 at Wolf Creek. (Tr. 250:17-21). However, Petitioner established undisputed evidence that when MPAC came into existence MPAC really “limped along” and the buyers’ were continuing to use the old MAPPER program in addition to MPAC. (*Rogers*, Tr. 257: 9-16; 259: 14-23; *Somerhalder*, Tr. 281: 5-9). Additionally, in 2002, MPAC went through an upgrade from revision 7.7 to 8.5. This caused major changes to the policies and procedures that the buyers and other Wolf Creek employees were required to follow. (Tr. 262: 11-14; Exhibit P7). Numerous revisions listed in the “DRR” indicate that the changes made were required by the upgrade in MPAC to revision 8.5. (Exhibit P7, pgs. 1-10). Ms. Somerhalder also testified that AP-24-002 is the buyers’ “mother procedure” and the more

changes made to this procedure, the more it impacted and controlled the buyers work. (Tr. 282:1-10).

One of the most important changes that came with the 8.5 revision in 2002 was the addition of curator. (*Somerhalder*, Tr. 280: 18-23). According to Ms. Somerhalder, the first requisition available in curator for review came in 2002. Curator also brought with it the ability to conduct detailed audit trails as identified in Exhibit P13. (Tr. 280: 18-23). However, it was not until 2006 that MPAC became an entirely automated program. This brought with it key changes to the Employer's procedures and the buyers' work. First, the process of sending purchase orders and all related documents to document services for processing and storage was eliminated. (Exhibit P8; Tr. 284: 18-25; 285: 1-4). These documents began being placed in curator. This allowed for MPAC to have direct access to these documents and be able to pull those documents for use in future purchase orders. Second, the main procedure AP 24-002 was changed with specific application to procedures for competitive bids by requiring adherence to an entire other procedure, AP 24C-009 which governs the process for "requests for quotation." (Exhibit P9; Tr. 288: 15-25). These changes occurred in March 2006. (Tr. 286: 8-10).

Another major change that occurred in 2008 is that MPAC was again upgraded to revision 8.6 which is the revision currently in place today. (Tr. 291: 18-23). Ms. Somerhalder indicated that one of the major changes with the 2008 revision was that the commodity code, while used previously, was added to MPAC which helped ensure for automatic routing of requisitions for approvals. (Tr. 372: 17-25).

One of the most crucial changes to MPAC came sometime after 2010 according to Ms. Somerhalder. Exhibit P11 contains a number of "condition reports" created in 2009 and 2010 by former Lead Buyer Betty Saylor. Ms. Saylor created these condition reports because the buyer completing the requisition in those documents had failed to obtain the required approvals or failed

to include required information. These condition reports, according to the testimony of Ms. Somerhalder, led to the creation of the dialogue “pop-up” boxes contained in Exhibit P12. These dialogue boxes are key because they were designed by the Employer’s IT department based on condition reports such as those in P11 to stop those errors from happening. These dialogue boxes pop up anytime a buyer attempts to process a purchase order without having certain required approvals or if they are missing certain required clauses or terms. MPAC now tells the buyers when something is missing. Before these post-2010 changes in MPAC, the buyers were on their own to ensure these mistakes didn’t happen.

Additionally, the buyers’ purchase order procedure was changed in 2006 to put the responsibility on reviewing and ensuring the accuracy of the purchase orders on the buyers as opposed to the supply chain manager. Ms. Somerhalder and Ms. Beard both testified that this was not due to management trying to give the buyers’ more discretion. It was instead, an indication that MPAC’s capabilities in overseeing and checking the buyers’ work grew to a point that the supervisors review was not necessary. Mistakes were routinely caught and fixed through the use of MPAC. According to Ms. Somerhalder and Ms. Beard, MPAC incrementally became the de-facto supervisor of the buyers’.

Evidence was also established through Exhibit P13 that the buyers’ do not have access to any management reports filed in supply chain services by their managers. The record also establishes that the buyers’ are not even listed in the document that lists which employees have the power to commit certain levels of expenditures through their approvals. (Exhibit P14). It is also important to note that the PAR bonus program, which is paid to employees based on a hierarchy of their employment status, classifies the buyers’ in the general employees section above bargaining unit employees but below that of supervisors and managers. (Vickrey, Tr. 433: 18-25; 434: 1-23).

Tracy Beard also testified that her job duties changed substantially in 2011 when the service labor contract work that she was completing was removed from the buyers' department and transferred to the contract services department. She went from actually drafting agreements revolving around software licensing to doing buyers work 100 percent of the time using MPAC. (Tr. 396: 19-25; 397: 1-20).

IV. Argument and Authorities

A. The Regional Director's Finding of a Material Change to the Buyers' Job Duties was not Clearly Erroneous

While the Employer disagrees with the Regional Director's finding of a material change in the Buyers' job duties justifying relitigation of the Buyers' managerial status, its' discontent is simply not enough to justify review of the Regional Director's decision. The Employer bears the burden of establishing that the Regional Director's decision was **clearly erroneous** based on the facts established on the record. As previously discussed, the "clearly erroneous" standard is significantly deferential and requires a "definite and firm conviction that a mistake has been committed." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001). It is not enough for the Employer to disagree with the finding. If the Regional Director's account of the evidence is plausible in light of the entire record, the Board should not grant review even if it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

1. The Petitioner's Burden of Establishing a Material Change is "not an Onerous One"

As the Board indicated in its April 7, 2017, decision, while it is the Petitioner's burden to prove that there has been a material change in the buyers' circumstances which would justify relitigation of the buyers' managerial status, that burden is not an onerous one. In fact, pointing to "one material differentiating fact" would be sufficient to justify such relitigation. *Wolf Creek*, 365 NLRB No. 55, slip op. at 3. According to *Black's Law Dictionary*, something is "material" if it is "[o]f

such a nature that knowledge of the item would affect a person's decision-making."³ Thus, the Petitioner has met its burden if it has established one factual change in circumstances for the buyers' which would affect the buyers' decision-making process at Wolf Creek.

The record establishes that EMPAC came into existence at Wolf Creek in approximately November 1998. It was also conclusively established at when EMPAC was implemented in late 1998, the EMPAC system did not have the functionality that it does presently and the Buyers' continued to use MAPPER in the performance of their duties. Additionally, EMPAC has been repeatedly and significantly modified to add new capabilities and functions since the *2000 Decision*. These changes occurred in 2002, 2008 and 2010. In 2002, EMPAC went from revision 7.7 to revision 8.5. In 2006, the record establishes that the Employer made upgrades in technology which allowed for EMPAC and Curator to interact and store information about previous purchases and supplier information. Additionally, in 2006 the commodity code was changed which provided for automatic routing of the requisition to the different departments and management who were required to approve any purchases. In 2008, EMPAC was again upgraded to Revision 8.6 which is its current revision. Each upgrade brought with it substantial changes to the procedures the Buyers' are required to operate within.

Most significantly, the record establishes that the technological changes in EMPAC enhanced the Employer's ability to monitor and control the requisition process. EMPAC has been programmed to conform with the Employer's procurement policies to ensure that the Buyers' do not make mistakes or go outside of those procedures. As EMPAC has evolved since 2000, the Employer has continued to program checks and balances into the system to ensure that the employees comply with relevant procurement policies. As evidenced in Petitioner's exhibits 11 and

³ See *Black's Law Dictionary*, Tenth Edition, Bryan A. Gardner, pg. 1124.

12, this programming resulted in EMPAC being programmed to flag certain fields to alert the Buyers' to potential policy violations.

There is little question that the record contains substantial evidence of changed circumstances in the Buyers' job duties justifying relitigation of the Buyers' managerial status. Additionally, while the Petitioner's burden of establishing such changed circumstances "is not an onerous one," the Employer's burden of establishing the Regional Director's decision is "clearly erroneous" is an onerous one. It requires the Employer to show that the Regional Director's decision is one which creates a "definite and firm conviction that a mistake has been committed." The Employer must show that the Regional Director's decision is not plausible in light of the entire record. There is little question that the Employer has fallen well short of meeting this standard. The Regional Director's decision is based on relevant competent evidence and is clearly plausible based on the established record.

2. The Changes in the Buyers' Job Duties Since 2000 Enhanced Regulation and Oversight of the Buyers' Work While Reducing Discretion

The Employer rests most of its argument on Board precedent finding technological changes are insufficient to establish material changes to a job classification. While the Employer correctly cites the Board's well-established precedent, it incorrectly applies it to this case. This case is more than just technological changes and innovation. Changes to EMPAC do more than simply making the Buyers' job easier to do. The changes to EMPAC since the *2000 Decision* have fundamentally limited the Buyer's discretion. As the Regional Director pointed out, these changes have taken information that was once available only in the mind of a seasoned Buyer, is now not only automatically assessable electronically, they are built into EMPAC along with the Employer's policies and procedures with automatic pop-up warnings alerting Buyers' when they need certain approvals or may be violating procedure.

Additionally, in several aspects, EMPAC actually performs the functions for which Buyers were previously independently responsible. EMPAC automatically analyzes and calculates the low bid and shipping terms. EMPAC also automatically obtains the required approvals before the requisition gets to the Buyers'. In the event that the requisition is changed by the Buyers' EMPAC notifies the Buyer that additional approvals are required and automatically routes the requisition to the individuals required to approve it. Beyond the technological changes, the record also establishes that the Employer no longer relies on the Buyers' to prepare competitive bids for purchases and review price quotes as frequently as it did in 2000. The Employer has continued to increase its use of single-source supplies through negotiated alliance agreements. The record also establishes that the Buyers' do not negotiate these agreements. The record also establishes that the Buyers' now consult with other departments on responses to RFQs where in the past they did not.

Thus, while the Employer correctly argues that changes in technology alone do not constitute changed circumstances, the record in this case clearly establishes that the changes to the Buyers' circumstances are more than simply innovation in the technology they use. They are fundamental changes to the Buyers' job duties which severely restrict their discretion. Additionally, under the clearly erroneous standard, the Employer has fallen well short of its required burden. For those reasons, the Employer's request should be denied and the Regional Director's decision should be allowed to stand.

B. The Regional Director's Finding that the Buyers' are not Managerial Employees was not Clearly Erroneous

Just as discussed above, the Employer's burden is not to persuade the Board that their position is the preferable one. It is to establish that the Regional Director's decision is clearly erroneous. The Employer must establish that the Regional Director's decision that the Buyers' are not managerial employees is not plausible in light of the entire record.

Further, the Employer's white knuckled grip on *Concept & Designs* as its life preserver on review is greatly misplaced. *Concept & Designs* stands for the concept that employees who make routine purchases for an employer, within and not independent of Employer procedures, are not managerial employees while those who commit substantial amounts of an employer's credit without review or approval are managerial employees. 318 NLRB at 957. However, where review or pre-approval is required, the commitment of substantial amounts of an employer's credit, alone, does not establish managerial status. The Employer also cited *Swift & Co.* as a basis for review of the Regional Director's decision. 115 NLRB 752 (1956) While it is true that the Board has found that the ability of an employee to commit an employer's credit in amounts which are substantial is strong evidence of managerial status, that fact alone is not dispositive. Swift also required the commitment of the substantial amount of credit to be unreviewed, not pre-approved, and subject to the discretion of the employee committing the credit. 115 NLRB at 753.

As the Regional Director also pointed out, this case more clearly resembles *Lockheed-California Co.*, which established that although a buyer can commit a company's credit up to \$50,000 and also negotiates prices with suppliers, where that buyer does not have discretion independent of established policy since higher authority must review and approve much of their recommendations, those buyers are not managerial employees. 217 NLRB 573 (1975). Additionally, *Solartec, Inc. & Sekely Indus.* found employees to be not managerial even though they had authority to recommend purchase and use equipment and negotiate with supplier. 352 NLRB 331, 336 (2008). In *Eastern Camera and Photo Corp.*, the Board found that:

Managerial status is not necessarily conferred upon employees because they possess some authority to determine, within established limits, prices and customer discounts. In fact, the determination of an employee's managerial status depends upon the extent of his discretion, although even the authority to exercise consideration discretion does not render an employee managerial where his decisions must conform to the employer's established policy. 140 NLRB 569 (1962) (cited and relied upon in *Concept & Designs*, 318 NLRB at 957).

The record firmly establishes that the Employer has substantially limited the amount of independent discretion the Buyers' exercise. This is due to the Employer's evolving practices and requisition and procurement policies, which have been embedded into the EMPAC software to the extent that it eliminates much of the Buyers' independent discretion. As was pointed out by the Petitioner in its previous opposition to the Employer's Request for Review, the Buyers' make absolutely no purchases without an approval of a member of management. Petitioner's Exhibit 14 contains the complete list of those who are qualified approvers of requisitions and lists the dollar amount they are allowed to approve up to. It is important to note that the Buyers' are not even listed in this document at all. This is important evidence establishing that they have no ability to commit the Employer's credit on their own.

V. Conclusion

For the reasons stated herein, the Petitioner respectfully requests the Board deny the Employer's Request for Review as no compelling reasons for granting such review exists under 29 C.F.R. § 102.67(d).

Respectfully Submitted

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CERTIFICATE OF SERVICE

The foregoing, Petitioner's Response in Opposition to Employer's Request for Review, filed by IBEW 225 in Case No. 14-RC-168543 was served upon the Employer and Region 14 by electronic mail on May 30, 2017, to the following:

Brian J. Christensen
Trecia Moore
Jackson Lewis P.C.

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Attorneys for the Employer

Leonard Perez
Regional Director
NLRB Region 14
1222 Spruce Street
Room 8.302
St. Louis, MO 63103-2829

/s/William R. Lawrence IV
Counsel for Petitioner

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14**

**WOLF CREEK NUCLEAR OPERATING
CORPORATION**

and

Case 14-CA-181053

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 225**

**MOTIONS TO TRANSFER CASE TO BOARD AND FOR SUMMARY JUDGMENT
DECISION AND ORDER ON TEST OF CERTIFICATION**

The above-captioned case is a test of the Certification of Representative issued by the National Labor Relations Board (Board) to the International Brotherhood of Electrical Workers, Local 225 (Union) as the exclusive collective-bargaining representative of a unit of certain employees employed by Wolf Creek Nuclear Operating Corporation (Respondent). As the pleadings in the above-captioned case raise no material issues of fact or law requiring a hearing, the undersigned Counsel for the General Counsel, pursuant to Sections 102.24, 102.26 and 102.50 of the National Labor Relations Act (Act) and upon the facts stated below, as well as the attached documents and exhibits referred to herein, hereby moves the Board to: (1) transfer Case 14-CA-181053 to the Board; and (2) issue a Decision and Order granting Summary Judgment against Respondent, with the requisite findings of fact and conclusions of law establishing violations of Sections 8(a)(1) and (5) as alleged; order Respondent to appropriately remedy the unfair labor practices; and grant such other relief as may be proper. Counsel for the General Counsel shows and alleges the following in support of these Motions:

1.

On January 28, 2016, the Union filed a petition in Case 14-RC-168543 seeking to represent certain employees of respondent. A copy of the Petition is attached as Exhibit 1.

2.

Following a hearing on February 5, 2016, the Regional Director of Region 14 of the Board issued a Decision and Direction of Election on February 16, 2016, scheduling an election among the following employees of Respondent (Unit), a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Buyers I, II, III and Lead Buyer employed by the Employer at its facility near Burlington, Kansas to be included in a separate unit, EXCLUDING all office clerical employees, all other professional employees, all managerial employees, all guards and supervisors as defined by the Act, and all other employees.

A copy of that Decision and Direction of Election is attached as Exhibit 2.

3.

On February 24, 2016, a representation election was conducted among employees in the Unit. The tally of ballots showed that, of 4 eligible voters, 3 cast valid ballots in favor of representation by the Union and 1 cast a valid ballot against such representation. There were no void ballots, and there were no challenged ballots. Thus, the tally of ballots disclosed that a majority of valid votes were cast for the Union. A copy of the tally of ballots is attached as Exhibit 3.

4.

On February 29, 2016, Union Business Manager Raymond Rogers emailed Labor Relations Supervisor Jayne Pearson and attached to the email was a request for information related to bargaining for the Unit. The email and attached request for information are attached as

Exhibit 4. Also on February 29, 2016, Rogers spoke with Pearson by phone and requested to begin negotiations for a contract. Pearson declined. See *infra*, Exhibit 18, Respondent's Answer to Paragraph 5(a) and 5(c) of the Complaint and Notice of Hearing.

5.

On March 1, 2016, Respondent filed with the Board a Request for Review of the Regional Director's Decision and Order of February 16, 2016. Respondent argued, in part, that the Regional Director erred when he disregarded the decision in Case 17-UC-210 (hereinafter the 2000 decision), wherein the Region found the same job classifications encompassed by the petitioned for Unit to be "managerial employees." A copy of this document is attached as Exhibit 5.

6.

On March 7, 2016, Labor Relations Supervisor Jayne Pearson emailed Union Business Manager Raymond Rogers confirming receipt of the February 29, 2016 request for information. Pearson stated that the Employer had no obligation to provide the information because the results of the election had not yet been certified by the Regional Director. A copy of the March 7, 2016 email is attached as Exhibit 6.

7.

On March 8, 2016, the Regional Director issued a Certification of Representative certifying the Union as the exclusive collective-bargaining representative of the Unit. A copy of the certification is attached as Exhibit 7.

8.

On March 15, 2016, Labor Relations Supervisor Jayne Pearson emailed Union Business Manager Raymond Rogers regarding, *inter alia*, the February 29, 2016, request for information

and Respondent's position that the job classifications encompassed by the Unit were managerial employees within the meaning of the Act. Pearson also stated that Respondent did not have an obligation to bargain with the Union with respect to the Unit. A copy of the March 15, 2016, email is attached as Exhibit 8.

9.

On July 28, 2016, the Union filed the Charge in Case 14-CA-181053, alleging that the Respondent violated Sections 8(a)(1) and (5) of the Act by refusing to bargain with the Union, the certified bargaining representative and by failing to furnish information requested by the Union. A copy of the charge, including the affidavit of service, is attached as Exhibit 9.

10.

On April 7, 2017, the Board issued an order granting in part and denying in part, without prejudice and remanding the case to the Regional Director for further appropriate action. In particular, the Board remanded the case to the Regional Director to consider whether the record demonstrates changed circumstances sufficient to allow reconsideration of the buyers' managerial status that was previously litigated and decided in a unit-clarification proceeding in 2000. A copy of the Board's order is attached as Exhibit 10.

11.

On April 18, 2017, the Regional Director issued an Order Reopening Record and Notice of Further Hearing. A copy of the Order and Affidavit of Service are attached as Exhibit 11.

12.

Following a hearing on April 25, 2017, the Regional Director of Region 14 of the Board issued a Supplemental Decision on May 9, 2017. The Regional Director found that the evidence demonstrated that material changes warranted declining to give the 2000 decision preclusive

effect and that the evidence no longer supported the conclusion that the petitioned-for buyers are managerial employees. A copy of the Supplemental Decision is attached as Exhibit 12.

13.

On May 23, 2017, Respondent filed with the Board its Employer's Request for Review of the Regional Director's Supplemental Decision of May 9, 2017. A copy of this document is attached as Exhibit 13.

14.

On October 27, 2017, the Board issued an Order denying Employer's Request for Review of the Regional Director's Supplemental Decision. A copy of the Board's Order is attached as Exhibit 14.

15.

On October 30, 2017, the Union, by letter, requested that Respondent recognize it as the exclusive collective-bargaining representative of the Unit and bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit. A copy of the Union's letter is attached as Exhibit 15.

16.

Since about February 29, 2016, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit. Respondent, by emails dated March 15, 2016, supra Exhibit 8, and November 14, 2017, refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit described above in paragraph 2. A copy of Respondent's November 14, 2017, email is attached as Exhibit 16.

17.

On November 28, 2017, pursuant to Section 102.15 of the Board's rules and regulations, the Regional Director for Region 14 issued a Complaint and Notice of Hearing in Case 14-CA-181053, alleging that since about February 29, 2016, Respondent has violated Sections 8(a)(1) and (5) of the Act by failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees and by failing and refusing to furnish the Union with information it requested that was relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit. The Complaint required that Respondent file an Answer to the Complaint by December 12, 2017. A copy of the Complaint was served by certified mail upon the parties to this proceeding. A copy of the Complaint, including affidavit of service, is attached as Exhibit 17.

18.

On December 12, 2017, Respondent filed an Answer to the Complaint, and served a copy thereof on the parties to this proceeding. A copy of Respondent's Answer is attached as Exhibit 18.

19.

In its Answer, Respondent admits the following allegations of the Complaint, noted by their paragraph numbers:

1. Service;
- 2.(a)-(d) Incorporation, business operations, Inflow of goods and services from outside the State of Kansas; Outflow of good and services to States other than State of Kansas; Commerce conclusion;
3. Labor Organization Status;
- 4.(b) Representative Election was held on February 24, 2016, and the Union was certified as the exclusive collective-bargaining representative on March 8, 2016;

- 4.(c)(part) Admits that an election was conducted;
- 5.(a) About February 29, 2016, the Union requested Respondent recognize it as exclusive collective-bargaining representative of the Unit and bargain collectively with the Union as the exclusive collective-bargaining representative;
- 5.(b) About October 30, 2017, the Union renewed its request that Respondent recognize it as exclusive bargaining representative of Unit and bargain collectively with the Union;
- 5.(b)(sic)(part) Respondent has declined to recognize and bargain with the Union as the collective bargaining representative of the Unit
- 6.(a) - About February 29, 2016, Union requested, by email, information;
- 6.(c)(part) Respondent declined to provide the information;
- 7.(part) Respondent has declined to recognize the Union as the collective-bargaining representative of Unit employees and to bargain collectively with the Union.

20.

In its Answer, Respondent denies the following allegations of the Complaint, noted by their paragraph numbers:

- 4.(a) Unit employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of § 9(b) of the Act.
- 4.(c)(part) Since February 24, 2016, Union has been exclusive collective-bargaining representative of the Unit.
- 5.(b)(sic)(part) Union is the collective-bargaining representative of the Unit and that employees are covered by the Act and constitute an appropriate unit for bargaining.
- 6.(b) Information in 6(a) is necessary for and relevant to Union's performance of its duties as the exclusive collective-bargaining representative of the Unit.
- 6.(c)(part) Remaining allegations.
- 7.(part) Commission of Unfair labor practice by failing and refusing to bargain collectively with the Union as the exclusive collective-bargaining representative of its Unit employees.

8. The unfair labor practices it committed affect commerce within the meaning of §§ 2(6) and (7) of the Act.
9. Any and all relief sought to remedy the unfair labor practices including an Order requiring Respondent to bargain in good faith.

21.

Respondent's Answer also raises the following affirmative defenses, requesting that the Complaint be dismissed in its entirety, as numbered in Respondent's Answer:

1. The allegations in the Complaint are barred by the doctrine of res judicata and/or collateral estoppel.
2. The Complaint fails to state a claim upon which relief may be granted.
3. At all relevant times Respondent has acted lawfully and in good faith and has not violated any rights that may be secured to any individual or labor organization under the Act.
4. Employees at issue are managerial as defined by the Act, and therefore, are not properly included in the purported bargaining unit.
5. The Unit at issue was not properly certified because it is comprised of employees who are not covered by the Act.

22.

Counsel for the General Counsel respectfully requests that the Board take administrative notice of all the documents described above in Cases 14-RC-168543 and 14-CA-181053. Based on the foregoing, pursuant to Sections 102.24 and 102.50 of the Board's Rules and Regulations, Counsel for the General Counsel hereby moves to transfer this case to the Board and to continue proceedings before the Board and for summary judgment in this matter.

ARGUMENT

Although Respondent denies certain allegations of the Complaint, its Answer fails to raise any material issues of fact, as Respondent admits it has failed and refused to recognize and

bargain with the Union as the exclusive collective-bargaining representative of the Unit and failed to provide the Union with requested, relevant information. As such, Respondent admits it has failed to bargain with the Union and its conduct constitutes a violation of Section 8(a) (1) and (5) of the Act. *See Machine Maintenance, Inc. d/b/a Machine Maintenance and Equipment Company*, 303 NLRB No. 21 (1991); *Beverly California Corporation*, 303 NLRB No. 20 (1991).

Notwithstanding Respondent's denials of certain of the complaint allegations, all allegations should be deemed admitted as true. Respondent is seeking to re-litigate issues previously determined in the underlying representation case, Case 10-RC-168543. The Board and the Courts have consistently held that issues that were or could have been raised and determined by the Board in a prior representation proceeding cannot be re-litigated in a subsequent unfair labor practice proceeding, absent newly discovered evidence, previously unavailable evidence, or special circumstances. Thus, a respondent in a Sections 8(a)(1) and (5) proceeding is not entitled to re-litigate issues that were or could have been raised in prior representation proceedings. *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); *LTV ElectroSystems, Inc.*, 166 NLRB 938, 939-40 (1967), *enfd.* 388 F. 2d 683 (4th Cir. 1968); *Warren Unilube, Inc.*, 357 NLRB 44 (2011); *Board's Rules and Regulations*, subsection 102.67(f).

Accordingly, as Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding, a hearing is unwarranted in this matter. As there is no genuine issue of fact existing in this case, and Respondent has not shown that newly discovered, relevant evidence is now available, the Board should transfer this case and continue the proceedings before it, find the allegations set forth in the complaint to be true without receiving evidence, grant summary judgment, and issue a Decision and Order finding a violation.

It is respectfully requested that the Board make its findings of fact based on the allegations in the complaint and Respondent's admissions thereto and conclude that, as a matter of law, Respondent has violated Sections 8(a)(1) and (5) of the Act. It is also respectfully requested that the Board order an appropriate remedy, including an order that the initial certification year shall be deemed to begin on the date Respondent commences to bargain in good faith with the Union as the certified bargaining representative of the employees in the appropriate Unit. *Mar-Jac Poultry Co.*, 136 NLRB 786 (1982); *Campbell Soup Company*, 224 NLRB 13 (1976); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F. 2d 600 (5th Cir. 1964), *cert denied* 379 U.S. 817.

WHEREFORE, because Respondent has failed to raise any issues of material fact requiring a hearing, it is respectfully requested that:

- (a) This case be transferred to and continued before the Board;
- (b) The allegations of the complaint be found to be true;
- (c) This motion for summary judgment be granted; and
- (d) The Board issue a Decision and Order containing findings of fact and conclusions of law in accordance with the allegations of the complaint and remedying Respondent's unfair labor practices by including a provision that, for the purpose of determining the effective date of the Union's certifications, the initial year of certification shall be deemed to begin on the date that Respondent commences to bargain in good faith with the Union, and order any other relief as is deemed just and proper.

Respectfully submitted,

Date: December 20, 2017

/s/Julie M. Covel

Julie M. Covel

Counsel for the General Counsel

National Labor Relations Board, Region 14

8600 Farley, Suite 100

Overland Park, Kansas 66212-4677

STATEMENT OF SERVICE

I hereby certify that I have this date served copies of the foregoing Motions To Transfer Case To Board and For Summary Judgment Decision And Order On Test Of Certification on all parties listed below pursuant to the National Labor Relations Board's Rules and Regulations 102.114(i) by electronically filing with service by electronic mail on the parties identified below.

Dated: December 20, 2017

/s/ Julie M. Covel

Julie M. Covel
Counsel for the General Counsel

PARTIES RECEIVING ELECTRONIC MAIL:

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UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
RC PETITION

DO NOT WRITE IN THIS SPACE

Case No.

14-RC-168543

Date Filed

January 28, 2016

INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlr.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.

1. PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

2a. Name of Employer
Wolf Creek Nuclear Operating Corporation

2b. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code)
1550 Oxen Lane
Burlington KS 66839

3a. Employer Representative - Name and Title
Jayne Pearson

3b. Address (If same as 2b - state same)

3c. Tel. No.
(620) 364-8831

3d. Cell No.

3e. Fax No.

3f. E-Mail Address
japears@wcnoc.com

4a. Type of Establishment (Factory, mine, wholesaler, etc.)
Energy

4b. Principal product or service

5a. City and State where unit is located:
Burlington, KS

5b. Description of Unit Involved

Included: See Attached Page 2 for additional details

Excluded: See Attached Page 2 for additional details

6a. No. of Employees in Unit:
4

6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes No

Check One: **7a.** Request for recognition as Bargaining Representative was made on (Date) _____ and Employer declined recognition on or about _____ (Date) (If no reply received, so state).

7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8a. Name of Recognized or Certified Bargaining Agent (If none, so state).

8b. Address

8c. Tel No.

8d Cell No.

8e. Fax No.

8f. E-Mail Address

8g. Affiliation, if any

8h. Date of Recognition or Certification

8i. Expiration Date of Current or Most Recent Contract, if any (Month, Day, Year)

9. Is there now a strike or picketing at the Employer's establishment(s) involved? No If so, approximately how many employees are participating? _____
(Name of labor organization) _____ has picketed the Employer since (Month, Day, Year) _____

10. Organizations or individuals other than Petitioner and those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. (If none, so state)

10a. Name

10b. Address

10c. Tel. No.

10d. Cell No.

10e. Fax No.

10f. E-Mail Address

11. Election Details: If the NLRB conducts an election in this matter, state your position with respect to any such election.

11a. Election Type: Manual Mail Mixed Manual/Mail

11b. Election Date(s):
February 17, 2016

11c. Election Time(s):
9am-10am

11d. Election Location(s):
William Allen White Building at Employer's facility.

12a. Full Name of Petitioner (including local name and number)
Ray Rogers
International Brotherhood of Electrical Workers, Local 225

12b. Address (street and number, city, state, and ZIP code)
P.O. Box 404
Burlington KS 66839

12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (if none, so state)
International Brotherhood of Electrical Workers

12d. Tel No.
(620) 366-2306

12e. Cell No.
(620) 366-2306

12f. Fax No.

12g. E-Mail Address
rcrogers@cableone.net

13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.

13a. Name and Title
William R Lawrence IV Attorney
Fagan Emerit & Davis, L.L.C.

13b. Address (street and number, city, state, and ZIP code)
730 New Hampshire Suite 210
Lawrence KS 66044

13c. Tel No.
(785) 331-0300

13d. Cell No.
(785) 580-7090

13e. Fax No.
(785) 331-0303

13f. E-Mail Address
wlawrence@fed-firm.com

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print)
William R Lawrence IV

Signature
William R. Lawrence IV

Title
Attorney

Date
01/28/2016 08:49:53

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

DO NOT WRITE IN THIS SPACE

Case

14-RC-168543

Date Filed

January 28, 2016

Attachment

Employees Included

All full-time and part-time Buyers I, II, III and Lead Buyer employed by the Employer at its facility near Burlington, Kansas to be included in a separate unit.

Employees Excluded

All office clerical employees, all other professional employees, all managerial employees, all guards and supervisors as defined by the Act, and all other employees.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14**

**WOLF CREEK NUCLEAR OPERATING
CORPORATION**

Employer

and

Case 14-RC-168543

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 225**

Petitioner

DECISION AND DIRECTION OF ELECTION

Wolf Creek Nuclear Operating Corporation (“Employer”) operates a nuclear power facility located in Burlington, Kansas (“Employer’s Facility”). On January 28, 2016, the Petitioner, International Brotherhood of Electrical Workers, Local 225 (“Petitioner”), filed a petition with the National Labor Relations Board (“Board”) under Section 9(c) of the National Labor Relations Act (“Act”) seeking to represent the following unit of employees:

All full-time and part time Buyers I, II, III and Lead Buyer employed by the Employer at its facility near Burlington, Kansas to be included in a separate unit, EXCLUDING all office clerical employees, all other professional employees, all managerial employees, all guards and supervisors as defined by the Act, and all other employees.

There are approximately four employees employed in the petitioned for unit. On February 5, 2016, a hearing officer conducted a hearing in this matter.

The Regional Director of Region 14 of the Board directed that the sole issue to be litigated was whether the job classifications of Buyer I, Buyer II, Buyer III, and Lead Buyer (collectively the “Buyers”) are managerial employees within the meaning of the Act. The Employer opposes the Petition on the grounds that on May 4, 2000 the Acting Regional Director of then Region 17 found Buyers to be managerial employees in a “Decision, Order and Clarification of Bargaining Unit” issued in Case 17-UC-210. The Petitioner maintains that there

have been changes in the duties and job assignments of the Buyers since 2000 and, as such, the Buyers are not managerial employees and the Petitioner should be allowed to represent them in a separate unit.¹

I. RES JUDICATA AND THE 2000 UC DECISION

As a preliminary matter, the Employer argues that the Petition should be dismissed under the doctrine of *res judicata*. The Employer asserts that since the Acting Regional Director of then Region 17 issued a “Decision, Order and Clarification of Bargaining Unit” (“*2000 Decision*”) finding Buyers to be managerial employees, the Petitioner is precluded from bringing this matter before the Regional Director in the instant proceeding. The Employer’s reliance on the doctrine of *res judicata* is misplaced. Under the doctrine of *res judicata*, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. *Sabin Towing & Transportation Co.*, 263 NLRB 114, 120 (1982) citing *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1877); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326 (1955). While the Regional Director of Region 17 did make such a finding in 2000, the Board did not make an official or final ruling on the issue. Indeed, the Board simply did not grant review of the matter. Much like a *writ of certiorari* before the Supreme Court, the Board’s refusal to grant review is not the same as an official ruling on a subject. Since the Board did not issue an official ruling on the issue of whether Buyers are managerial employees the *2000 Decision* does not rise

¹ At the February 5, 2016 hearing, as a peripheral issue, Petitioner raised that the Buyers may be considered professional employees within the meaning of Section 2(12) of the Act. The Petitioner has not met its burden to establish the professional status of the Buyers. Moreover, the record does not contain sufficient evidence or authority for the Region to make a determination of whether Buyers are professionals. Therefore, the issue of whether Buyers are professional employees is not addressed in this Decision and Direction of Election.

to the level of a final decision, and *res judicata* does not preclude the Region from revisiting the status of the petitioned-for employees.

It is also important to note that the *2000 Decision* was issued almost 16 years ago, and it is incumbent on the Regional Director to create a record documenting how circumstances have changed with regard to Buyers and their duties and responsibilities. The transcript of the 2000 proceedings is not available and the *2000 Decision* does not contain a detailed description of the Buyers' job duties, and did not address those duties in relation to computer software used by the petitioned-for employees. The present proceedings have allowed me the opportunity to review how the EMPAC computer system impacts the employee status of the Buyers.

II. OVERVIEW OF OPERATIONS

The Employer's Supply Chain Division, Purchasing Department employs Buyers to procure all goods and services, except for fuel, for the Employer. The Buyers report to Supervisor of Purchasing and Contracts Everette Weems, who in turn reports to the Manager of Purchasing and Supply Chain David Sullivan. None of the Buyers supervise any other employees.

Buyer I's must have either an associate's degree or a high school diploma (or GED equivalent) and four years of experience in procurement/supply chain or office environment. Buyer II's are required to have a bachelor's degree and two years of experience, an associate's degree and six years of experience, or a high school diploma and ten years of experience. Buyer III's must have a bachelor's degree and four years of experience, an associate's degree and eight years of experience, or a high school diploma and twelve years of experience. Buyers also train for and receive certifications through the Institute of Supply Management (ISM), specifically the

Accredited Purchasing Practitioner (APP) and the Certified Purchasing Manager (CPM) certifications. The Employer pays for the training required so the Buyers can receive their certifications. To maintain their certifications, Buyers must fulfill the ISM's continuing education requirements; Buyers can take classes offered by the Employer to all employees to fulfill the continuing education requirement.

Purchases are initiated when the Purchasing Department receives a requisition. Requisitions are created through the Employer's EMPAC computer system by the requesting department. The requisition lists the items that are being requested; how many of the items are needed; the commodity code; whether the item is engineered or safety-related; the item's price; and whether the item has been bought before and, if so, the price the Employer paid in the past. Buyers are not involved in the initial requisition process.

The level of purchasing authority that a Buyer has correlates directly with the purchasing authority that the signatory requestor has. For example, if a requisition has \$50,000 in purchasing authority, the Buyer then has up to \$50,000 to use to purchase the requested item.

Not all employees are allowed to submit a requisition. The Purchasing Department trains employees on how to submit requisitions, and David Sullivan approves individuals so they can be entered into EMPAC and allowed to submit requisitions. Requisitions must be authorized by a supervisor or manager in the requesting department prior to submission through EMPAC. The Buyers are not involved in the requisition authorization process.

Once a requisition is received by the Purchasing Department, Weems assigns each requisition to a Buyer, depending on the type of items being requested. For example, Buyer III Tracy Beard handles pump repairs and refurbishments, and valve purchases; Buyer III Sean

Nelson handles electrical and Westinghouse purchases; Buyer III Toni Sipe focuses on motor repairs; and Buyer III Sandra Somerhalder handles chemicals, piping, plate, and metal purchases.

After being assigned the requisition, the Buyer first determines whether the procedure requires the item be competitively bid. Where the value of goods and services is expected to exceed \$50,000, the Employer's written policy requires the Buyer to issue a competitive bid for the goods/services.² In practice, the Buyers also competitively bid items that cost well under \$50,000 on a regular basis.

According to the Employer's procedures, to begin the competitive bidding process, "the Buyer determines the suppliers from whom to solicit bids, based on commercial, technical, and/or quality considerations." In practice the Buyer first compiles a list of potential suppliers from which to seek a bid using EMPAC. EMPAC provides the Original Equipment Manufacturer ("OEM") and the price of any previous orders. To select suppliers, the Buyers go to the item's OEM or other Employer-authorized distributors. The Buyer may also find suppliers using the internet (e.g., Google searches). For safety items, Buyers are required to use suppliers on a specific list. Sometimes, there is only a single supplier for a certain product, so there are no other companies from which to seek bids.

Once the Buyer has compiled its list of potential suppliers, the Buyer uses EMPAC to generate a Request for Quotation ("RFQ") to send to those suppliers. EMPAC allows the Buyer to tailor the RFQ to match the requisition by using established request clauses and information. For example, if the requisition states delivery must be expedited, the Buyer will use EMPAC to

² A new competitive bidding procedure was established on or about January 21, 2016. Under the new procedure, the \$50,000 limit over which items must be competitively bid increased from \$5,000 to \$50,000. The Buyers were not involved in the decision to raise the minimum competitive bidding amount.

include a clause with this request in the RFQ. The Buyer determines the bid due date, which is set based on the requested dates in the original requisition.

Sometimes suppliers will request an exception to the RFQ. If the product is safety-related or engineered, the Buyer sends the exceptions to the Procurement Engineer who determines whether the exception is acceptable. If the product is not safety-related, Buyers typically go back to the original requisitioner for input on the exception. For example, if a requisition is for red notebooks, but a supplier can only provide blue notebooks, the Buyer, although not required, will make sure the change is okay with the original requisitioner.

Upon receiving the bids from suppliers, the Buyer will enter the bids into EMPAC and then EMPAC performs a bid analysis. Typically, the Buyer will select the lowest bidder. If a Buyer does not make the purchase with the lowest bidder, the Buyer is required to enter into EMPAC the reason why the supplier was chosen; however, EMPAC does not prevent Buyers from making the purchase. In this vein, consideration may be given to when the Employer needs the item, the cost of freight, and the type of delivery (e.g., whether there are safety concerns). When determining to whom the bid will be awarded, Buyers rely on their background, experience, training, certifications, and knowledge. Buyers also discuss the bids with their peers and the suppliers to see how these types of bids were handled in the past.

Once a supplier is selected, the Buyer drafts a Purchasing Order in EMPAC. EMPAC allows the Buyer to select different clauses regarding terms and conditions to use in the Purchasing Order and will then issue the Purchasing Order.³ If the bids come back and are more

³ EMPAC has a mechanism to notify Buyers if they forgot to include terms and conditions in the Purchasing Order.

than \$1,000 per line item⁴ than what was on the original requisition, the Buyer will go back to the requisitioner for funding approval before issuing the Purchasing Order. If a bid comes back and it is still above the original requisition price, but less than \$1,000 per line item, the Employer's procedure provides that a Buyer can make the purchase. EMPAC will specifically ask the Buyers if they received funding approval before the system creates the Purchasing Order. Once the Purchasing Order is issued, the Buyer has committed Employer funds for the purchase of the requisitioned item.

The Buyer is responsible to arrange for shipping and to ensure that shipments are reasonably priced. Shipping rates for UPS and Fed Ex are determined through alliance agreements with other plants. The Buyers are not responsible for negotiating the shipping agreements. The Buyer does have the ability to choose which carrier to use; however, Buyers are limited to working within the confines of the alliance agreements.

III. FACTORS TO CONSIDER WHEN DETERMINING THE MANAGERIAL STATUS OF EMPLOYEES

The Act makes no specific provision for managerial employees; however, the Supreme Court and the Board have held that managerial employees are excluded from the protection of the Act. *See, e.g., NLRB v. Yeshiva University*, 444 U.S. 672 (1980); *Ladies Garment Workers v. NLRB*, 339 F.2d 116, 123 (2d Cir. 1964); *Ford Motor Co.*, 66 NLRB 1317 (1946); *Palace Dry Cleaning Corp.*, 75 NLRB 320 (1948). Managerial employees are excluded from the protections of the Act because "their functions and interests are more closely aligned with management than with unit employees." *Connecticut Humane Society*, 358 NLRB No. 31, slip op. at 23 (2012).

⁴ This amount was increased from \$250 to \$1,000, but the record does not reflect exactly when this change was made.

“Managerial employees” have been defined by the Supreme Court in *NLRB v. Yeshiva University*, supra at 682-683, as:

[T]hose who “formulate and effectuate management policies by expressing and making operative the decisions of their employer.” *NLRB v. Bell Aerospace Co.*, supra, at 288, 94 S.Ct., at 1768 (quoting *Palace Laundry Dry Cleaning Corp.*, 75 N.L.R.B. 320, 323, n. 4 (1947)). . . . Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. [citations omitted] Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.

The Board has issued decisions directly addressing whether buyers, and other employees with purchasing authority, are considered managerial employees under the Act. See, e.g., *Lockheed-California Co.*, 217 NLRB 573 (1975) (buyer, although they can commit company’s credit up to \$50,000 and also negotiates prices with suppliers, does not have discretion independent of established policy since higher authority must review and approve much of their recommendations); *Washington Post Company*, 254 NLRB 168 (1981) (assistant manager not managerial employee although half the employee’s time was spent determining need for stock items and ordering items, employee solicited bids from vendors and then selected the most appropriate vendor via price and quality guidelines); *Concepts & Designs, Inc.*, 318 NLRB 948 (1995) (employee was managerial based on the manner in which she exercised purchasing authority, unreviewed discretion, and magnitude of impact); *Solartec, Inc. & Sekely Indus.*, 352 NLRB 331, 336 (2008) (employee not managerial even though he had authority to recommend purchase and use equipment and to negotiate with supplier). These cases rely heavily on an

examination of the facts. In the instant case, based upon the facts presented on the record, I find that that the Buyers are not managerial employees.

IV. DISCUSSION OF RELEVANT FACTORS

A. Exercise Discretion Within and/or Independently of Established Employer Policy

The Employer argues that the Buyers exercise discretion when they select suppliers to participate in the competitive bidding process and when they make the selection of the supplier. However, this discretion is not determinative with regard to the Buyer's status as managerial employees. "An employee's exercise of discretion is not a touchstone of managerial authority if the employee's actions must conform to the employer's established policy." *Solartec, Inc. & Sekely Indus.*, 352 NLRB 331, 336 (2008).

The case law is clear - with regard to buyers, even though an employee has the authority to recommend action by the employer regarding the purchase of equipment, such purchasing authority "does not always evidence the employee's discretion or the employee's authority to make the ultimate determination, independent of the employer's consideration and approval." *Id.* Even if a buyer is in a position to commit an employer's credit, the Board looks to see whether the "discretion and latitude for independent action must take place within the confines of the general directions which the [e]mployer has established. *Washington Post Co.*, 254 NLRB 168, 189 (1981)

Here, the Buyers do have some discretion, but their purchasing decisions are dictated by the Employer's policies and procedures, which rely heavily on the EMPAC system, past practice, and the Buyer's own technical experience, developed over time and with Employer assistance.

For example, when a requisition is first created, EMPAC automatically provides the purchasing history and previous suppliers. The Buyers rely heavily on past practice to determine which suppliers they should offer RFQ's and, if they deviate from past practice, Buyers must provide a justification for such a departure. So, although Buyers do exercise discretion with regard to whom they offer RFQ's, the discretion takes place within the confines of Employer policy.

The record also reflects that Buyers are not required to competitively bid pre-approved requisitions under a certain amount of money (\$50,000); however, again, the Buyers are required to work within the Employer's purchasing policies and procedures and often still competitively bid out items under \$50,000.⁵ In this vein, the requisition process effectively sets the limits of Buyer discretion. Buyers also do not have to go back to the original requisitioner for funding approval if the difference is less than \$1,000 per line item, an increase from \$250. Again, the Buyers can exercise this discretion, but only within the Employer's pre-established limits.

With regard to the Employer's argument that Buyers determine which suppliers to issue RFQ's to and make the ultimate determination to whom to award the bid, "technical expertise in administrative functions involving the exercise of judgment and discretion does not confer managerial status upon the performer." *Case Corp.*, 304 NLRB 939, 948 (1991); *Connecticut Humane Society*, 358 NLRB No. 31, slip op. at 23 (2012). The Buyer's decision to award the

⁵ It is also important to note that in the scope of a nuclear power plant, \$50,000 is not a significant amount of money with regard to purchases. In *Lockheed-California*, the Board found that a buyer and a subcontract administrator could combine to commit the Employer's credit up to \$50,000 in 1975 and they were not found to be managerial employees. *Lockheed-California*, 217 NLRB at 575, fn. 10. The Board stated that "while the ability to commit such amounts of an employer's credit may be highly significant in the context of a small retail enterprise, it is of far less significance in the context of the aerospace industry." *Id.* The same argument can be made regarding nuclear power facility. If \$50,000 was considered insignificant in 1975, it is still not significant enough to prove managerial status in 2016.

bid depends on their technical expertise regarding the bidding process and the training they have received. The Buyer's dependence on their own expertise, which the Employer helps nurture through its willingness to help Buyers receive ISM certifications, is simply not a sign of managerial status.

Finally, to support its argument that the Buyers have significant discretion, the Employer has argued that the Buyers have committed a significant amount of the Employer's funds, namely \$21 million. The Employer also points out that the Buyers' actions have saved the Employer over \$300,000 due to their skills. Again, this argument is not determinative. Although the Buyers extended \$21 million dollars to suppliers on behalf of the Employer, the Buyers were acting within the scope of the official purchasing policies and procedures. With regard to the amounts saved because of the efforts of the Buyers, "[i]t is well established that even where recommendations of a purported managerial employee results in saving of money for or a change of direction of employer's policies that is insufficient to establish managerial status, particularly, where the recommendations must be approved by higher management." *Connecticut Humane Society, supra* at slip op. 24. So, even though the Buyers saved the Employer money, the savings are not sufficient to prove their managerial status.

B. Interests Aligned with Management

The record contains no evidence that Buyers "represent management interests by taking or recommending discretionary actions that effectively control or implement employer policy" or that the Buyer's interests align with management. *NRLB v. Yeshiva University, supra*.

In *Concepts & Designs, Inc., supra*, the Board held that an employee was managerial where her interests clearly aligned with management. In *Concepts & Designs, Inc.*, the

employee regularly attended management meetings with lead and supervisory personnel and was the sole employee who represented the employer at meetings with vendors. *Id.* at 957. The employee committed the employer's credit, regardless of amount, without being reviewed by other officials of the employer. *Id.* The employee also kept records and made the determination of when parts needed to be ordered. *Id.* at 986.

None of the management alignment present in *Concepts & Designs, Inc.* is present here. First, Buyers can only purchase items upon receipt of a requisition already approved by management. Buyers do not have the discretion to create requisitions. Second, the Employer provided no evidence that Buyers attend high level management meetings not usually attended by rank and file employees. Finally, the record shows that Buyers do not have input into changes to the purchasing procedures. For example, on January 21, 2016, the value of goods over which Buyers were required to competitively bid increased from \$5,000 to \$50,000. The Buyers were not consulted with regard to increase the amount and were not afforded the opportunity to provide input on the decision to make the increase. Also, the amount under which Buyers do not have to go back to the original requisitioner for funding approval has been increased from \$250 to \$1,000 per line item. Again, the record does not show any evidence that management consulted with Buyers before implementing the line item increase. To the contrary, the evidence shows that Buyers were told of the changes after the increases had already been implemented.

Based on the foregoing, Buyers are required to act within policies and procedures created by management, do not formulate or effectuate management policies, and do not engage in discretionary actions that control or implement employer policy. Accordingly, I find that Buyers

are not managerial employees and are entitled to the protection of the Act, and I am, therefore, making the following:

CONCLUSIONS AND FINDINGS

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Buyers I, II, III and Lead Buyer employed by the Employer at its facility near Burlington, Kansas, EXCLUDING all office clerical employees, professional employees, managerial employees, guards and supervisors as defined by the Act, and all other employees.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Brotherhood of Electrical Workers, Local 225.

A. Election Details

The election will be held on February 24, 2016 from 9:00 a.m. to 10:00 a.m. at the William Allen White Building, room to be determined later.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **January 29, 2016**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3)

employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by Thursday, February 18, 2016. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed

with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: February 16, 2016

/s/ Daniel L. Hubbel

Daniel L. Hubbel, Regional Director
National Labor Relations Board, Region 14
1222 Spruce Street, Room 8.302
Saint Louis, MO 63103-2829

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Date Filed:

Wolf Creek Nuclear Operating Corporation

Case No. 14-RC-168543

January 28, 2016

Employer

Date Issued February 24, 2016

and

City Burlington

State Kansas

International Brotherhood of Electrical Workers, Local 225

Petitioner

TYPE OF ELECTION

(CHECK ONE)

- Stipulation
- Board Direction
- Consent Agreement
- RD Direction

Incumbent Union (Code)

(If applicable check either or both)

8(b)(7)

Mail Ballot

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows:

1. Approximate number of eligible voters.

4

2. Number of Void ballots.

0

3. Number of Votes cast for International Brotherhood of Electrical Workers, Local 225

3

4. Number of Votes cast for

5. Number of Votes cast for.

6. Number of Votes cast against participating labor organization.

1

7. Number of Valid votes counted (sum of 3 and 6).

4

8. Number of Challenged ballots.

0

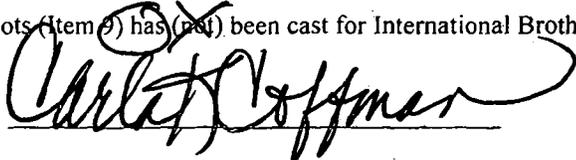
9. Number of Valid votes counted plus challenged ballots (sum of 7 and 8).

4

10. Challenges are (not) sufficient in number to affect the results of the election.

11. A majority of the valid votes counted plus challenged ballots (Item 9) has (not) been cast for International Brotherhood of Electrical Workers, Local 225.

For the Regional Director
Subregion 17



The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For: Wolf Creek Nuclear Operating Corporation



For: International Brotherhood of Electrical Workers, Local 225



Covel, Julie

From: Jason Ianacone <jason.ianacone@gmail.com>
Sent: Tuesday, August 09, 2016 10:16 AM
To: Raymond Rogers
Subject: Fwd: Buyers initial RFI
Attachments: Buyers initial RFI.docx

----- Forwarded message -----

From: **Raymond Rogers** <rcrogers2@cableone.net>
Date: Mon, Feb 29, 2016 at 9:22 AM
Subject: Buyers initial RFI
To: japears@wcnoc.com
Cc: jason.ianacone@gmail.com, Mefford Nathaniel L <nameffo@wcnoc.com>, Kirk Matthew T <makirk1@wcnoc.com>, Todd_Newkirk@ibew.org

Jayne, please find attached the initial info request from the Union to support Bargaining for the Buyers. If you could work with the guys on site with this, I would appreciate it



LOCAL UNION 225
INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS



JASON IANACONE
PRESIDENT

RAYMOND ROGERS
BUSINESS MANAGER

REQUEST FOR INFORMATION

STEWARD REQUESTING INFORMATION: Raymond Rogers

DATE: 02/29/2016

In order to monitor and administer the collective bargaining agreement, the union requests the following information:

1. Current pay information for the 4 existing Buyers
2. Salary information for the last 3 years for all Buyers including the recently retired Lead Buyer
3. Classification seniority information, including past titles for the existing buyers
4. Site Seniority information for all the buyers
5. Return of any Employee at will letters in the Current Employee
6. Par Bonus amounts for the last 3 years for all Buyers
7. _____
8. _____

This request is made without prejudice to the union's right to file subsequent requests. Please provide the information by 3/8/2016. If any part of this letter is denied or if any material is unavailable, please state which items and reasons why in a written response. Please provide the remaining items by the above date which the union will accept without prejudice to its position that it is entitled to all documents and information called for in the request.

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

WOLF CREEK NUCLEAR OPERATING CORPORATION,)	
)	
Employer,)	
)	
and)	Case No. 14-RC-168543
)	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 225,)	
)	
Petitioner.)	
)	
)	

**EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S
DECISION AND ORDER OF FEBRUARY 16, 2016**

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EMPLOYER'S BRIEF ON REVIEW

Pursuant to § 102.67 of the Board's Rules and Regulations, the Employer, Wolf Creek Nuclear Operating Corporation ("Wolf Creek" or "Employer"), respectfully requests that the Board review the Regional Director's Decision and Order (hereinafter "Decision") dated February 16, 2016, finding that the Employer's Buyers I, II, III, and Lead Buyer are not "managerial employees" under the National Labor Relations Act ("Act"). (02/16/16 Decision & Order ("02/16/16 D&O"), p. 12-13).

This Decision represents a grave and disturbing departure from the Region's previous, final and binding decision in Case 17-UC-210 (hereinafter "2000 Decision"), wherein the Region found these *same* job classifications to be "managerial employees," and therefore, excluded from coverage of the Act. Inexplicably, the Regional Director categorically rejected the Region's 2000 Decision, finding that its supposed lack of specificity inhibited his ability to determine whether the Buyers' job duties changed in any material respect. (*Id.* at p. 3). In so doing, the Decision does violence to well-settled Board law and legal principles, ignores clear statutory language, applies choice facts disparately, and otherwise engages in outcome-based decision-making of the worst kind. It also is highly prejudicial to the Employer as the Decision ignores dispositive testimony and evidence concerning the Employer's implementation of EMPAC¹ – an issue that strikes at the heart of this case. In addition to departing from the Region's 2000 Decision, the Decision turns well-settled Board precedent in *Concepts & Designs, Inc.* on its head. 318 NLRB 948 (1995). The Decision profoundly fails to "do justice" to the issues and the parties' interests. As such, this Decision calls out for review. Compelling reasons exist for granting this request, as follows:

¹ Implemented in 1998, EMPAC is Wolf Creek's automated computerized system used to assist the Buyers as they procure goods and services on behalf of Wolf Creek.

1. The Decision raises substantial questions of law and policy because its departure from the Region's previous, final and binding decision in Case 17-UC-210 contravenes the Board's longstanding policy precluding re-litigation, as well as the clear statutory language of Section 102.67(g);
2. The Decision on substantial factual issues is clearly erroneous on the record and such error prejudicially affects the rights of the Employer. Specifically, the Regional Director failed to consider the evidence and testimony that the Buyers' job duties did not change in any material respect since at least May 2000, the date of the Region's 2000 decision.
3. The Decision erred with respect to a substantial factual issue when it ignored dispositive testimony concerning the timeframe in which the Employer implemented EMPAC – testimony that is fatal to Petitioner's claims;
4. The Decision raises substantial questions of law and policy because of its departure from officially reported Board precedent in *Concepts & Designs, Inc.*, 318 NLRB 948 (1995); and
5. The Decision on substantial factual issues is clearly erroneous on the record and such error prejudicially affects the rights of the Employer as the Regional Director failed to consider the record evidence establishing the Buyers' exercise of discretion and level of authority, which are aligned with the interests of management.

The Employer, therefore, requests that the Board grant this Request for Review and find, consistent with the Region's 2000 Decision, that the job classifications of Buyer I, II, III, and Lead Buyer are "managerial employees" under the Act.

STATEMENT OF THE CASE

Wolf Creek operates a nuclear power facility located in Burlington, Kansas. There are approximately 1,100 employees employed at the facility, 400 of whom are represented by the International Brotherhood of Electrical Workers Local Union 225 (“IBEW” or the “Petitioner”).² At issue is the Union’s petition to represent Buyers I, II, III and Lead Buyer. This is the *same* issue addressed by the Board in its May 4, 2000 Decision. On February 1, 2016, the Employer filed a motion to dismiss the petition as barred pursuant to Section 102.67(g) and under the doctrine of *res judicata*. The Regional Director denied this motion and the matter was heard before Hearing Officer Carla K. Coffman on February 5, 2016.

Previous Case: 17-UC-210

On April 7, 1998, Wolf Creek filed a unit clarification petition seeking to exclude as managerial employees Quality Specialists and Buyers I, II, III and Lead Buyer. (05/04/00 Decision & Order (“05/04/00 D&O”)). On May 4, 2000, the Acting Regional Director issued a Decision, Order and Clarification of Bargaining Unit, in Case 17-UC-210, finding the *same* Buyers to be “managerial employees,” and thereby excluded from coverage of the Act. (*Id.*). The IBEW did not file a request for review in that case and, under Section 102.67(g) of the Board’s Rules and Regulations, the Acting Regional Director’s actions in that case are final and binding. 29 C.F.R. § 102.67(g) (“[T]he regional director’s actions are final unless a request for review is granted.”); *see also Maphis Chapman Corp.*, 151 NLRB 73, 84-85 (1965) (holding regional director’s decision final and binding).

² International Brotherhood of Electrical Workers, Local Union 304 is now known as International Brotherhood of Electrical Workers, Local Union 225.

Current Case: 14-RC-168543

On January 28, 2016, Petitioner filed Case 14-RC-168543, petitioning to represent “All full-time and part-time Buyers I, II, III and Lead Buyer employed by the Employer at its facility near Burlington, Kansas to be included in a separate unit.” (02/16/16 D&O, p. 1). Over the employer’s objection, a hearing was held on February 5, 2016, before Hearing Officer, Carla K. Coffman, to determine once again “whether or not the job classifications of Buyer I, Buyer II, Buyer III, and Lead Buyer are managerial employees.” (02/05/16 Transcript (“Tr.”), at 11:21-25).³

Significantly, Hearing Officer Coffman noted that because “there has been a previous determination that *these same job classifications were found to be managerial*, in Case 17-UC-210 . . . I am taking judicial notice of the Acting Regional Director’s Decision, Order and Clarification of Bargaining Unit, that issued on May 4th, 2000, in Case 17-UC-210.” (*Id.* at 12:1-19) (emphasis added). Consistent with this finding, Hearing Officer Coffman explained that although both parties were tasked with presenting a complete record for review, it was the Petitioner’s burden to establish a material change in the Buyers’ job duties, sufficient to disturb the Acting Regional Director’s previous findings and conclusions. (*Id.* at 19:19-20:9).

At the hearing, Petitioner argued that the job duties and responsibilities of Buyers I, II, III and Lead Buyer, employed in Employer’s Supply Chain Division, Purchasing Department, underwent “significant changes” since May 4, 2000 due to advances in technology that streamlined the purchasing procedure for Buyers; in particular, the Employer’s utilization of a computer program known as EMPAC. (*Id.* at 13:12-18:18). Importantly, Petitioner conceded that the *only* change was the *efficiency* in how these *same* tasks and responsibilities were being

³ References to the exhibits introduced at the February 5, 2016 Hearing will be referred to as “Joint Ex.,” “Employer Ex.” and “Petitioner Ex.” followed by the appropriate number.

performed. (*Id.* at 156:19-157:7). Significantly, the unrebutted testimony at the hearing substantiated that EMPAC was in existence and utilized by the Buyers' as early as April 1998 – more than two years prior to the Region's 2000 Decision – and thus, appropriately considered by the Acting Regional Director. (*Id.* at 210:5-10; 216:10-24; 224:21-25; 226:5-19). This dispositive testimony was flatly ignored by the Regional Director without explanation. Moreover, the testimony and evidence adduced at the hearing did not substantiate any material change in the Buyers' job duties and responsibilities as a result of EMPAC.

At the conclusion of the hearing, the parties made closing arguments. Regional Director Daniel L. Hubbel (“Regional Director”) issued his Decision and Order on February 16, 2016, finding that the “Buyers are not managerial employees and are entitled to the protection of the Act” (02/16/16 D&O, at p. 12-13). Wolf Creek now moves for review.

STATEMENT OF FACTS

A. Overview Of The Supply Chain Division, Purchasing Department.

Wolf Creek's Supply Chain Division, Purchasing Department, currently employs four Buyers to procure all goods and services for the Employer, excluding fuel. (*Id.* at 93:12-24; 177:11-14). The Buyers report to Everette Weems, Supervisor of Purchasing and Contracts, who in turn, reports to David Sullivan, Manager of Purchasing and Supply Chain. (*Id.* at 33:14-35:9; 177:16-18; 204:1-11).

B. Requirements For The Positions Of Buyer I, II, III, And Lead Buyer.

Wolf Creek requires Buyers to have the necessary education and experience. (*Id.* at 26:15-25). For example, Buyer I's must have either an Associates Degree or a High School Diploma, as well as four years of experience in procurement/supply chain or in an office environment. (02/16/16 D&O, at p. 3). Buyer II's are required to have a Bachelor's Degree and

two years of experience, an Associates Degree and six years of experience, or a High School Diploma and twelve years experience. (*Id.*) Buyer III's must have a Bachelor's Degree and four years of experience, an Associates Degree and eight years of experience, or a High School Diploma and twelve years experience. (*Id.*)

Buyers also train for and receive certifications through the Institute of Supply Management ("ISM"), specifically the Accredited Purchasing Practitioner ("APP") and the Certified Purchasing Manager ("CPM") certifications. (Tr., at 27:9-28:24). To maintain these certifications, Buyers must fulfill ISM's continuing education requirements. (*Id.* at 30:25-31:23).

C. The Purchasing Procedure – Buyers' Job Responsibilities.

The Buyers' primary role is to procure all goods for the Employer, excluding nuclear fuel. (*Id.* at 177:11-14). Buyers may also handle requests for labor services. (*Id.* at 53:15-54:3). In both instances, Buyers possess significant discretion in exercising their job responsibilities. (*Id.* at 54:10-55:5). Although the Buyers' job duties are governed by procedures and policies, it is undisputed that these policies have *always* existed. (*Id.* at 123:3-13).

1. Initiation Of The Purchasing Procedure – Requisition Forms.

The purchasing process is initiated when the Purchasing Department receives a requisition. (*Id.* at 42:23-43:19; 97:12-18). Generally speaking, the requisition identifies the item to be purchased, including but not limited to, the type, purchase price, and any previous purchases by the Employer. (*Id.* at 57:17-58:10; 98:3-18; 177:25-178:11).

The requisition is created through the Employer's EMPAC computer system. (*Id.* at 125:14-23). EMPAC is the computer program utilized by Buyers in procuring items for the Employer. (*Id.* at 77:9-18; 125:14-23; Petitioner Ex. 5). Buyers are provided with desktop guideline instructions for processing purchases through EMPAC. (*Id.*; Petitioner Ex. 5).

Employees are trained to create requisitions on the EMPAC computer system. (*Id.* at 45:3-14). Tracy Beard (“Beard”), Buyer III, is responsible for training employees. (*Id.*). Requisitions are then forwarded to the Accounting Department for review and approval prior to reaching the Purchasing Department. (*Id.* at 68:23-69:11).

2. Receipt Of The Requisition Forms.

Upon receipt, the Purchasing Department assigns the requisition to the Buyer who specializes in these types of purchases. (*Id.* at 94:13-96:1). The Buyer assigned to the requisition creates a packet of information detailing the Employer’s previous purchases. (*Id.* at 69:18-70:21).

The Buyer may be required to complete a Commitment Approval Summary Form (“CASF”) when the cost of the requested item exceeds a predetermined monetary amount. (*Id.* at 94:13-96:1; Petitioner Ex. 3). Regardless, a CASF must be completed if an item exceeds \$250,000. (*Id.* at 61:1-5). The CASF is processed after the Buyer obtains the necessary signature for approval. (*Id.* at 62:19-63:12). However, items that fall below the \$250,000 threshold can be approved via electronic mail. (*Id.* at 65:13-66:1). In these instances, EMPAC may alert a Buyer as to a discrepancy, but it does not preclude the processing of the requisition. (*Id.* at 64:7-65:3).

3. Decision To Competitively Bid The Requisition.

After being assigned the requisition, the Buyer unilaterally determines whether the item should be competitively bid. (*Id.* at 105:12-23). Although Buyers are required to competitively bid items in excess of \$50,000, Buyers regularly issue competitive bids for items well under this amount. (*Id.* at 104:13-24; 105:12-23). Ultimately, the decision to issue a competitive bid is at the discretion of the Buyer. (*Id.* at 83:4-12).

To begin the competitive bidding process, the Buyer identifies the suppliers from whom to solicit bids. (*Id.* at 108:9-24; Employer Ex. 1) (“The Buyer determines the suppliers from whom to solicit bids, based on commercial, technical, and/or quality considerations.”). The Buyer has significant discretion in compiling the list of potential bidders. (*Id.*; 182:6-15). For example, although the Buyer will identify the Original Equipment Manufacturer (“OEM”) and other Employer-authorized distributors from the Employer’s database, the Buyer may also find additional suppliers using the internet. (*Id.* at 55:6-22; 181:7-16). Thus, Buyers have the authority to go outside the Employer’s database to locate a supplier or labor services provider. (*Id.* at 55:6-22). Bids may be solicited either in writing or verbally. (*Id.* at 109:15-110:14; Employer Ex. 1). However, bids in excess of \$50,000 must be submitted in writing. (*Id.*)

4. **Creation Of A Request For Quotation.**

Once the Buyer compiles a list of potential suppliers, the Buyer will generate a Request for Quotation (“RFQ”) to send to these suppliers. (*Id.*) As part of the RFQ, the Buyer must identify various contract clauses that describe the specifics of the purchase. (*Id.* at 71:9-21). It is the Buyers’ responsibility to identify the proper clauses for incorporation. (*Id.* at 72:10-22). To assist, the Buyers may consult a clause worksheet, which is essentially a “cheat sheet.” (*Id.*) The Buyer also determines the bid due date for inclusion on the RFQ. (*Id.* at 114:4-12). After the Buyer includes the required information and corresponding clauses, an RFQ is generated through the EMPAC computer system. (*Id.* at 72:10-22). Although EMPAC may alert the Buyer as to an inaccuracy in the RFQ, a Buyer may override the program and proceed with the RFQ. (*Id.* at 75:22-25).

On occasion, suppliers will request an exception to the RFQ. (*Id.* at 182:24-183:14). If the product is safety-related, the Buyer will send the exception to the Procurement Engineer for

approval. (*Id.*). If the product is not safety-related, the Buyer will typically seek the approval of the original requisitioner. (*Id.*). Buyers are responsible for evaluating those exceptions to determine the impact on the bid. (*Id.* at 110:24-112:4). It is the Buyer's job to ensure a level playing field for all bidders. (*Id.* at 112:5-113:9). To assist with this, Buyers are authorized to schedule or conduct a pre-bid or pre-award conference with the bidders. (*Id.* at 113:10-114:3).

5. Buyers' Authority And Discretion In Selecting A Supplier.

Upon receipt of the suppliers' bids, the Buyer will conduct a comparative analysis of the bids. (*Id.* at 134:11-16). Although the Buyer typically will select the lowest bid, the Buyer retains the discretion to select another supplier. (*Id.* at 84:12-85:14). In that instance, the Buyer will "try to give an explanation . . . why we did not choose the lowest bidder." (*Id.* at 118:25-119:5). For example, the Buyer, at his discretion, may select a higher bid based on a variety of factors, including but not limited to, delivery time, location of the supplier, cost of freight, safety, and the form of delivery. (*Id.* at 118:18-119:5; 151:1-19; 153:4-5; 184:4-11). Importantly, although management has always possessed the ability, it generally does not review the Buyers' selections. (*Id.* at 86:2-14).

The comparative analysis is initially generated through EMPAC. (*Id.* at 184:16-185:7). However, because the Buyer must take into consideration a variety of factors affecting the job requisition, the EMPAC analysis is not determinative. (*Id.*).

Overall, "[w]hen determining to whom the bid will be awarded, Buyers rely on their background, experience, training, certifications, and knowledge." (*Id.* at 130:20-131:24; 154:6-155:1). Buyers essentially "determine what the primary need [of the Employer] is." (*Id.* at 166:8-18). To this end, Buyers routinely negotiate with suppliers for the best price, resulting in substantial savings for the Employer. (*Id.* at 161:13-18). Buyers are ultimately responsible for

ensuring all necessary reviews and approvals have been obtained prior to making the award to the supplier. (*Id.* at 125:5-11; Employer Ex. 2).

6. Preparation Of The Purchase Order.

Once a supplier is selected by the Buyer as part of the competitive bidding process, the Buyer prepares a purchasing order. (*Id.*) This also applies in the instance an item is not competitively bid. (*Id.* at 98:19-99:9). In both scenarios, Buyers retain a substantial level of discretion and authority to purchase the requested item, limited only by the purchasing authority of the signatory requestor. (*Id.* at 98:19-99:9). Thus, a Buyer is authorized to place a purchase order and thereby bind the Employer for the amount approved by in the requisition. (*Id.* at 100:6-13; 102:1-10). Currently, managers have the authority to purchase items for an amount up to \$250,000. (*Id.* at 99:16-23).

Additionally, a Buyer is authorized to purchase an item that exceeds the amount originally approved for in the requisition. (*Id.* at 68:3-16). In particular, if the bids come back and are less than \$1,000 per line item that what was on the original requisition, the Buyer has the authority to approve and bind the Employer for this excess amount without management approval. (*Id.*; Petitioner Ex. 2). Once again, in this scenario, the Buyer is able to override EMPAC and make the purchase without prior approval. (*Id.*).

Once the Purchasing Order is placed by the Buyer, the Buyer has committed the Employer's funds for the purchase of the requisitioned item. (*Id.* at 124:22-125:2; 169:6-24). The Buyer is ultimately responsible for the content and accuracy of the purchase order. (*Id.* at 124:17-21; Employer Ex. 2). If there is a dispute, the Buyer is authorized to communicate with the supplier to negotiate a resolution. (*Id.* at 170:4-171:10). Buyers must also exercise their

discretion to ensure that proprietary and financial information remains confidential. (*Id.* at 210:20-211:7).

In 2015, the Buyers committed a substantial amount of money on behalf of the Employer, totaling **\$21 million**. (*Id.* at 102:11-17; 204:22-205:1). Through their independent negotiations, the Buyers also saved the Employer “a little over \$300,000, about \$330,000” in that same year. (*Id.* at 205:2-7).

7. **Executing Delivery Of The Purchased Item.**

Thereafter, the Buyer is responsible to arrange for shipping and to ensure the shipments are reasonably price. (*Id.* at 120:9-122:9). Similar to the competitive bidding process, Buyers accept and analyze bids from freight carriers. (*Id.* at 187:14-188:24). Buyers select the freight carrier based upon price and the Employer’s need. (*Id.*). In doing so, the Buyer has the ability to choose which carrier to use. (*Id.*). The Buyer is also responsible for resolving disputes with carriers on behalf of the Employer. (*Id.* at 189:10-190:18).

ARGUMENT

A. **The Regional Director’s Departure From The Region’s Previous, Final And Binding Decision In Case 17-UC-210 Was Clearly Erroneous.**

The Decision’s departure from the Region’s 2000 Decision raises substantial questions of law and policy and, is therefore ripe for review. The Regional Director further erred in ignoring the record evidence as to the Buyers’ job duties prior to and after the 2000 Decision.

1. **The Doctrine Of Res Judicata Mandates Dismissal Of The Petition.**

In this matter, the Regional Director disregarded the Region’s previous findings and conclusions, opting to review the matter anew. The Regional Director reasoned that the Region’s 2000 Decision did “not rise to the level of a final decision,” and thus, did “not preclude the Region from revisiting the status of the petitioned-for employees.” (02/16/16 D&O, at p. 2-

3). The Regional Director's holding defies well-settled Board law, as well as the express language of Section 102.67(g) of the NLRB's Rules and Regulations.

Section 102.67(g) expressly states that “[t]he Regional Director's actions are *final* unless a request for review is granted.” 29 C.F.R. § 102.67(g) (emphasis added). To preclude collateral and burdensome litigation, the Board strictly construes Section 102.67(g). *See e.g., Serv-U Stores, Inc.*, 234 NLRB 1143, 1144 (1978); *Graneto Datsum*, 220 NLRB 399, 399 fn. 1 (1975) (affirming ALJ's conclusion that “since the issues concerning the Union's status as a labor organization . . . and the appropriateness of the unit were decided in a prior case involving the same parties, they need not be relitigated in this proceeding.”); *Shuttle Express, Inc.*, Case 05-RC-112774 (2013) (affording administrative comity to the Region's previous decision); *Guardsmark, LLC*, Case 3-RC-11739, at *3 (2007) (finding “that the Employer is precluded from making the [same] claim . . . because this identical issue was fully litigated and decided in Cases 7-RC-22970 and 7-RC-23019.”).

The Regional Director expressly refused to apply the doctrine of *res judicata* with respect to the Region's previous findings in contravention of well-settled Board law and clear statutory language. Accordingly, the Regional Director's findings are arbitrary and merit review. *See e.g., San Diego Gas and Electric*, 325 NLRB 1143 (1998) (granting review where employer raised issue that Regional Director's decision was contrary to the Board's rules).

2. **The Decision Is Factually Flawed As The Record Is Devoid Of Any Evidence Establishing A Material Change In The Buyers' Job Duties To Justify Disturbing The Region's Previous Decision.**

The Decision further held that because “[t]he transcript of the 2000 proceedings is not available and the 2000 Decision does not contain a detailed description of the Buyers' job duties, and did not address those duties in relation to computer software used by the petitioned-for

employees,” the Board was unable to make a determination as to whether a material change in the circumstances occurred since May 4, 2000. (*Id.* at p. 3). In doing so, the Regional Director ignored dispositive testimony that strikes at the heart of this matter. Thus, because the Decision raises substantial factual issues, review is warranted.

Initially, the Decision’s rationale improperly shifted the burden of proof to the Employer. In contrast, it is well-settled that a petitioner seeking to relitigate the certification of a unit bears the burden of establishing “a material change in circumstances since the prior case was decided.” *See e.g., Shuttle Express, Inc., Case 05-RC-112774, at *3 (2013)* (noting that a petitioner must establish “a material change in circumstances since the prior case was decided.”). Indeed, consistent with Board law, Hearing Officer Coffman noted that although both parties were tasked with creating a complete record, it was the Petitioner’s burden to establish “whether there have been sufficient changes as claimed by the Petitioner, that the – that has changed the status of these employees from managerial to non-managerial, and the Employer can put whatever they want in to prove that the employees remain managerial.” (*Id.* at 19:19-20:9). The Regional Director clearly erred in shifting the burden of proof to the Employer.

Moreover, and contrary to the Regional Director’s findings, the 2000 Decision aptly describes the Buyers’ job duties and responsibilities as of May 4, 2000. (05/04/00 D&O, at p. 19-23). In particular, the 2000 Decision addressed the: (1) requirement to obtain manager approval as part of the requisition process; (2) level of authority as limited by the requisitioner; (3) assignment of the authorized requisition per their familiarity and expertise; (4) determination as to whether competitively bid the requisition; (5) compilation of potential bidders based on past successful bidders, suppliers listed in trade journals, or suppliers found from internet sources, including any limitations based on the type of item requested (i.e. safety); (6) issuance of a RFQ,

which identifies the requirements of the goods/services sought and a bid due date selected by the Buyer; (7) evaluation of exceptions to the RFQ; (8) analysis of the bids based on price, delivery, performance schedule, payment terms, warranties, exceptions, etc., including the Buyers use of “a bid evaluation template”; (9) awarding of the bid, including the Buyers obligation to document the reason for not selecting the lowest bidder; (10) issuance of the purchase order, which are occasionally reviewed by the supervisor; and (11) determination of the carrier for delivery of particular products, “with the aid of a software program.” (*Id.*)

These are the *same* job duties and responsibilities at issue in this matter. (02/16/16 D&O, at p. 3-7). The *only* change in the Buyers’ job duties was the alleged rise in efficiency in how these *same* tasks were performed, as a result of EMPAC. However, the unrebutted testimony at the hearing confirmed that EMPAC was utilized by the Employer as early as April 1998 – more than two years prior to the May 4, 2000 Decision. (*Id.* at 210:5-10; 214:19-215:2; 216:10-24; 224:21-226:19; Employer Ex. 3). Notwithstanding, the Regional Director ignored this fatal testimony without explanation. This testimony strikes at the heart of Petitioner’s claim and thus, mandates review.

Even if EMPAC had been implemented after the 2000 Decision, the Board repeatedly has found that an increase in efficiency is wholly insufficient as a matter of law to significantly alter the fundamental characteristics of an employee’s job duties. See *e.g.*, *Constellation Power Source Generation, Inc.*, 2000 NLRB LEXIS 942, *104-05 (2000) (ALJ Shuster) (concluding that although the job has become more computerized since 1996, it has otherwise not changed); *United Technologies Corp.*, 287 N.L.R.B. 198, 204 (1987) (finding technological advancements did not significantly alter job duties); *John P. Scripps Newspaper Corp.*, 329 NLRB 854, 861 (1999) (finding “differences in the methodology or the manner in which they perform their job,

including use of technology [] however, do not change the fundamental character of their job duties or their primary function of making advertisements ready for insertion into the newspaper.”).

Indeed, in this matter, Petitioner’s witnesses testified that prior to EMPAC, requisition forms were created by a typewriter and then physically walked over to management for approval. (Tr. at 87:24-88:19; 139:16-140:7). Upon receipt of the requisition, Buyers utilized MAPPER, a computer program similar to EMPAC, to process the request. (*Id.* at 139:16-140:23). MAPPER, an MS-DOS database, generated the RFQs and purchase orders for Buyers. (*Id.* at 141:3-23). Similar to EMPAC, Buyers inputted the required information into MAPPER, including the descriptive clauses, which would then print out an RFQ or purchase order. (*Id.* at 168:7-16). Notwithstanding these *de minimis* changes, Petitioner’s witnesses confirmed that the fundamental character of their job duties did not change after the implementation of EMPAC:

Q. Is it correct to say that the fundamental difference between the two [EMPAC and MAPPER] is the efficiency by which the purchasing and requisition processes were - - efficiency. In other words, the EMPAC process made more efficient the same processes that were taking place under MAPPER?

A. I would say so, yes. I mean, yeah, it’s like anything – you know, any other technology. I mean, the schoolroom chalkboard compared to the smartboard over there. I mean, of course, there’s - -

Q. It’s the same thing but more efficient technology?

A. Yeah, yes.

(*Id.* at 156:19-157:7). According to Petitioner’s witnesses, the Buyers’ authority and discretion exercised in the requisition process has at all times remained the same regardless of EMPAC:

Q. . . . But in terms of who it goes to to get the approvals and the fact that it goes to accounting and then over to supply chain services where it’s given to the buyers, that process in and of itself of the route that takes place, is

that more or less the same now as it was in 1996, or is that whole process different back then?

A. I'd roughly say it's the same.

(*Id.* at 143:2-12; 144:17-145:3). Consistent with this testimony, Betty Sayler ("Sayler"), retired Lead Buyer, was a Buyer when the 2000 Decision was issued testified that the "[t]he process of being a buyer is the same no matter what system you're in" and that although EMPAC "gave us automation . . . what we did to do our job didn't change." (*Id.* at 175:12-20; 186:6-12). In sum, Sayler provided unrebutted testimony that over the past 28 years, the fundamental character of the Buyers' job duties did not change in any material respect:

Q. And in your view, based on your experience, 28 years of experience . . . did the buyer job substantially change in any material respect?

A. Not substantially, no.

(*Id.* at 189:4-9; *see also* 177:25-183:25; 185:8-186:9; 186:25-188:24). Nor did EMPAC have any impact whatsoever on the Buyers' discretion or level of authority. (*Id.* at 186:13-24).

Accordingly, regardless of the date EMPAC was implemented, the fundamental character of the Buyers' job duties, level of independence and discretion remained largely unchanged.

B. The Regional Director Erred In Concluding That The Job Classifications Of Buyers I, II, III, And Lead Buyer Are Not Managerial Employees.

It is well-settled that managerial employees are not covered by the Act. Indeed, over 40 years ago, the U.S. Supreme Court held:

In sum, the Board's early decisions, the purposes and legislative history of the Taft-Hartley Act of 1947, the Board's subsequent and consistent construction of the Act for more than two decades, and the decisions of the courts of appeals all point *unmistakably to the conclusion that "managerial employees" are not covered by the Act.*

NLRB v. Bell Aerospace Co. Div. of Textron, Inc., 416 U.S. 267, 289 (1974) (emphasis added).

In *NLRB v. Yeshiva, Univ.*, 444 U.S. 672, 682-83 (1980), the U.S. Supreme Court defined managerial employees and set forth the following test:

Managerial employees are defined as those who “*formulate and effectuate management policies by expressing and making operative the decisions of their employer.*” *NLRB v. Bell Aerospace Co., supra* (quoting *Palace Laundry Dry Cleaning Corp.*, 75 NLRB 320, 323, n.4 (1947)... Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management... Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he *represents management interest by taking or recommending discretionary actions that effectively control or implement employer policy.*

Id. (emphasis added).

In *Yeshiva*, the Court explained that managerial employees, like supervisors, “are excluded from the categories of employees entitled to the benefits of collective bargaining” under the Act, because “both exemptions grow out of the same concern: that an employer is entitled to undivided loyalty of its representatives.” *Id.* at 682.

For the reasons that follow, the job classifications of Buyer I, II, III, and Lead Buyer are “managerial employees” and, therefore, the Regional Director erred in concluding to the contrary and this error prejudiced the Employer.

1. **The Decision Cites *Concepts & Designs, Inc.*, But Fails To Correctly Apply It.**

In the instant case, the Regional Director cited *Concepts & Designs, Inc.*, 318 NLRB 948 (1995) but failed to correctly apply it to the facts in this matter. (02/16/16 D&O, p. 12). In *Concepts & Designs, Inc.*, a purchasing employee was responsible for ordering manufacturing parts based upon bills of materials for such projects. *Id.* at 956. The Board concluded that the

employee's "discretion and the magnitude of its impact on Respondent's overall business" demonstrated her "managerial status." *Id.* at 957.⁴

Importantly, the Board noted that although the employee typically ordered parts from the vendors listed on the employer's inventory cards, she maintained the discretion to change vendors based upon the price and time of delivery. *Id.* This included identifying additional vendors outside the employer's inventory cards. *Id.* Importantly, the inventory cards, similar to EMPAC, "identified the part, the minimum number needed in inventory, the vendor from whom it is usually ordered, as well as its price and the normal time needed for that vendor to deliver it, and, finally the names of other vendors who can supply that same part." *Id.* at 956. As part of this process, the employee would consult with the employer's "technically knowledgeable personnel" as well as with her supervisor in the instance she was unable to locate a supplier. *Id.* at 957. However, the Board noted that "even statutory Supervisors will confer with their superiors whenever unusual situations arise; that does not strip them of their supervisory status based upon powers which they ordinarily exercise." *Id.* The employee was further authorized to confer with the vendors regarding any potential purchases. *Id.*

Lastly, the Board emphasized the employee's ability to commit substantial sums of money on behalf of the employer as indicative of managerial status. *Id.* ("Ability to commit an employer's credit in amounts which are substantial, especially where done through exercise of discretion which is not ordinarily reviewed, is strong evidence of managerial status.") (citing *Swift & Co.*, 115 NLRB 752, 753 (1956) and *American Locomotive Co.*, 92 NLRB 115, 116-17 (1950))(emphasis added). Based on the above, the Board concluded that "in carrying out these

⁴ In a stroke of supreme irony, the Regional Director who authored the 2000 Decision also relied heavily on *Concepts and Designs*, but to reach the opposite conclusion regarding the Buyers' managerial status.

duties she ‘represents management interests by taking . . . discretionary actions that effectively . . . implement employer policy.’ *Id.*

The Board’s decision in *Concepts & Designs, Inc.* is controlling and the Regional Director’s failure to correctly apply it to the facts in this matter raises substantial questions of law and policy.

2. **The Regional Director Failed To Apply *Concepts & Designs, Inc.* In Finding The Buyers Did Not Exercise The Necessary Discretion And Authority.**

In this matter, the Regional Director concluded that the Buyers’ exercise of discretion in identifying the suppliers to participate in the competitive bidding process, as well as, their ultimate selection of the supplier awarded the bid, was not determinative of their managerial status. (02/16/16 D&O, p. 9). The Regional Director reasoned that “although Buyers do exercise discretion with regard to whom they offer RFQ’s, the discretion takes place within the confines of Employer policy.” (*Id.* at p. 10). The Decision also discounted the Buyers’ ability to commit a significant amount of the Employer’s funds, as well as, save the Employer over \$300,000 annually, as indicative of a managerial employee. (*Id.* at p. 11).

The Regional Director’s findings are wholly inconsistent with the Board’s decision in *Concepts & Designs, Inc.* For example, the buyer in *Concepts & Designs, Inc.*, like the Buyers in this matter, purchased items following their receipt of a requisition or “based upon bills of materials for such projects.” *Id.* at 956 ((Tr. at 42:23-43:19; 97:12-18). To assist in these purchases, the buyer in *Concepts & Designs, Inc.* utilized the Employer’s inventory cards, which “identified the part, the minimum number needed in inventory, the vendor from whom it is usually ordered, as well as its price and the normal time needed for that vendor to deliver it, and, finally the names of other vendors who can supply that same part.” *Id.* Here, the Employer’s database provides the same information as inventory cards in *Concepts & Designs, Inc.* (Tr. at

55:6-22; 108:9-24; 181:7-16; 182:6-15). Similar to the buyers in this matter who consult with project engineers, the buyer in *Concepts & Designs, Inc.* regularly consulted with “technically knowledgeable personnel” as well as her supervisor. *Id.* at 957 (Tr. at 182:24-183:14). However, the Board expressly held that “that does not strip them of their supervisory status based upon powers which they ordinarily exercise.” Buyers also confer with, negotiate and resolve disputes with vendors without management assistance – conduct the Board found indicative of a managerial employee in *Concepts & Designs, Inc.* (Tr. at 113:10-114:3; 161:13-18).

The Buyers in this matter engage in additional tasks that exceed the level of discretion and authority exhibited by the buyer in *Concepts & Designs, Inc.* as follows: (1) determining whether to competitively bid requisitions; (2) identifying potential suppliers for soliciting bids based on prior successful bidders, suppliers listed in trade journals, and suppliers from the internet; (3) preparing and issuing RFQs to suppliers, including identifying the bid due date; (4) conferring and negotiating with suppliers in the instance exceptions are submitted in response to the RFQ; (5) performing a commercial evaluation of the bids; (6) awarding the bid to the supplier based upon price, delivery time, cost of freight and other factors; (7) issuing purchase orders to financially bind the Employer for substantial amounts totaling approximately \$21 million per annum; and (8) negotiating with and selecting freight carriers for transportation. (Tr. at 157:8-159:6; 177:25-183:25; 185:8-186:9; 186:25-188:24).

Indeed, the Board consistently has found employees who exercise this level of discretion and authority to be managerial employees. *See e.g., Mack Trucks, Inc.*, 116 NLRB 1576, 1578 (1956) (excluding buyers as managerial employees because they had authority to negotiate prices, change delivery dates, and adjust disputes with suppliers over rejected items); *Kearney & Trecker Corp.*, 121 NLRB 817, 822 (1958) (finding buyers’ authority to place orders with

alternative suppliers if deliveries were not made on time indicative of a managerial employee). For example, in *Titeflex, Inc.*, 103 NLRB 223 (1953), the Board found a buyer to be a managerial employee based on similar job duties:

He receives requisitions that have been prepared by the planning department, countersigned by the person in charge of the department, and he places them with an approved list of vendors. Although he cannot go outside that list of vendors he may use his discretion as to which of those vendors will receive the order. He has final authority over such deals and is able to **responsibly commit** the credit of the Employer. We find that he is a managerial employee and we shall exclude him from the unit.

Id. at 225 (emphasis added).

Accordingly, the Regional Director's departure from well-settled Board precedent raises a substantial question of law and policy for review.

3. **The Regional Director Erred In Finding The Buyers' Interests Are Not Aligned With Management.**

The Regional Director further erred in finding the Buyers interests not aligned with management. In an attempt to distinguish the Board's decision in *Concepts & Designs, Inc.*, the Regional Director emphasized that the employee in *Concepts & Designs, Inc.* attended management meetings, "meetings with vendors" and "committed the employer's credit, regardless of amount, without being reviewed by other officials of the employer." (02/16/16 D&O, p. 12). The Regional Director misconstrues the Board's holding in *Concepts & Designs, Inc.* and ignores record evidence to the contrary.

Contrary to the Regional Director's analysis, the Board in *Concepts & Designs, Inc.* did not find the employee's ability to commit employer funds to be limitless. (*Id.*). Nor did the Board find the buyer's purchases to be immune from management review. (*Id.*). Rather, the Board in *Concepts & Designs, Inc.* expressly noted that "those purchasing duties [are] not **ordinarily reviewed** by any other official of Respondent." *Id.* at 957 (emphasis added).

Likewise, in this matter, witnesses testified that although management possessed the ability, it did not regularly review purchase orders. (*Id.* at 86:2-14).

The Regional Director further ignored the overwhelming evidence in the record that the Buyers' interests are sufficiently aligned with management. As in *Concepts & Designs, Inc.*, the Buyers regularly confer with potential suppliers, discuss and evaluate exceptions to RFQs, and negotiate prices and transportation costs without management intervention. (Tr. at 161:13-18; 170:4-171:10). Indeed, the Buyers financially commit the Employer's funds in substantial amounts. It is uncontested those amounts totaled **\$21 million** in 2015. (Tr. at 124:22-125:2; 169:6-24; 204:22-205:1). The Buyers also train employees on the EMPAC computer system (*Id.* at 45:3-14), conduct competitive bid evaluations (*Id.* at 130:24-131:9), as well as; negotiate and handle disputes with suppliers with the intent to save the Employer money. (*Id.* at 190:4-18). In doing so, the Buyers exercise their discretion and authority on behalf of management to ensure that the plant runs efficiently. (*Id.* at 191:3-10).

Despite this compelling evidence and the Petitioner's failure to even come close to satisfying its burden of proof, the Regional Director found that the Buyers are more closely aligned with employees than management, and therefore, entitled to the protection of the Act. (02/16/16 D&O, p. 12-13). This error should be reviewed and reversed.

CONCLUSION

As demonstrated in the record, including the transcript, exhibits and Decision and Order in the previous case, there is ample evidence that the Buyers in this case are managerial employees and not covered by the Act. Accordingly, the Regional Director's Decision and Order in this case warrants review.

Respectfully submitted,

/s/ Brian J. Christensen
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Trecia L. Moore
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Attorneys for the Employer

CERTIFICATE OF SERVICE

The foregoing Employer's Brief on Review of Regional Director's Decision and Order, was electronically served on the following on March 1, 2016:

William Lawrence
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Daniel L. Hubbel
Regional Director
NLRB Region 14
1222 Spruce Street
Room 8.302
St. Louis, MO 63103-2829
(Sent via NLRB e-filing)

/s/ Brian J. Christensen
Attorney for Employer
Wolf Creek Nuclear Operating Corporation

Covel, Julie

From: Jason Ianacone <jason.ianacone@gmail.com>
Sent: Tuesday, August 09, 2016 10:16 AM
To: Raymond Rogers
Subject: Fwd: Buyers initial RFI

----- Forwarded message -----

From: Pearson Jayne M <japears@wcnoc.com>
Date: Mon, Mar 7, 2016 at 10:16 AM
Subject: RE: Buyers initial RFI
To: Raymond Rogers <rcrogers2@cableone.net>
Cc: "jason.ianacone@Gmail.com" <jason.ianacone@gmail.com>, Mefford Nathaniel L <nameffo@wcnoc.com>, Kirk Matthew T <makirk1@wcnoc.com>, "Todd_Newkirk@IBEW.org" <Todd_Newkirk@ibew.org>

Raymond, we are in receipt of your Request for Information relating to the Buyer job classification. The Regional Director has not yet certified the results of the election. Wolf Creek has no obligation to provide the information you request. Accordingly, we respectfully decline to do so.

Jayne

From: Raymond Rogers [mailto:rcrogers2@cableone.net]
Sent: Monday, February 29, 2016 9:23 AM
To: Pearson Jayne M
Cc: jason.ianacone@Gmail.com; Mefford Nathaniel L; Kirk Matthew T; Todd_Newkirk@IBEW.org
Subject: Buyers initial RFI

Jayne, please find attached the initial info request from the Union to support Bargaining for the Buyers. If you could work with the guys on site with this, I would appreciate it

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

Wolf Creek Nuclear Operating Corporation

Employer

and

Case 14-RC-168543

**International Brotherhood of Electrical Workers,
Local 225**

Petitioner

TYPE OF ELECTION: RD DIRECTED

CERTIFICATION OF REPRESENTATIVE

An election has been conducted under the Board's Rules and Regulations. The Tally of Ballots shows that a collective-bargaining representative has been selected. No timely objections have been filed.

As authorized by the National Labor Relations Board, it is certified that a majority of the valid ballots has been cast for

International Brotherhood of Electrical Workers, Local 225

and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

Unit: All full-time and regular part-time Buyers I, II, III and Lead Buyer employed by the Employer at its facility near Burlington, Kansas, EXCLUDING all office clerical employees, professional employees, managerial employees, guards and supervisors as defined by the Act, and all other employees.



March 8, 2016

/s/ Daniel L. Hubbel

Daniel L. Hubbel
Regional Director, Region 14
National Labor Relations Board

NOTICE OF BARGAINING OBLIGATION

In the recent representation election, a labor organization received a majority of the valid votes cast. Except in unusual circumstances, unless the results of the election are subsequently set aside in a post-election proceeding, the employer's legal obligation to refrain from unilaterally changing bargaining unit employees' terms and conditions of employment begins on the date of the election.

The employer is not precluded from changing bargaining unit employees' terms and conditions during the pendency of post-election proceedings, **as long as** the employer (a) gives sufficient notice to the labor organization concerning the proposed change(s); (b) negotiates in good faith with the labor organization, upon request; and (c) good faith bargaining between the employer and the labor organization leads to agreement or overall lawful impasse.

This is so even if the employer, or some other party, files objections to the election pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board (the Board). If the objections are later overruled and the labor organization is certified as the employees' collective-bargaining representative, the employer's obligation to refrain from making unilateral changes to bargaining unit employees' terms and conditions of employment begins on the date of the election, not on the date of the subsequent decision by the Board or court. Specifically, the Board has held that, absent exceptional circumstances,¹ an employer acts at its peril in making changes in wages, hours, or other terms and conditions of employment during the period while objections are pending and the final determination about certification of the labor organization has not yet been made.

It is important that all parties be aware of the potential liabilities if the employer unilaterally alters bargaining unit employees' terms and conditions of employment during the pendency of post-election proceedings. Thus, typically, if an employer makes post-election changes in employees' wages, hours, or other terms and conditions of employment without notice to or consultation with the labor organization that is ultimately certified as the employees' collective-bargaining representative, it violates Section 8(a)(1) and (5) of the National Labor Relations Act since such changes have the effect of undermining the labor organization's status as the statutory representative of the employees. This is so even if the changes were motivated by sound business considerations and not for the purpose of undermining the labor organization. As a remedy, the employer could be required to: 1) restore the status quo ante; 2) bargain, upon request, with the labor organization with respect to these changes; and 3) compensate employees, with interest, for monetary losses resulting from the unilateral implementation of these changes, until the employer bargains in good faith with the labor organization, upon request, or bargains to overall lawful impasse.

¹ Exceptions may include the presence of a longstanding past practice, discrete event, or exigent economic circumstance requiring an immediate response.

Covel, Julie

From: Jason Ianacone <jason.ianacone@gmail.com>
Sent: Tuesday, August 09, 2016 10:16 AM
To: Raymond Rogers
Subject: Fwd: Request For Information

----- Forwarded message -----

From: **Raymond Rogers** <rcrogers2@cableone.net>
Date: Tue, Mar 15, 2016 at 1:26 PM
Subject: Fwd: Request For Information
To: Jason Ianacone <jason.ianacone@gmail.com>, Nathan Mefford <meffordnathan@yahoo.com>, makirk1@wcnoc.com

Please read at Local meeting. I am working on this with our attorney and the international.

----- Forwarded message -----

From: Pearson Jayne M <japears@WCNOC.com>
Date: Mar 15, 2016 12:36 PM
Subject: Request For Information
To: 'Raymond Rogers' <rcrogers2@cableone.net>
Cc: Mcintyre Ellie D <elmcint@WCNOC.com>

We are in receipt of your February 29, 2016, email in which you requested certain information with respect to our Buyers, and Jason Ianacone's March 3, 2016, email in which he requested certain information related to Buyer, Tracy Beard.

We believe, and continue to maintain, that the job classifications of Buyer I, Buyer II, Buyer III and Lead Buyer are managerial employees, excluded from coverage under the National Labor Relations Act.

Subsequent to your email, WCNOG filed a Request For Review with the National Labor Relations Board ("Board"), in Washington D.C. requesting that the Board review the Regional Director's Decision and Order dated February 16, 2016.

We do not waive our right to request review. Moreover, we reassert, preserve and do not waive any and all arguments presented to the Region in the underlying cases, 17-UC-210 and 14-RC-168543, or that we otherwise have an obligation to furnish requested information or bargain with the IBEW with respect to the employees at issue.

Jayne

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case 14-CA-181053	Date Filed July 28, 2016

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT	
a. Name of Employer Wolf Creek Nuclear Operating Corporation	b. Tel. No. (620) 364-8831
	c. Cell No.
	f. Fax No.
d. Address (Street, city, state, and ZIP code) 1550 Oxen Lane Burlington KS 66839	e. Employer Representative Jayne Pearson Labor Relations
	g. e-Mail japears@wcnoc.com
	h. Number of workers employed 1100
i. Type of Establishment (factory, mine, wholesaler, etc.) Energy	j. Identify principal product or service Nuclear Energy
k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) 5 of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.	
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)	
(1) Within the previous six months, the Employer failed and refused to recognize the union as the collective bargaining representative of its employees. (2) Within the previous six months, the Employer failed and refused to bargain in good faith with the union as the collective bargaining representative of its employees. (3) Within the previous six months, the Employer failed and refused to bargain in good faith with the union as the collective bargaining representative of its employees by failing to furnish information requested by the union.	
3. Full name of party filing charge (if labor organization, give full name, including local name and number) Raymond Rogers Title: The International Brotherhood of Electrical Workers, Local 225	
4a. Address (Street and number, city, state, and ZIP code) P.O. Box 404 Burlington KS 66839	4b. Tel. No. (620) 366-2306
	4c. Cell No.
	4d. Fax No.
	4e. e-Mail rcrobers@cablone.net
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)	
6. DECLARATION	
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.	
By William R. Lawrence IV (signature of representative or person making charge)	William R Lawrence IV Title: Attorney (Print/type name and title or office, if any)
	Tel. No. (785) 331-0300
	Office, if any, Cell No.
	Fax No. (785) 331-0303
	e-Mail wlawrence@fed-firm.com
730 New Hampshire Street Suite 210 Address Lawrence KS 66044	07/28/2016 12:03:04 (date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of information is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes. General Counsel Exhibit **9**

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

**WOLF CREEK NUCLEAR OPERATING
CORPORATION**

Charged Party

and

**THE INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 225**

Charging Party

Case 14-CA-181053

AFFIDAVIT OF SERVICE OF CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, state under oath that on July 28, 2016, I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

Jayne Pearson, Labor Relations
Wolf Creek Nuclear Operating Corporation
1550 Oxen Lane
Burlington, KS 66839

July 28, 2016

Date

Regina Creason, Designated Agent of NLRB

Name

/s/ Regina Creason

Signature

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Wolf Creek Nuclear Operating Corporation and International Brotherhood of Electrical Workers, Local 225, Petitioner. Case 14-RC-168543

April 7, 2017

DECISION ON REVIEW AND ORDER REMANDING
BY ACTING CHAIRMAN MISCIMARRA AND MEMBERS
PEARCE AND MCFERRAN

The Employer's Request for Review of the Regional Director's Decision and Direction of Election is granted in part and denied in part, without prejudice, and the case is remanded to the Regional Director for further appropriate action.

The Regional Director found that the buyers in this case, whom the Petitioner is seeking to represent, are statutory employees, not managerial employees, and accordingly directed an election in a bargaining unit of buyers. The Employer requests review on two separate grounds: (1) that the Regional Director erred in not applying the doctrine of res judicata, based on a prior decision in a 2000 unit-clarification proceeding (17-UC-210), in which an Acting Regional Director found that the same classification of buyers at the Employer were managerial employees; and (2) that, on the present record, the Regional Director clearly erred in determining that the buyers are not managerial employees. The Petitioner has filed an opposition to the Employer's request for review.

We grant the Employer's request with regard to the application of res judicata doctrine because it raises a substantial issue warranting review, for reasons explained below. On review, we conclude that a remand to the Regional Director is appropriate. Accordingly, we deny the Employer's request in all other respects, without prejudice.

In his decision, the Regional Director rejected the applicability of res judicata doctrine based on the earlier decision finding the buyers to be managerial employees, reasoning as follows:

While the Regional Director did make such a finding in 2000, the Board did not make an official or final ruling on the issue. Indeed, the Board simply did not grant review of the matter. Much like a writ of certiorari before the Supreme Court, the Board's refusal to grant review is not the same as an official ruling on a subject. Since the Board did not issue an official ruling on the issue of whether Buyers are managerial employees[,] the 2000 Decision does not rise to the level of a

final decision, and res judicata does not preclude the Region from revisiting the status of the petitioned-for employees.

Decision and Direction of Election at pp. 2-3 (italics omitted). The Regional Director's analysis was mistaken.

To begin, we note that the Regional Director misstated the procedural history of the earlier case. In fact, no party—including the Union—filed a request for review of the Acting Regional Director's 2000 decision. Thus, the Board never refused to grant review. As we will explain, however, those circumstances do not mean that the 2000 decision cannot have preclusive effect.

The Board has explicitly held that Board decisions and rulings in representation cases have preclusive effect in subsequent representation cases. See *Carry Cos. of Illinois*, 310 NLRB 860, 860 (1993).

It is also clear as a matter of Board law and procedure that a Regional Director's decision is final—and thus may have preclusive effect—if no request for review is made (as here) or if the Board denies a request for review. It does not matter that the Board itself did not address the issue.

Under general preclusion doctrine, a judgment is considered final, for purposes of preclusion, when it is "a firm and stable one, the 'last word' of the rendering court—a 'final' judgment." Restatement (Second) of Judgments § 13 cmt. a (1982). Plainly, a decision such as the 2000 decision concerning the Employer's buyers—one that has not been appealed and that resolves the disputed issues in a manner that is binding upon the parties—is final for preclusion purposes.

Indeed, the Board's Rules establish that decisions of a Regional Director, even where review is not requested or is denied, are to be accorded such finality. At the time of the 2000 Acting Regional Director's decision, Section 102.67(b) of the Board's Rules and Regulations provided that such a "decision of the regional director shall be final," subject to the procedure for requesting review by the Board. 29 C.F.R. § 102.67(b) (2000). Section 102.67(f), in turn, provided that

[f]ailure to request review shall preclude parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been raised in the representation proceeding. Denial of a request for review shall constitute an affirmation of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

29 C.F.R. § 102.67(f) (2000). The Board's current rules are to the same effect.¹

Here, then, the failure of any party to seek review of the Acting Regional Director's 2000 decision does not mean that the decision was not final. Just the opposite is true. Cf. *Premier Living Center*, 331 NLRB 123, 123 (2000) (“[I]n the absence of newly discovered and previously unavailable evidence or special circumstances,” employer not permitted to relitigate status of LPNs in UC proceeding after it stipulated to LPNs’ non-supervisory status in RC proceeding.).

We see no reason why a regional director's decision that could have preclusive effect in a related subsequent unfair labor practice proceeding would not also be potentially preclusive in a subsequent *representation* proceeding involving the same parties and the same issue, although the Board's Rule and Regulations do not expressly contemplate that scenario. The Board's administrative interest in finality—resolving questions concerning representation quickly and definitively—is substantially the same in either case.²

It follows, then, that the 2000 decision may have preclusive effect here, unless the party seeking relitigation of the previously decided issue satisfies its burden of presenting new factual circumstances that would vitiate the preclusive effect of the earlier ruling. See *Carry Cos. of Illinois*, supra at 860 (“changed circumstances” exception to preclusion not established because “the Petitioner has failed to produce” evidence of such); *Harvey's Resort Hotel*, 271 NLRB 306, 306–307 (1984) (applying preclusion in context of unfair labor practice proceedings and holding that when it is clear that an issue was “fully

litigated,” i.e., “put in issue and resolved in the earlier proceeding,” preclusion applies unless evidence of changed circumstances is produced). Here, the Regional Director suggested that such changed circumstances may be present, but—presumably because he had first concluded that the 2000 decision could not have preclusive effect—his decision did not articulate in sufficient detail the nature of the changes or their materiality to the question of the buyers’ managerial status. Accordingly, a remand is in order.

Our dissenting colleague would affirm the Regional Director's refusal to give preclusive effect to the 2000 decision because, in our colleague's view, the Employer has not established the preclusive effect of that decision even if the preclusion doctrine is applicable to this proceeding.³ We view this case differently.

To establish the prima facie applicability of preclusion, an identical issue must have been fully litigated and must have been an essential component of a valid final judgment between the same parties. *Donna-Lee Sportswear*, supra. Our colleague appears not to contest that the buyers’ managerial status was fully litigated by these parties and decided as an essential component of the 2000 final decision. Moreover, there can be no doubt that identity of issues has been established here. “An issue on which relitigation is foreclosed may be one of evidentiary fact, of ‘ultimate fact’ (i.e., the application of law to fact), or of law.” Restatement (Second) of Judgments § 27 cmt. c (1982). The “issue” in this case, for purposes of preclu-

¹ Sec. 102.67(g) provides that the “regional director's actions are final unless a request for review is granted.” It further provides that the failure to request review and the denial of a request for review will have preclusive effect in a subsequent unfair labor practice proceeding. See, e.g., *Mirage Casino-Hotel*, 364 NLRB No. 1, slip op. at 1 fn. 2 (2016) (giving preclusive effect in unfair labor practice case to regional director's decision following Board's denial of request for review).

² It makes sense that there is no Board rule expressly addressing the issue-preclusive effect of a determination made in a prior representation case in a subsequent representation case involving the same issue and the same parties. In such a scenario, giving the determination in the prior proceeding preclusive effect in the subsequent proceeding is simply a matter of applying black-letter collateral estoppel doctrine. See, e.g., *NLRB v. Donna-Lee Sportswear Co., Inc.*, 836 F.2d 31, 34 (1st Cir. 1987) (stating elements of collateral estoppel, including identity of issues and identity of parties). Because the General Counsel is not a party in any representation case but is a party in unfair labor practice cases, having a Board rule that states the preclusive effect of representation-case findings in related unfair labor practice proceedings has the particular effect of ensuring that preclusion principles apply even where there is not an identity of parties as would normally be required to establish preclusion. Such a rule, addressing a gap in preclusion applicability, readily coexists with a practice of applying normal preclusion principles in situations where the traditional criteria are met.

³ Although our dissenting colleague chiefly argues that the Employer here has not met the burden he would erroneously place on it to establish the preclusive effect of the Board's prior decision, he also suggests that preclusion might not apply at all in representation cases. The cases he cites for this latter proposition are distinguishable. In *Film & Dubbing Productions, Inc.*, 181 NLRB 583, 583 fn. 1 (1970), the Board did not suggest that preclusion cannot apply in representation cases; rather, it stated that the record there did not support a finding that the employer's translators in the petitioned-for unit were the same as those found to be independent contractors in a prior representation case involving the employer's predecessor. Even assuming arguendo that the case involved the same translators, the Board stated that it was “not thereby precluded from again considering the status of these [translators] as it may appear from the present record,” thus indicating it discerned a change in circumstances apparent from the record before it. *Id.* (emphasis added). Indeed, new material facts concerning the location and supervision of translators' work were presented in *Film & Dubbing*. Compare *El Mundo, Inc.*, 127 NLRB 538 (1960). In *Cement Transport, Inc.*, 162 NLRB 1261, 1266 fn. 11 (1967), intervening caselaw changed the nature of the analysis of an employee's independent-contractor status, and this justified relitigation of the issue.

Further, as explained already, far more recent cases firmly establish that issue preclusion applies in the representation-case context. For example, *Carry Cos. of Illinois*, supra, expressly stands for the proposition that the disposition of an issue “fully argued and litigated” in an earlier representation proceeding can be conclusive in a subsequent representation proceeding “in the absence of evidence of changed circumstances.”

sion, is an ultimate fact, gleaned by application of governing law to a set of evidentiary facts: whether the buyers meet the legal definition of managerial employees. Because this ultimate fact was litigated and decided in the 2000 case between the parties, and the same ultimate fact is in dispute in the present proceeding, the Employer has demonstrated that the 2000 decision may be entitled to preclusive effect.⁴

The Employer having done as much, the question becomes whether there are any changed circumstances that would justify relitigating the managerial status of the buyers. On that point, our colleague seemingly would require that the Employer show an *absence* of changes since the earlier decision for that decision to have preclusive effect. To the contrary, it is appropriate to place the burden on the party opposing preclusion—here, the Petitioner—to demonstrate that material changes *have occurred* since the prior decision. Indeed, once identity of issues has been established, requiring the party asserting preclusion also to show the absence of material changes is inconsistent with preclusion cases generally, with the cases discussed here,⁵ and with the underlying principles of preclusion. With the goals of administrative finality and efficiency in mind, it would be anomalous to require that a party asserting preclusion engage in the quixotic task of conclusively showing an absence of changed circumstances.⁶ Instead, imposing the burden on the party opposing preclusion ensures that relitigation of an already-decided issue will occur only when it is warranted.

⁴ In *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2305 (2016), cited by the dissent, the Supreme Court—in a case that considered whether bringing a new claim was precluded, as opposed to whether relitigation of a particular fact or issue was precluded—held that preclusion did not apply, but the Court did not specifically address the question of whose burden it was to prove changed circumstances. It did note, however, that it was the party that opposed claim preclusion that had produced evidence of new facts. *Id.* at 2306 (“And the Court of Appeals in this case properly decided that new evidence *presented by petitioners* had given rise to a new claim and that petitioners’ applied challenges are not precluded.”) (emphasis added).

⁵ E.g., *Harvey's Resort Hotel*, *supra* at 307 (finding that doctrine of collateral estoppel precluded the General Counsel from relitigating status of the respondent’s floormen because “no . . . evidence [of significant job changes] was adduced in the instant proceeding”). Contrary to the assertion of our dissenting colleague, the Board in *Harvey's Resort Hotel* did not place a burden on the party asserting collateral estoppel to prove that circumstances have remained the same. Rather, the Board placed the burden on the party opposing the application of collateral estoppel to introduce “evidence that [the disputed classification’s] job has changed significantly since the earlier litigation.” *Id.*

⁶ Moreover, requiring the Employer to prove that circumstances have *not* changed runs counter to the general rule against requiring parties to prove a negative. See, e.g., *Evankavitch v. Green Tree Servicing, LLC*, 793 F.3d 355, 366 (3d Cir. 2015) (“[A]ll else being equal, courts should avoid requiring a party to shoulder the more difficult task of proving a negative.”) (internal quotations omitted).

Moreover, the Regional Director has not made any findings nor drawn any inferences that circumstances have changed in a way that would materially alter the analysis of the buyers’ managerial status.⁷ Rather, in addressing the significance of the 2000 decision concerning the buyers’ status, the Regional Director merely hinted at the possibility that there may have been changes occasioned by the passage of time and the implementation of new computer equipment. As we now hold, there must be an affirmative finding of material changed circumstances when an identical issue was decided in an earlier proceeding involving the same parties. The Regional Director failed to make and support such a finding. On remand, the Regional Director will have the opportunity to consider precisely that question: whether the record demonstrates changed circumstances sufficient to allow reconsideration of the buyers’ managerial status. In making that determination, it is of particular importance that the Regional Director examine any factual changes in context and in light of the relevant statutory question.

Thus, without expressing any view on the issue in the first instance, we remand this case to the Regional Director to more fully consider whether changed circumstances warrant declining to give the 2000 decision preclusive effect and to issue an appropriate supplemental decision. The Regional Director may, within his discretion, reopen the record to take additional relevant evidence.⁸

⁷ Applying his view of the proponent’s burden in preclusion cases, our dissenting colleague would find that the passage of over 16 years, along with new workplace methods utilized by the buyers in 2016, would defeat the Employer’s assertion of preclusion. Although passage of time, depending on the context, may suggest changed circumstances, it does not establish that fact. We note that although the passage of time alone is insufficient to satisfy the Petitioner’s burden to prove changed circumstances, that burden is not an onerous one. The Petitioner need only point to “one material differentiating fact” in order to relitigate the issue of the buyers’ managerial status. See *Miller's Ale House, Inc. v. Boynton Carolina Ale House, LLC*, 702 F.3d 1312, 1319 (11th Cir. 2012) (quoting *CSX Transp., Inc. v. Brotherhood of Maintenance of Way Employees*, 327 F.3d 1309, 1317 (11th Cir. 2003)). Our colleague also alludes to record evidence of some changes in the buyers’ working conditions since the 2000 decision. The question, however, is whether those changes are material to the managerial status of the buyers.

⁸ Because we now remand this case for the Regional Director to reevaluate the threshold legal question of the preclusive effect of the 2000 decision, we deny without prejudice that portion of the Employer’s Request for Review challenging the Regional Director’s finding, on the current record, that the buyers are employees. If the Regional Director reaffirms his ruling concerning the lack of preclusive effect of the 2000 decision, the Employer may again file a request for review of the Regional Director’s determination of the employee status of the buyers, whether on the present record or the record, if any, developed on remand.

ORDER

IT IS ORDERED that this case is remanded to the Regional Director for further appropriate action consistent with this decision.

Dated, Washington, D.C. April 7, 2017

Philip A. Miscimarra, Acting Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER PEARCE, dissenting.

At issue is whether the Regional Director erred in finding that the petitioned-for buyers were statutory employees and not managerial employees. The majority finds that the Employer presented prima facie evidence that litigation of the buyers' status may be barred in this proceeding based on an Acting Regional Director's 2000 decision in a unit-clarification proceeding (Case 17-UC-210). Finding further that the Regional Director's decision did not "articulate in sufficient detail" whether there were any changed circumstances that would justify litigating the buyers' status, my colleagues remand this case to the Regional Director to further consider the nature of any such changes. Contrary to my colleagues, I find that the Regional Director did not err, and I reject the Employer's argument that the doctrine of res judicata and Section 102.67(g) of the Board's Rules and Regulations apply to this proceeding.

The Petitioner seeks to represent a bargaining unit that includes the Employer's full-time and part-time Buyers I, II, III, and its Lead Buyer. The Employer has raised res judicata as an affirmative defense, relying on an almost 17-year-old determination that individuals classified as Buyers I, II, and III are managerial employees.¹ Notwithstanding the prior determination, the Petitioner contends that litigation of the buyers' status is permissible because its evidence establishes that changes have impacted the buyers' duties.

Under the doctrine of res judicata, a valid and final judgment of an administrative agency may preclude the parties or their privies from subsequently litigating issues

¹ The classifications at issue in Case 17-UC-210 included Quality Specialist I, Quality Specialist II, Quality Specialist III, Buyer I, Buyer II, and Buyer III. The Lead Buyer position was not, as here, at issue in the prior proceeding.

that were or could have been raised in that proceeding. See generally *B & B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S.Ct. 1293, 1302–1306 (2015) (describing the analytical framework for determining whether an agency decision grounds issue preclusion); Restatement (Second) Judgments § 83(1) ("a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications as a judgment of a court"). However, a valid and final judgment has preclusive effect in a subsequent proceeding only where there is a finding that the particular issue to be litigated is identical to an issue that was or could have been raised in the previous proceeding. See generally *B & B Hardware*, supra at 1306 (issue preclusion applicable in trademark litigation where "the issues in the two cases are indeed identical and the other rules of collateral estoppel are carefully observed") (quoting 2 J. McCarthy Trademarks and Unfair Competition § 32:99 (4th ed. 2014)). Significantly, the Board has long held that a determination in a prior representation proceeding *does not* have preclusive effect in a subsequent representation proceeding. See, e.g., *Film & Dubbing Productions, Inc.*, 181 NLRB 583, 583 fn. 1 (1970) (previous determination that translators were independent contractors when employed by predecessor employer did not preclude reconsideration of their status in subsequent representation proceeding); *Cement Transport, Inc.*, 162 NLRB 1261, 1266 fn. 11 (1967) (previous determination that certain leased-vehicle drivers were independent contractors did not preclude reconsideration of their status in subsequent representation proceeding).² See also *Thalhimer Brothers, Inc.*, 93 NLRB 726 (1951).

The Employer has raised res judicata as an affirmative defense to the petition, relying on a unit clarification de-

² The majority contends that neither *Film & Dubbing* nor *Cement Transport* demonstrates that a prior determination of employee status does not have preclusive effect in a subsequent representation proceeding. In *Film & Dubbing*, however, the Board plainly stated that a previous determination of employee status did not preclude the Board "from again considering the status of these individuals as it may appear from the present record." *Film & Dubbing*, supra at 583 fn. 1. Contrary to the suggestion of my colleagues, the Board's decision makes no reference to any change in duties or responsibilities since the prior determination. Indeed, the only "new circumstance" mentioned in that decision is the identity of the employer.

In *Cement Transport*, the Board held that a prior determination, that certain leased-vehicle drivers were independent contractors, did not preclude litigation of the same issue in that representation proceeding. Contrary to the suggestion of my colleagues, the Board's decision was not based on an intervening change in the Board's standard for determining independent-contractor status. Rather, the Board found that the prior determination took an unduly limited view of certain factors that were present in both proceedings, instead of appropriately evaluating the totality of the facts. See *Cement Transport*, supra at 1266 fn. 11.

termination that is almost 17 years old. As the party raising *res judicata* as an affirmative defense, the Employer bears the burden of proving that its defense is justified. See generally *Fallon-Williams, Inc.*, 336 NLRB 602, 604 (2001); *Marydale Products Co., Inc.*, 133 NLRB 1232, 1235 fn. 8 (1961) (“It is well settled that the burden of proving an affirmative defense is on the party asserting it.”), *enfd.* 311 F.2d 890 (5th Cir. 1963), *cert. denied* 375 U.S. 817 (1963). “The Restatement of Judgments notes that the development of new material facts can mean that a new case and an otherwise similar previous case do not present the same claim.” *Whole Woman’s Health v. Hellerstedt*, 136 S.Ct. 2292, 2305 (2016).³

Here, the Employer has failed to establish its affirmative defense. The Regional Director’s determination that buyers are employees rests on a detailed description of their current functions in the procurement process where they utilize a complex computer system titled EMPAC. This stands in stark contrast to the Acting Regional Director’s 2000 unit-clarification decision that makes no mention of EMPAC or indeed any other computer system that buyers may have used to solicit and evaluate bids from vendors. Rather, in describing the bid-evaluation process, the Acting Regional Director’s 2000 decision stated:

Upon receiving the bids, the Buyer performs a commercial evaluation to determine the most beneficial bid based on price, delivery, performance schedule, payment terms, warranties, exceptions, etc. With the aid of a bid evaluation template, the Buyer is able to list all of the pertinent bid attributes side-by-side and evaluates the best option.

Despite the clear differences between the Acting Regional Director’s 2000 findings and the Regional Director’s 2016 findings, the Employer nonetheless claims that the Regional Director erred because there *was* evidence in this proceeding that buyers used the EMPAC system as early as 1998. However, the sum total of the Employer’s evidence on this point was a 2016 screenshot from its procurement system, regarding an item the Employer purchased in 1998. At most, this evidence purports to show that in 1998 the Employer used EMPAC to store and retrieve information pertaining to items it purchased from vendors and maintained in its inventory. It does not show that in 2000 the buyers used EMPAC to generate a comparative bid analysis before making a purchase, as

³ My colleagues state that the Employer need not prove its affirmative defense here, because doing so would require it to prove a negative. I disagree, as it would merely require the Employer to produce the procurement policies and procedures showing that they are the same today as they were in 2000.

they do today. In fact, it does not establish whether EMPAC could even perform that function in 2000.

Significantly, the Employer does not contend that the EMPAC system or any other aspect of its procurement process has remained unchanged since 2000. On the contrary, the Employer concedes changes and describes some of them, such as the fact that in 2000, buyers used the bid evaluation template to analyze bids, whereas they currently use the EMPAC system to generate a comparative analysis. Further, the Employer’s request for review does not even attempt to reconcile the Regional Director’s description of the current automated bid-evaluation process with the apparently manual process described in the 2000 decision. Plainly, the Employer has not sustained its burden in this case, as it is apparent that the Petitioner litigated the buyers’ employment status based on evidence that did not exist in 2000.⁴ Because a determination of the buyers’ current status requires an application of governing law to a new set of facts—facts which significantly differ from those detailed in the Acting Regional Director’s 2000 decision—the Employer failed to establish an identity of issues foreclosing relitigation of the “ultimate fact” decided in the prior proceeding.⁵ Contrary to the Employer’s contention, the Regional Director’s decision to permit litigation of the employee-status issue in these circumstances is consistent with Board precedent⁶ and with the doctrine of *res judicata*.⁷

⁴ See generally *General Motors Corp.*, 158 NLRB 1723, 1728 (1966) (rejecting contention that a previous decision precluded litigation of respondents’ contractual no-distribution rule where language at issue, though identical to language at issue in previous proceeding, was maintained in a contract that came into existence after the previous proceeding) (citing *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948)).

⁵ Contrary to the majority’s suggestion, the mere passage of time is not the primary basis for finding that issue preclusion is not applicable here. The Regional Director clearly identified specific changes, including a new competitive-bidding procedure that increased from \$5,000 to \$50,000 the purchase amount that would warrant buyers’ solicitation of competitive bids. In addition, as discussed above, comparing the Acting Regional Director’s description of the buyers’ duties in 2000 with the Regional Director’s description of their present duties reveals a material change in the buyers’ role in selecting a winning vendor in the competitive-bidding process. The majority’s view of an absence of changed circumstances is, therefore, without support.

⁶ See *Heartshare Human Services of New York, Inc.*, 320 NLRB 1, 1 fn. 1 (1995) (denying review of regional director’s ruling limiting the scope of hearing to evidence of changed circumstances since previous representation proceeding).

⁷ See *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 328 (1955) (previous “judgment precludes recovery on claims arising prior to its entry” but “cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case”).

My colleagues contend that *Carry Cos. of Illinois*, 310 NLRB 860 (1993), warrants a grant of review. However, the Board in *Carry Cos. of Illinois* simply found that the union, as the party asserting supervisory status under Section 2(11) of the Act, failed to sustain its burden of proving that the employees at issue were statutory supervisors. Contrary to my colleagues' suggestion, *Carry Cos. of Illinois* did not establish the burden-shifting framework they apply today, and thus their finding of a "prima facie applicability of preclusion" is without support.⁸ Plainly, nothing in that case supports a finding that a party asserting an affirmative defense need not carry its burden of proof.⁹

⁸ Further, and contrary to my colleagues' suggestion, *Carry Cos. of Illinois* did not overrule sub silentio *Film & Dubbing, Cement Transport*, or any other decision where the Board held that a prior determination in a representation proceeding did not have preclusive effect in a subsequent representation proceeding.

⁹ Similarly, my colleagues' citation to *Harvey's Resort Hotel*, 271 NLRB 306 (1984), is unavailing because the Board found there that *the respondent's contention*, that collateral estoppel precluded litigation of its floormen's supervisory status, was supported in the particular circumstances. In other words, the Board found that, unlike the Employer here, the respondent sustained its burden of establishing its affirmative defense.

Further, and contrary to the Employer's contention, Section 102.67(g) of the Board's Rules and Regulations is clearly inapplicable here. That rule only precludes parties from relitigating representation issues "in any related subsequent unfair labor practice proceeding." As such, it provides no basis for precluding the Petitioner from litigating the employee-status issue in this representation proceeding.

Accordingly, I find that the Employer has provided no basis for granting review of the Regional Director's finding that the buyers are employees. Contrary to my colleagues, I would therefore deny the Employer's Request for Review of the Regional Director's Decision and Direction of Election.

Dated, Washington, D.C. April 7, 2017

Mark Gaston Pearce,

Member

NATIONAL LABOR RELATIONS BOARD



UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 17



Wolf Creek Nuclear Operating Corporation
Employer

and

International Brotherhood of Electrical Workers,
Local 225

Case 14-RC-168543

Petitioner

ORDER REOPENING RECORD AND NOTICE OF FURTHER HEARING

On April 7, 2017, the Board granted, in part, the Employer's March 1, 2016, request for review of the Regional Director's February 1, 2016, Decision and Direction of Election, finding that the Employer's buyers are not managerial employees, despite an earlier 2000 Regional Director's unit clarification decision addressing the same issue and finding them to be managerial employees. The February 2016 Regional Director's decision found that the earlier 2000 Regional Director's decision had no preclusive effect. The Board found that the Regional Director's unit clarification decision in 2000, that buyers were managerial employees, may have preclusive effect in the instant case, unless the Petitioner satisfies its burden of presenting material changed circumstances that would vitiate the preclusive effect of the earlier ruling. The Board's Order remanded the instant case for further processing, including reopening of the record, if necessary

After considering the Board's remand, I am ordering the reopening the record to afford the parties the opportunity to supplement the record on the issue of the managerial status of the

Employer's buyers, including materially changed circumstances in the buyers' workplace methods since the Regional Director's 2000 decision.

IT IS ORDERED that the record in this proceeding is reopened for further hearing before a hearing officer on the managerial issue described above.

Accordingly, YOU ARE HEREBY NOTIFIED that at 9:00 a.m. on the **25th day of April, 2017**, and on consecutive days until concluded, at the Subregional Office of the National Labor Relations Board, Sharon K. Evans Hearing Room, 8600 Farley, Overland Park, Kansas, a hearing will be held in this matter for the purpose of receiving additional evidence as described above. At the hearing, the parties will have the right to appear in person or otherwise and give testimony. Form NLRB-4669, *Statement of Standard Procedures in Formal Hearings Held Before The National Labor Relations Board Pursuant to Petitions Filed Under Section 9 of The National Labor Relations Act*, is attached.

Dated at Overland Park, Kansas, this 18th day of April, 2017.

Leonard J. Perez, Regional Director
National Labor Relations Board, Region 14, by

/s/ Mary G. Taves

Mary G. Taves, Officer-In-Charge
National Labor Relations Board, Subregion 17
8600 Farley Street, Suite 100
Overland Park, KS 66212-4677

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Wolf Creek Nuclear Operating Corporation Employer and International Brotherhood of Electrical Workers, Local 225 Petitioner	Case 14-RC-168543
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AFFIDAVIT OF SERVICE OF: Order Reopening Record and Notice of Further Hearing

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on April 17, 2017, I served the above documents by electronic mail upon the following persons, addressed to them at the following addresses:

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April 18, 2017

Date

Melissa Nisly, Designated Agent of NLRB

Name

/s/ Melissa Nisly

Signature

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14**

Wolf Creek Nuclear Operating Corporation

Employer

and

Case 14-RC-168543

**International Brotherhood of Electrical Workers,
Local 225**

Petitioner

SUPPLEMENTAL DECISION

On January 28, 2016, International Brotherhood of Electrical Workers, Local 225 (Petitioner), filed a petition with the National Labor Relations Board (Board) under Section 9(c) of the National Labor Relations Act (Act) seeking to represent the following unit of employees employed by Wolf Creek Nuclear Operating Corporation (Employer):

All full-time and part time Buyers I, II, III and Lead Buyer employed by the Employer at its facility near Burlington, Kansas to be included in a separate unit, EXCLUDING all office clerical employees, all other professional employees, all managerial employees, all guards and supervisors as defined by the Act, and all other employees.

By Decision dated February 16, 2016, the then Regional Director directed an election among the four buyers in the appropriate unit, finding that the evidence failed to establish that the petitioned-for buyers were managerial employees. An election was conducted on February 24, 2016, and a majority of the valid votes were cast for the Petitioner.¹ On March 1, 2016, the Employer filed a Request for Review with the Board.

On April 7, 2017, the Board issued a Decision on Review, reported at 365 NLRB No. 55, granting the Employer's request with regard to its argument that the doctrine of *res judicata*

¹ The Regional Director issued a Certification of Representative on March 8, 2016.

barred processing the petition in this case because on May 4, 2000, the Acting Regional Director in then Region 17 found that the same classification of buyers were managerial employees in Case 17-UC-210. Consequently, the Board remanded the case for consideration of whether the Petitioner had demonstrated that there have been sufficient material changes with respect to the buyer classification to allow reconsideration of their managerial status. Thereafter, pursuant to my Order dated April 18, 2017, the record in this proceeding was reopened before a Hearing Officer on April 25, 2017, to afford the parties the opportunity to supplement the record on the issue of the managerial status of the Employer's buyers, specifically whether circumstances in the buyers' jobs had materially changed since the 2000 unit clarification decision.

After carefully reviewing the original and reopened records and considering the parties' briefs and arguments, I find that the evidence demonstrates that material changes warrant declining to give the decision in Case 17-UC-210 preclusive effect. Consistent with the then Regional Director's 2016 Decision and Direction of Election, I also find that the evidence no longer supports the conclusion that the petitioned-for buyers are managerial employees.

THE EMPLOYER'S REQUISITION AND PROCUREMENT PROCESS

The Employer employs four Buyers in the petitioned-for unit. Facts concerning the Employer's operations and the buyers' training and general responsibilities are accurately described in the 2016 Decision and Direction of Election and are not repeated herein.

In general terms, buyers are primarily responsible for completing requests for quotes (RFQ) and purchase orders for most of the goods and services purchased and utilized by the Employer. Although buyers play an important role in the Employer's requisition and

procurement process, they are neither the only employees involved in the process, nor are they responsible for every aspect of the process.

The Employer has developed and maintains a Requisition and Procurement Process or Administrative Control Procedure (ACP), which embodies many of the guidelines that govern the Employer's procurement of materials. The ACP applies not only to buyers, but also to all other employees involved in the requisition and procurement process. The ACP has been revised periodically throughout the years, and has been further supplemented by other instructional guidelines that address procedures to be followed when requisitioning or purchasing specific types of materials and services.

The procurement process begins with a requisition that is completed by an authorized requisition initiator (ARI). A typical requisition includes the desired number of items, a commodity code that specifically identifies the desired materials or services, and whether the requisitioned items are safety related. For previously purchased items, the commodity code also includes the previous purchase price of the item. The requisition may also include notes that contain more detailed information about a particular supplier or material.

Once initiated, a requisition is routed electronically through the appropriate approval process before it moves to the purchasing and supply chain department where it then is assigned to a buyer to complete an RFQ and/or purchase order. The buyers are primarily responsible for ensuring that the pertinent requisition information is entered into the Employer's procurement software program and that appropriate authorizations have been received before transmitting a purchase order or RFQ to a supplier. Buyers do not have authority to purchase materials without

prior authorization, and a buyers' spending authorization is tied directly to the authorization level of the manager approving the requisition.

About November 1998, the Employer began using a procurement software program called EMPAC to automate its procurement process. Although the record reflects that by 1998 the Employer already utilized a computer program, MAPPER, to generate requisitions, EMPAC's enhanced technology capabilities allowed the Employer to transition its requisition process from paper to electronic format. The evidence indicates, however, that at its implementation in late 1998, the EMPAC system did not have the functionality that it does presently, and that for a period of time buyers continued to use MAPPER in the performance of their duties.

Because of the limited functionality at its inception in 1998, the EMPAC system has been repeatedly and significantly modified to add new capabilities and functions, including major changes in 2002, 2008, and 2010. Although specific dates when revisions to the system occurred are not readily available, the record establishes that between 2000 and 2008, EMPAC evolved basically to its current format – Revision 8.6, which allows buyers and other employees involved in the requisition process to perform their jobs more quickly, with greater accuracy, but also under more scrutiny and tighter system control. EMPAC is programmed to automatically route requisitions through the appropriate approval chain, track any changes to requisitions, and to interface with Curator, an electronic database that includes information concerning suppliers, materials and pricing. Additionally, each new action in EMPAC is documented through an audit trail, which not only reflects the date of an action, but also memorializes the department and employee responsible for the action. EMPAC allows a buyer to electronically append necessary

documents to a requisition request, automatically insert relevant clauses into RFQs, and save the requisition documents in Curator. Further, buyers now use EMPAC to search for approved vendors and research previously-purchased materials rather than relying on personal or institutional memory to determine when, where, and how to obtain materials and services.

The record establishes that technological changes have also enhanced the Employer's ability to monitor and control the requisition process. EMPAC is programmed to conform to the Employer's procurement policies and incorporate them into the procurement process to ensure that buyers prevent and/or catch mistakes. As the EMPAC system has evolved since 2000, the Employer has programmed checks and balances into its system to ensure that employees comply with relevant procurement policies. When a buyer completes an RFQ or purchase order, the system flags certain fields as the buyer enters information, alerting the buyer to potential policy violations. Now, for example, as a buyer completes an RFQ or purchase order to procure materials, the EMPAC program will alert the buyer when he or she is required to obtain documented authorization before submitting the document to a supplier.

ANALYSIS AND CONCLUSIONS

1. Changed Circumstances Warrant Reconsideration of the Buyers' Managerial Status

As noted above, in remanding this case, the Board instructed me to consider whether changed circumstances since the issuance of the decision in Case 17-UC-210 justify relitigating the buyers' managerial status. See *Wolf Creek Nuclear Operating Corporation*, 365 NLRB No. 55, slip op. at 3 (April 7, 2017). As the party asserting that the prior decision should not preclude reconsideration of the buyers' managerial status, the Petitioner bears the burden of demonstrating that material changes have occurred since 2000. See *Harvey's Resort Hotel*, 271 NLRB 306, 307

(1984) (holding collateral estoppel precluded reconsideration of supervisory status of foremen absent evidence of changed circumstances).

The Petitioner argues that technological and policy changes have materially altered the buyers' responsibilities to the extent that they are no longer managerial employees. Namely, the Petitioner contends that, since 2000, buyers less frequently solicit competitive bids, no longer independently perform bid analyses, and now rely on checks and balances built into EMPAC to ensure that procurement documents are accurate and have the appropriate authorizations. Conversely, the Employer contends that the Petitioner has failed to establish any material changes involving the buyers' responsibilities and duties, as buyers continue to procure goods and services, report to the same supervisor, and are subject to the same procedures and policies that governed their duties in 2000. The Employer argues that the Petitioner insincerely portrays technological changes occasioned by EMPAC as having materially altered the buyers' responsibilities even though the Employer implemented EMPAC before 2000, and despite evidence that EMPAC has not altered the character of the buyers' job duties or their primary function.

Contrary to the Employer's arguments, I find that the changes to the EMPAC system, largely a result of technical innovation, have fundamentally limited the buyers' discretion. As the Employer correctly argues, standing alone, technological changes are insufficient to establish material changes to a job classification. See, e.g. *The Sun*, 329 NLRB 854, 861 (1991); *United Technologies Corp.*, 287 NLRB 198, 204 (1987). In this case, however, as EMPAC has evolved since 2000, it has allowed the Employer to integrate its procurement procedures and its procurement software, and thus, regulate and restrict the buyers' discretionary actions.

Essentially, information that was once available only in the mind of a seasoned buyer or maintained in hardcopy form is now not only easily, but automatically accessible on a buyer's desktop, as well as to managers and other employees in the requisition and procurement process. Whereas buyers were previously required to have memorized or physically reviewed the Employer's procurement policies before completing a transaction, those policies are now built into EMPAC, with automatic pop-up warnings reminding buyers when they need authorization for a particular procurement and assisting them in including necessary clauses in an RFQ or purchase order. In several respects, EMPAC actually performs the functions for which buyers were previously independently responsible. For instance, buyers now utilize EMPAC to analyze and calculate bids and calculate shipping terms, and they are able to immediately route procurement documents electronically to a manager or requisitioning department. As a result of the technological changes, even though buyers remain responsible for transmitting completed RFQs or purchase orders to a suppliers just as they did in 2000, their role as one of the final gatekeepers in the procurement process has been diminished.

Apart from the changes occasioned by technological improvements, the record also reflects that the Employer no longer relies on buyers to prepare competitive bids for purchases and review price quotes as frequently as it did in 2000. Although buyers continue to issue RFQs and receive bids from suppliers, the evidence shows that the Employer has increased its use of single-source suppliers, relying on negotiated alliance agreements that identify a preferred supplier. In many other instances, a buyer simply has no other alternative than to purchase materials or equipment from a single supplier because it is the only approved source. Notably,

buyers do not negotiate alliance agreements, and they do not play a role in evaluating whether materials or equipment meet the Employer's engineering specifications.

Finally, the record establishes that buyers now have less involvement in evaluating responses to RFQs and selecting which purchaser the Employer uses to fill a purchase order. In most cases, aside from routine or lost-cost purchases, buyers customarily consult with the requisitioning department, the procurement engineering department, or a manager to identify a preferred supplier, rather than independently selecting the supplier.

As a result of the changes identified above, I find that there are material differences between the buyers' current job responsibilities and those they had in 2000. Even though the buyers remain responsible for preparing and issuing purchase orders as they did in 2000, there has been a sufficient material change in the manner in which they perform those duties to warrant reconsideration of their managerial status. While the evidence of change may not be overwhelming, as cited by the Board in *Wolf Creek*, the burden of showing changed circumstances is not an onerous one. 365 NLRB No. 55, slip op. at 3, fn. 7. The evidence in the instant case is sufficient to warrant reconsideration of these employees status as managerial employees, particularly where sole reliance on the Region's 2000 decision could result in disenfranchisement of statutory employees.

2. Buyers Are Not Managerial Employees

The Board defines managerial employees as "those who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy." *General Dynamics Corp.*, 213 NLRB 851, 857 (1974). In Case 17-UC-210,

the Acting Regional Director concluded that buyers were managerial employees because they exercised independent discretion to locate vendors without pre-approved lists, selected vendors without prior approval, negotiated prices for goods and services, and committed the Employer's credit in substantial amounts. The record in this proceeding demonstrates that, in several important respects, the Employer has substantially limited the amount of independent discretion that buyers exercise. Based on the current manner and conditions in which the buyers perform their duties, I find that the ultimate conclusion reached in the decision in Case 17-UC-210 is no longer appropriate.

As described above, I find that the buyers' authority has been circumscribed by the Employer's evolving practices and requisition and procurement policies, which have been integrated into the EMPAC software to an extent that eliminates much of the buyers' independent discretion. Buyers now only infrequently locate and select vendors without first consulting a manager or members of the department responsible for a requisition. And, although in some circumstances buyers continue to make vendor decisions on routine and cheap purchases, they do so guided by the Employer's detailed procedures and nearly always select either the lowest bidder or the supplier who can provide the materials within the requisitioning department's timeline. Buyers no longer perform technical bid evaluations, add new suppliers without authorization, independently decide which suppliers to utilize for engineered or safety-related materials, or negotiate prices for goods and services. Moreover, buyers are now more frequently limited to obtaining materials from a single source, either because they are constrained by the Employer's association agreements, or because the choice of supplier is dictated the Employer's engineering requirements.

Now, in nearly all aspects, the buyers' responsibilities appear to mirror the responsibilities of the non-managerial buyers in *Lockheed-California Company*, 217 NLRB 573 (1975). In concluding that the *Lockheed-California* buyers were not managerial employees, the Board noted that the buyers' authority, which, among other things, included committing credit and coordinating relationships with suppliers, was limited by established policies and subject to review by higher authority to such an extent there was no basis for finding that they formulated, effectuated, or made operative decisions of their employer. See *id.* at 575. Here, too, buyers have little if any independent purchasing authority, and they often rely on others within the Employer's organization to determine which supplier to use. See *Washington Post Co.*, 254 NLRB 168, 189 (1981). Although buyers still act as the Employer's agent to commit the Employer's funds by issuing purchase orders, they neither make the ultimate decision to acquire materials or approve the acquisition of materials. Rather, in nearly all aspects of their job, buyers "act[] within prescribed limits under policies determined by company officials and only with clearance or approval by superior authority." *Iowa Southern Utilities Co.*, 207 NLRB 341, 345 (1973). Thus, I attribute little significance to the fact that the Employer's competitive bidding process has resulted in substantial savings for the Employer. See *Case Corp.*, 304 NLRB 939, 949 (1991); *Connecticut Humane Society*, 358 NLRB 187, 210 (2012).

On the record as a whole, I find that the evidence no longer establishes that the buyers are managerial employees. Buyers operate within the confines of detailed policies, and they do not exercise the type of discretion indicative of managerial status. Accordingly, I find that Buyers are entitled to the protection of the Act.

CONCLUSIONS AND FINDINGS

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Buyers I, II, III and Lead Buyer employed by the Employer at its facility near Burlington, Kansas, EXCLUDING all office clerical employees, professional employees, managerial employees, guards and supervisors as defined by the Act, and all other employees.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it

did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: May 9, 2017

/s/ Leonard J. Perez

Leonard J. Perez, Regional Director
National Labor Relations Board, Region 14
1222 Spruce Street, Room 8.302
Saint Louis, MO 63103-2829

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

WOLF CREEK NUCLEAR OPERATING CORPORATION,)	
)	
Employer,)	
)	
and)	Case No. 14-RC-168543
)	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 225,)	
)	
Petitioner.)	
)	

**EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S
SUPPLEMENTAL DECISION OF MAY 9, 2017**

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I. EMPLOYER'S BRIEF ON REVIEW

Pursuant to § 102.67 of the Board's Rules and Regulations, the Employer, Wolf Creek Nuclear Operating Corporation ("Wolf Creek" or "Employer"), respectfully requests the Board's review of the Regional Director's Supplemental Decision ("5/9/17 Decision") dated May 9, 2017, finding that the Employer's Buyers I, II, III, and Lead Buyer are no longer "managerial employees" under the National Labor Relations Act. ("Act"). (5/9/17 Decision, at 10).

This Decision represents a grave and disturbing departure from the Region's previous, final and binding decision in Case 17-UC-210 (hereinafter "2000 Decision"), wherein the Region found these *same* job classifications to be "managerial employees," and therefore, excluded from coverage of the Act. The Regional Director categorically rejected the Region's 2000 Decision, finding that "evidence demonstrates that material changes warrant declining to give the decision in Case 17-UC-210 preclusive effect." (5/9/17 Decision, at 2). In so doing, the Decision does violence to well-settled Board law and legal principles, ignores clear statutory language, applies choice facts disparately, and otherwise engages in outcome-based decision-making of the worst kind. It also is highly prejudicial to the Employer as the Decision ignores dispositive testimony and evidence concerning the Employer's technological advances to EMPAC¹ – an issue that strikes at the heart of this case. In addition to departing from the Region's 2000 Decision, the Decision turns well-settled Board precedent in *Concepts & Designs, Inc.* 318 NLRB 948 (1995) and *Lockheed-California Co.*, on its head. 217 NLRB 573 (1975). The Decision profoundly fails to "do justice" to the issues and the parties' interests. As such, this Decision calls out for review. Compelling reasons exist for granting this request, as follows:

¹ Implemented in 1998, and still in use today, EMPAC is Wolf Creek's automated computerized system used to assist the Buyers as they procure goods and services on behalf of Wolf Creek.

1. The Decision raises substantial questions of law and policy because its departure from the Region's previous, final and binding decision in Case 17-UC-210 contravenes the Board's longstanding policy precluding re-litigation, as well as the clear statutory language of Section 102.67(g);
2. The Decision on substantial factual issues is clearly erroneous on the record and such error prejudicially affects the rights of the Employer. Specifically, the Regional Director failed to consider the evidence and testimony that the Buyers' job duties did not change in any material respect since at least May 2000, the date of the Region's 2000 decision;
3. The Decision raises substantial questions of law and policy because of its departure from and erroneous reliance on officially reported Board precedent in *Concepts & Designs, Inc.*, 318 NLRB 948 (1995) and *Lockheed-California Co.*, 217 NLRB 573 (1975) *et al.*; and
4. The Decision on substantial factual issues is clearly erroneous on the record and such error prejudicially affects the rights of the Employer as the Regional Director failed to consider the record evidence establishing the Buyers perform the same duties performed in 2000, which are aligned with the interests of management.

The Employer, therefore, requests that the Board grant this Request for Review and find, consistent with the Region's 2000 Decision, that the job classifications of Buyer I, II, III, and Lead Buyer are "managerial employees" under the Act.

II. STATEMENT OF THE CASE

Wolf Creek operates a nuclear power facility located in Burlington, Kansas. Out of the approximately 1,100 employees employed at the facility, about 400 are represented by the International Brotherhood of Electrical Workers Local Union 225 (“Union” or the “Petitioner”). At issue is the Union’s petition to represent Buyers I, II, III and the Lead Buyer. This is the *same* issue addressed by the Board in its May 4, 2000 Decision. On January 28, 2016, Petitioner filed Case 14-RC-168543, petitioning to represent “All full-time and part-time Buyers I, II, III and Lead Buyer employed by the Employer at its facility near Burlington, Kansas to be included in a separate unit.” (02/16/16 Decision & Order at 1 “2/16/16 Decision”). On February 1, 2016, the Employer filed a motion to dismiss the petition as barred pursuant to Section 102.67(g) and under the doctrine of *res judicata*. The Regional Director denied this motion and the matter was heard before Hearing Officer Carla K. Coffman on February 5, 2016, to determine once again “whether or not the job classifications of Buyer I, Buyer II, Buyer III, and Lead Buyer are managerial employees.” (Tr. 11:21-25).²

Significantly, Hearing Officer Coffman noted that because “there has been a previous determination that *these same job classifications were found to be managerial*, in Case 17-UC-210 . . . I am taking judicial notice of the Acting Regional Director’s Decision, Order and Clarification of Bargaining Unit, that issued on May 4th, 2000, in Case 17-UC-210.” (*Id.* at 12:1-19) (emphasis added). Consistent with this finding, Hearing Officer Coffman explained that Petitioner had the burden to establish a material change in the Buyers’ job duties, sufficient to disturb the Acting Regional Director’s previous findings and conclusions. (*Id.* at 19:19-20:9; Tr. 2017 251:2-6).

² Reference to the February 5, 2016 hearing transcript will be identified as “Tr. 2016.” Reference to the April 25, 2017, hearing transcript will be identified as “Tr. 2017” References to the exhibits introduced at both hearings will be referred to as “Joint Ex.,” “Employer Ex.” and “Petitioner Ex.” followed by the appropriate number.

At the February 2016 and April 2017 hearings, Petitioner argued that the job duties and responsibilities of Buyers I, II, III and Lead Buyer, employed in Employer's Supply Chain Division, Purchasing Department, underwent "significant changes" since May 4, 2000, due to advances in technology that streamlined the purchasing procedure for Buyers; in particular, the Employer's utilization of EMPAC. (Tr. 2016 13:12-18:18).

On February 16, 2016, the Regional Director issued his Decision and Direction of Election, finding that the doctrine of *res judicata* did not apply, and that the Buyers were no longer managerial employees.

Subsequently, on March 1, 2016, the Employer filed a Request for Review of the Regional Director's Decision and Direction of Election. The Employer requested the Board's review on two separate grounds: (1) that the Regional Director erred in not applying the doctrine of *res judicata*, based on the prior decision in 17-UC-210; and (2) that the Regional Director clearly erred in determining that the buyers are not managerial employees.

On April 7, 2017, the three member Board issued its Decision on Review and Order granting in part and denying in part the Employer's Request for Review.³ The Board, affirming the Employer's argument, found the Regional Director's analysis misapplied the doctrine of *res judicata* in that he failed to give preclusive effect to the 2000 decision, and he failed to recognize the 2000 decision as final. "[A] decision such as the 2000 decision . . . one that has not been appealed and that resolves the disputed issues in a manner that is binding upon the parties—is final for preclusion purpose." *Wolf Creek Nuclear Operating Corporation*, 365 NLRB No. 55, slip op. at 1 (April 7, 2017). The Board ordered the Regional Director to consider "whether the record demonstrates changed circumstances sufficient to allow reconsideration of the buyers'

³ The Board granted Employer's Request for Review with regard to the Regional Director's misapplication of the doctrine of *res judicata* because it raises a substantial issue warranting review. Employer's remaining requests were denied without prejudice.

managerial status.” (*Id.* at 3). Further the Board found “[i]t is appropriate to place the burden on the party opposing preclusion—here, the Petitioner—to demonstrate that material changes have occurred since the prior decision.” (*Id.*).

Accordingly, on April 18, 2017, the Regional Director issued his Order Reopening Record and Notice of Further Hearing. On April 25, 2017, Hearing Officer Carla K. Coffman reopened the record. At the February 2016 hearing, Petitioner argued that Wolf Creek implemented the EMPAC system after the 2000 Decision. In fact, at the April 2017, hearing, Petitioner completely abandoned its previous argument regarding the timing of EMPAC’s implementation and conceded that Petitioner’s central argument at the 2016 hearing—the implementation of EMPAC after 2000 decision—actually occurred in 1998—two years prior to the 2000 decision. Petitioner stipulated that the Buyers had been using EMPAC since at least November 1998. (Tr. 2017 250:17-21). Importantly, Petitioner conceded that the *only* change was the *efficiency* in how these *same* tasks and responsibilities were being performed. (Tr. 2016 156:19-157:7).

Based on the record developed on February 5, 2016, and on April 25, 2017, the Regional Director issued his May 9, 2017, Supplemental Decision, wherein he determined that “evidence demonstrates that material changes warrant declining to give the decision in Case 17-UD-210 preclusive effect.” (“5/9/17 Decision”). The testimony and evidence adduced at the hearing did not substantiate any material change in the Buyers’ job duties and responsibilities as a result of EMPAC. Wolf Creek now moves for review.

A. PREVIOUS CASE: 17-UC-210

On April 7, 1998, Wolf Creek filed a unit clarification petition seeking to exclude as managerial employees Quality Specialists and Buyers I, II, III and Lead Buyer. (2000 Decision).

On May 4, 2000, the Acting Regional Director issued a Decision, Order and Clarification of Bargaining Unit, in Case 17-UC-210, finding the *same* Buyers to be “managerial employees,” and thereby excluded from coverage of the Act. (*Id.*) The IBEW did not file a request for review in that case and, under Section 102.67(g) of the Board’s Rules and Regulations, the Acting Regional Director’s actions in that case are final and binding. 29 C.F.R. § 102.67(g) (“[T]he regional director’s actions are final unless a request for review is granted.”); *see also Maphis Chapman Corp.*, 151 NLRB 73, 84-85 (1965) (holding Regional Director’s decision final and binding).

III. STATEMENT OF FACTS

A. Overview Of The Supply Chain Division, Purchasing Department.

Wolf Creek’s Supply Chain Division, Purchasing Department, currently employs four Buyers to procure all goods and services for the Employer, excluding fuel. (Tr. 2016 93:12-24; 177:11-14). The Buyers report to Everette Weems, Supervisor of Purchasing and Contracts, who in turn, reports to David Sullivan, Manager of Purchasing and Supply Chain. (*Id.* at 33:14-35:9; 177:16-18; 204:1-11).

B. Requirements For The Positions Of Buyer I, II, III, And Lead Buyer.

Wolf Creek requires Buyers to have the necessary education and experience. (*Id.* at 26:15-25). For example, Buyer I’s must have either an Associates Degree or a High School Diploma, as well as four years of experience in procurement/supply chain or in an office environment. (2016 Decision at 3). Buyer II’s are required to have a Bachelor’s Degree and two years of experience, an Associates Degree and six years of experience, or a High School Diploma and twelve years experience. (*Id.*) Buyer III’s must have a Bachelor’s Degree and four

years of experience, an Associates Degree and eight years of experience, or a High School Diploma and twelve years experience. (*Id.*).

Buyers also train for and receive certifications through the Institute of Supply Management (“ISM”), specifically the Accredited Purchasing Practitioner (“APP”) and the Certified Purchasing Manager (“CPM”) certifications. (*Id.* at 27:9-28:24). To maintain these certifications, Buyers must fulfill ISM’s continuing education requirements. (*Id.* at 30:25-31:23).

C. The Purchasing Procedure – Buyers’ Job Responsibilities.

The Buyers’ primary role is to procure all goods for the Employer, excluding nuclear fuel. (*Id.* at 177:11-14). Buyers may also handle requests for labor services. (*Id.* at 53:15-54:3). In both instances, Buyers possess significant discretion in exercising their job responsibilities. (*Id.* at 54:10-55:5). Although the Buyers’ job duties are governed by procedures and policies, it is undisputed that these policies have *always* existed. (*Id.* at 123:3-13). In fact, Petitioner’s exhibits indicate that “procurement functions and processes remain the same” (Petitioner Ex. 7); that policies were revised with “minor changes for clarity in responsibility section for Purchasing and Contracts” (Petitioner Ex. 9); and policies were reviewed for “2-year divisional relevancy review” and not for the purpose of making changes to the job functions. (Petitioner Ex. 10).⁴

1. Initiation Of The Purchasing Procedure – Requisition Forms.

The purchasing process is initiated when the Purchasing Department receives a requisition. (Tr. 2016. 42:23-43:19; 97:12-18). Generally speaking, the requisition identifies the item to be purchased, including but not limited to, the type, purchase price, and any previous purchases by the Employer. (*Id.* at 57:17-58:10; 98:3-18; 177:25-178:11).

⁴ Petitioner’s exhibits 7, 9, and 10 are subject to the Employer’s “2-year divisional relevancy review” in which Wolf Creek reviews certain policies every two years. (Tr. 2017 341:4-8; 427:19-428:4; 431:12-18).

The requisition is created through the Employer's EMPAC computer system. (*Id.* at 125:14-23). EMPAC is the computer program utilized by Buyers in procuring items for the Employer. (*Id.* at 77:9-18; 125:14-23; Petitioner Ex. 5). Buyers are provided with desktop guideline instructions for processing purchases through EMPAC. (*Id.*; Petitioner Ex. 5). Employees are trained to create requisitions on the EMPAC computer system. (*Id.* at 45:3-14). Tracy Beard ("Beard"), Buyer III, is responsible for training employees. (*Id.*). Requisitions are then forwarded to the Accounting Department for review and approval prior to reaching the Purchasing Department. (*Id.* at 68:23-69:11).

2. Receipt Of The Requisition Forms.

Upon receipt, the Purchasing Department assigns the requisition to the Buyer who specializes in these types of purchases. (*Id.* at 94:13-96:1). The Buyer assigned to the requisition creates a packet of information detailing the Employer's previous purchases. (*Id.* at 69:18-70:21).

The Buyer may be required to complete a Commitment Approval Summary Form ("CASF") when the cost of the requested item exceeds a predetermined monetary amount. (*Id.* at 94:13-96:1; Petitioner Ex. 3). Regardless, a CASF must be completed if an item exceeds \$250,000. (Tr. 2016 61:1-5). The CASF is processed after the Buyer obtains the necessary signature for approval. (*Id.* at 62:19-63:12). However, items that fall below the \$250,000 threshold can be approved via electronic mail. (*Id.* at 65:13-66:1). In these instances, EMPAC may alert a Buyer as to a discrepancy, but it does not preclude the processing of the requisition. (*Id.* at 64:7-65:3).

3. Decision To Competitively Bid The Requisition.

After being assigned the requisition, the Buyer unilaterally determines whether the item should be competitively bid. (*Id.* at 103:19-104:12; 105:12-110:14; 130:20-131:9; 180:5-8; Tr. 325:11-326:4) Although Buyers are required to competitively bid items in excess of \$50,000, Buyers regularly issue competitive bids for items well under this amount. (Tr. 2016 104:13-24; 105:12-23). Ultimately, the decision to issue a competitive bid is at the discretion of the Buyer. (*Id.* at 83:4-12).

To begin the competitive bidding process, the Buyer identifies the suppliers from whom to solicit bids. (*Id.* at 108:9-24; Employer Ex. 1) (“The Buyer determines the suppliers from whom to solicit bids, based on commercial, technical, and/or quality considerations.”). (Tr. 2016 108:9-24). The Buyer has significant discretion in compiling the list of potential bidders. (*Id.* at 150:9-151:19; 166:19-23; 181:4-160182:6-15). For example, although the Buyer will identify the Original Equipment Manufacturer (“OEM”) and other Employer-authorized distributors from the Employer’s database, the Buyer may also find additional suppliers using the internet. (*Id.* at 55:6-22; 181:7-16). Thus, Buyers have the authority to go outside the Employer’s database to locate a supplier or labor services provider. (*Id.* at 55:6-22). Bids may be solicited either in writing or verbally. (*Id.* at 109:15-110:14; Employer Ex. 1). However, bids in excess of \$50,000 must be submitted in writing. (*Id.*).

4. Creation Of A Request For Quotation.

Once the Buyer compiles a list of potential suppliers, the Buyer will generate a Request for Quotation (“RFQ”) to send to these suppliers. (*Id.*). As part of the RFQ, the Buyer must identify various contract clauses that describe the specifics of the purchase. (*Id.* at 71:9-21). It is the Buyers’ responsibility to identify the proper clauses for incorporation. (*Id.* at 72:10-22). To

assist, the Buyers may consult a clause worksheet, which is essentially a “cheat sheet.” (*Id.*). The Buyer also determines the bid due date for inclusion on the RFQ. (*Id.* at 114:4-12). After the Buyer includes the required information and corresponding clauses, an RFQ is generated through the EMPAC computer system. (*Id.* at 72:10-22). Although EMPAC may alert the Buyer as to an inaccuracy in the RFQ, a Buyer may override the program and proceed with the RFQ. (*Id.* at 75:22-25).

On occasion, suppliers will request an exception to the RFQ. (*Id.* at 182:24-183:14). If the product is safety-related, the Buyer will send the exception to the Procurement Engineer for approval. (*Id.*). If the product is not safety-related, the Buyer may seek the approval of the original requisitioner. (*Id.*). Buyers are responsible for evaluating those exceptions to determine the impact on the bid. (*Id.* at 110:24-112:4; Tr. 2016 183:2-21; Petitioner Ex. 9 p. 44 at B.1.1-B.2). It is the Buyer’s job to ensure a level playing field for all bidders. (*Id.* at 112:5-113:9). To assist with this, Buyers are authorized to schedule or conduct pre-bid or pre-award conferences with the bidders. (*Id.* at 113:10-114:3).

5. Buyers’ Authority And Discretion In Selecting A Supplier.

Upon receipt of the suppliers’ bids, the Buyer will conduct a comparative analysis of the bids. (*Id.* at 134:11-16). Although the Buyer typically will select the lowest bid, the Buyer retains the discretion to select another supplier. (*Id.* at 84:12-85:14; 175:15-20; 183:15-184:3; Tr. 2017; 400:16-20). In that instance, the Buyer will “try to give an explanation . . . why we did not choose the lowest bidder.” (*Id.* at 118:25-119:5). For example, the Buyer, at his discretion, may select a higher bid based on a variety of factors, including but not limited to, delivery time, location of the supplier, cost of freight, safety, and the form of delivery. (*Id.* at 118:18-119:5;

151:1-19; 153:4-5; 184:4-11). Importantly, although management has always possessed the ability, it generally does not review the Buyers' selections. (*Id.* at 86:2-14).

The comparative analysis is initially generated through EMPAC. (*Id.* at 184:16-185:7). However, because the Buyer must take into consideration a variety of factors affecting the job requisition, the EMPAC analysis is not determinative. (*Id.*)

Overall, “[w]hen determining to whom the bid will be awarded, Buyers rely on their background, experience, training, certifications, and knowledge.” (*Id.* at 130:20-131:24; 154:6-155:1). Buyers essentially “determine what the primary need [of the Employer] is.” (*Id.* at 166:8-18). To this end, Buyers routinely negotiate with suppliers for the best price, resulting in substantial savings for the Employer. (*Id.* at 161:13-18). Buyers independently and without approval, determine to whom the bid is awarded. (*Id.* 186:25-187:3; Tr. 2017 328:10-15; 367:10-24). Buyers are ultimately responsible for ensuring all necessary reviews and approvals have been obtained prior to making the award to the supplier. (*Id.* at 125:5-11; Employer Ex. 2).

6. Preparation Of The Purchase Order.

Once a supplier is selected by the Buyer as part of the competitive bidding process, the Buyer prepares a purchasing order. (*Id.* at 102:1-6; 118:15; 158:10-17; 175:15-20; 186:25-187:3; 190:21-25; Tr. 2017 331:2-5; 336:1-3; Petitioner Ex. 8 p. 19 at 6.0). This also applies in the instance an item is not competitively bid. (*Id.* at 98:19-99:9). In both scenarios, Buyers retain a substantial level of discretion and authority to purchase the requested item, limited only by the purchasing authority of the signatory requestor. (*Id.* at 98:19-99:9). Purchase Orders are not reviewed by the Purchasing and Contracts Supervisor prior to their issuance. (Tr. 2016 187:4-7; Petitioner Ex. 8 p. 19 at 6.2). Thus, a Buyer is authorized to place a purchase order and thereby bind the Employer for the amount approved in the requisition. (*Id.* at 100:6-13; 102:1-10).

Currently, managers have the authority to purchase items for an amount up to \$250,000. (*Id.* at 99:16-23).

Additionally, a Buyer is authorized to purchase an item that exceeds the amount originally approved for in the requisition. (*Id.* at 68:3-16). In particular, if the bids come back and are less than \$1,000 per line item than what was on the original requisition, the Buyer has the authority to approve and bind the Employer for this excess amount without management approval. (*Id.*; Petitioner Ex. 2). Once again, in this scenario, the Buyer is able to override EMPAC and make the purchase without prior approval. (*Id.*).

Once the Purchasing Order is placed by the Buyer, the Buyer has committed the Employer's funds for the purchase of the requisitioned item. (*Id.* at 124:22-125:2; 169:6-24). The Buyer is ultimately responsible for the content and accuracy of the purchase order. (*Id.* at 124:17-21; Employer Ex. 2). Without prior approval or necessarily subsequent review, the Buyers initiate purchase orders committing the Employer's credit in amounts that are substantial. (Tr. 2016 102:7-17; 124:22-125:2; 169:6-17; Tr. 2017 337:1-5; Petitioner Ex. 8 p. 19 at 6.2).

If there is a dispute, the Buyer is authorized to communicate with the supplier to negotiate a resolution. (*Id.* at 170:4-171:10). Buyers must also exercise their discretion to ensure that proprietary and financial information remains confidential. (*Id.* at 210:20-211:7).

In 2015, the Buyers committed a substantial amount of money on behalf of the Employer, totaling **\$21 million**. (*Id.* at 102:11-17; 204:22-205:1). Through their independent negotiations, the Buyers also saved the Employer "a little over \$300,000, about \$330,000" in that same year. (*Id.* at 205:2-7).

7. Executing Delivery Of The Purchased Item.

Thereafter, the Buyer is responsible to arrange for shipping and to ensure the shipments are reasonably priced. (*Id.* at 120:9-122:9). Similar to the competitive bidding process, Buyers accept and analyze bids from freight carriers. (*Id.* at 187:14-188:24). Buyers select the freight carrier based upon price and the Employer's need. (*Id.*). In doing so, the Buyer has the ability to choose which carrier to use. (*Id.*). The Buyer is also responsible for resolving disputes with carriers on behalf of the Employer. (*Id.* at 189:10-190:18).

IV. ARGUMENT

A. The Regional Director Erred In Finding A Material Change To The Buyers' Job Duties.

In his 5/9/17 Decision, the Regional Director, erroneously determined that Petitioner presented sufficient evidence to establish material change to the Buyers' job duties. The Regional Director made this faulty conclusion based on his assessment of 1) alleged general technological advances; 2) the reduction of competitive bids; and 3) Buyers' alleged reduced involvement in the RFQ process.

1. Wolf Creek's Technological Advances And Innovations Are Insufficient To Justify Material Change To The Buyers' Job Duties.

Technological innovation is insufficient to justify reconsideration of a prior classification where the only significant difference between the work performed before and after the innovation is the result of "improved methodology and increase[d] efficiency brought on by computer technology." *Teamsters United Parcel Serv.*, 346 NLRB 484 (2006); *John P. Scripps Newspaper Corp.*, 329 NLRB 854, (1999) (technological innovation is insufficient to demonstrate a material change where the innovation does not change the work to such an extent that it would no longer make sense to include the disputed employees); *Winchell Co.*, 315 NLRB

526, n.2 (1994), *enfd*, 74 F.3d 1227 (3d Cir. 1995) (employer's switch to "desktop computers" that "eliminated the work of prepress personnel such as artists and typesetters [so that the] work was [instead] done by customers who forwarded it via computer" did not constitute a "change" in "the scope and direction of business;" rather, the "technological advance of the desktop computers changed the [employer's] operation by degree not kind."); *United Technologies Corp.*, 287 NLRB 198, 204 (1987) (technological innovation is insufficient to justify a review in a prior classification because it fails to meet the burden of showing sufficient change/dissimilarity to warrant a review).

In this matter, technological innovation, including the usage and development of EMPAC, is insufficient to demonstrate a material change. The Regional Director completely ignored relevant and applicable case law governing the impact of technological change on the Buyer classification. Instead, the Regional Director incorrectly determined that the "EMPAC system, largely a result of technical innovation, fundamentally limited the buyer's discretion." (5/9/17 Decision at 6). The Regional Director reasoned that "EMPAC has evolved since 2000, it has allowed the Employer to integrate its procurement procedures and its procurement software and thus regulate and restrict the buyer's discretionary actions." (*Id.*). In support of this reasoning, the Regional Director imprudently relied on the concept that "information that was once available only in the mind of a seasoned buyer or maintained in hardcopy form is now not only easily, but automatically accessible on a buyer's desktop, as well as to managers and other employees. . . ." (*Id.* at 7). The fact that the Buyers previously had to recall, or pull hard copies of documents and now instead can access that same information in a computer program, cannot establish a material change to the Buyers' job duties. Indeed, the Buyers are performing the same functions and duties as they did in 2000.

Further, absent any authority to support such claims, the Regional Director relied on witness' allegations as absolute facts. For example, the Regional Director states that EMPAC underwent "major changes in 2002, 2008, and 2010." (*Id.* at 4). Yet, Petitioner presented no testimony to establish any such material changes occurring at those times. Such arbitrary and capricious statements by the Regional Director are unfounded and not supported by the Record.

The Regional Director further contends that the Buyers no longer have discretion in that EMPAC provides the Buyers with "automatic pop-up warnings" (*Id.* at 7); it calculates bids and shipping costs (*Id.*); and it has an audit trail. (*Id.*). The Regional Director's reliance on these alleged material changes are completely misplaced. The pop-up boxes simply alert Buyers of certain check and balances. Since at least 2000, the Buyers have followed the rules for which the pop-ups are used and have had to calculate bids. Additionally, since at least 2000, the Buyers' work has created an audit trail. Prior to EMPAC, such trail was in paper form as opposed to EMPAC's electronic audit trail. In no manner or form have these removed the Buyers' discretion nor do these technological innovations demonstrate material change.

2. The Regional Director Erred In Determining That Changes In Competitive Bidding Caused A Material Change To The Buyers' Job Duties.

The Board has a "no re-litigation rule" that precludes a party from challenging a determination without sufficient evidence of a recent, substantial change. *Bethlehem Steel Corp.*, 329 NLRB 243, 244 (1999). Recent, substantial changes are determined on a case by case basis, where the party asserting the change bears the burden of proof. A failure to show recent, substantial change is fatal to a petition. *See Mountain States Telephone Co.*, 175 NLRB 553 (1969); *Lufkin Foundry & Machine Co.*, 174 NLRB 556 (1969); *Nat'l Can Corp.*, 170 NLRB 926 (1968); and *Sterilon Corp.*, 147 NLRB 219 (1964).

In this matter, the Regional Director misconstrued the facts and determined that the “Employer no longer relies on Buyers to prepare competitive bids for purchases . . . as frequently as it did in 2000.” (5/9/2017 Decision at 7). The fact is, once the Buyer receives the requisition, the Buyer determines whether it will be competitively bid. (Tr. 2016 103:19-104:12; 105:12-110:14; 130:20-131:9; 180:5-8; Tr. 2017 325:11-326:4; 327:9-13). As was the case in 2000, and is still the case today, Buyers continue to engage in the practice of seeking competitive bids and determining whether a competitive bid is necessary. (*Id.*).

It is uncontested that some items cannot be competitively bid. Specifically, because of the highly specialized nature of safety and engineered items, they cannot, and have not been competitively bid. For these items, the Buyers are limited to a prescribed list of suppliers. (Tr. 2016 181:17-182:12; Tr. 2017 400:5-11; 413:18-414:13; Petitioner Ex. 8 p. 20 at 6.3, 6.5.2; Petitioner Ex. 9 p. 21 at 5.7.2.4). This practice has not changed since the 2000 decision. Even if the number of competitive bids has declined, the Buyers still perform competitive bids as part of their routine job functions. Accordingly, such change is not material and therefore the Regional Director’s decision is flawed.

3. The Regional Director Erred In Determining That The Buyers’ Involvement In The RFQ Process Constitutes A Material Change To The Buyers’ Job Duties.

Again, the Regional Director made no effort to base his Supplemental Decision on actual facts and instead took issue with the “manner” in which the Buyers perform their job. (5/9/2017 Decision at 8). Specifically, the Regional Director found material change to the Buyers’ job duties in that “[e]ven though [] [they] remain responsible for preparing and issuing purchase orders as they did in 2000, there has been a sufficient material change in the *manner* in which they perform those duties to warrant reconsideration of their managerial status.” (*Id.*) (emphasis added). An employer's new way of manufacturing fails to show “a fundamental change in

employee classifications, responsibilities, and supervision [when] the same people make the same product.” *Leach Corp.*, 312 NLRB 990, 994, 995 (1993), *enfd*, 54 F.3d 802 (D.C. Cir. 1995) Although “significant, [the new] process [was] not really different from any change in manufacturing process resulting from advancing technology.” (*Id.*).

The evidence does not support that Buyers are less involved in RFQ’s. In fact, the testimony is that they are still involved in the RFQ process. (Tr. 2016 168:9-16; 187:22-24; Tr. 2017 327:4-8). Even Petitioner offered Exhibit 9, which states the Buyers “[p]rocess and administer Request for Quotes.” (Tr. 2017 288:15-21; Petitioner Ex. 9 p. 2 at 5.7.2.1).⁵ In *Good N’ Fresh Foods, Inc.*, a successor bakery continued to engage “in the same business” but switched from producing made from scratch to frozen baking and continued to engage in “the production and wholesale distribution of baked goods.” 287 NLRB 1231, 1235 (1988). Like the Buyers, *the Good N’ Fresh* “employees continued to perform substantially the same jobs” and therefore no material change could be established. (*Id.*). *E.g., United Tech. Corp.*, 287 NLRB 198, 204 (1987) (technological innovation is insufficient to justify a review in a prior classification because it fails to meet the burden of showing sufficient change/dissimilarity to warrant a review). The Regional Director’s findings are arbitrary and not based on any factual findings of material change presented in either the 2016 or 2017 hearing. Accordingly, the Regional Director’s Decision has prejudiced the Employer.

4. The Decision Is Factually Flawed In That The Regional Director Failed To Consider That The Buyers Still Perform The Same Duties Today, As Described In The 2000 Decision.

In addition to establishing a material change, the party challenging the previously litigated issue must also show that the evidence relied upon was not available during the first

⁵ Of importance is that Petitioner’s Exhibit 9 is a Wolf Creek “Document Revision Request,” (“DRR”). Simply stated, a DRR is issued when a policy is revised. Wolf Creek issued this DRR to make “Minor changes for clarity in responsibility section for Purchasing and Contracts.” (Petitioner Ex. 9 p. 1).

proceeding, or that special circumstances otherwise exist. See e.g., *Sabine Towing & Transport*, 263 NLRB 114 (1982) (finding no essential change in the living or working conditions of the employees is insufficient to overcome preclusion); *Pittsburgh Plate Glass Co., v. NLRB*, 313 U.S. 146, 162 (1941); *NLRB v. Certified Testing Laboratories, Inc.*, 159 NLRB 881 (1966) *enfd* 387 F.2d 275 (3rd Cir. 1967); *SOHIO Petroleum Co., A Div. of SOHIO Natural Res. Co.*, 239 NLRB 281 (1978) (mere contention of a material change in the type of work performed at an employer's facility, without evidence of the same, is insufficient to warrant re-litigation of issues).

Indeed, the 2000 Decision enumerates the Buyers' responsibilities, of which, nothing material has changed. In fact, as evidenced by the testimony and exhibits in the 2016 and 2017 hearings, the Buyers' duties remain the same.

1. The Buyers procure goods and services (except fuel) for the ER. (Tr. 2016 92:20-24; 177:11-14; Tr. 2017 415:11-15; Petitioner Ex. 8 p. 19 at 6.2.2).
2. The Buyers report to the Purchasing and Contracts Supervisor. (Tr. 2016 93:7-11; 177:15-118; Tr. 2017 424:9-12; 415:21-23; Petitioner Ex. 8 p. 19 at 5.7.2).
3. Purchases are initiated by a purchase requisition. (Tr. 2016 97:12-18; 157:11-13; 175:15-20; 177:25-178:1; Tr. 2017 331:9-14; 338:24-339:7; 343:8-9; Petitioner Ex. 8 p. 19 at 6.0).
4. The purchase requisition is approved by a manager's signature. (Tr. 2016 102:18-23; 178:12-179:2; Tr. 2017 416:13-15; Petitioner Ex. 8 p. 19 at 6.1.1).
5. The amount authorized for expenditure depends upon the level of management who approves the requisition. (Tr. 2016 158:4-9; 179:9-15; Tr. 2017 416:16-20; 356:17-25; 364:9-15; 270:16-24; Petitioner Ex. 9 at 42).
6. The spending authority of the signatory requisition manager limits the amount that can be expended on any particular requisition. (Tr. 2016 98:19-100-11; 146:10-147:4; 179:9-15; Tr. 2017 270:16-24; 356:17-25; 364:9-15; 416:16-20; Petitioner Ex. 9 at 42).
7. After a requisition has been authorized, it is sent to the purchasing department. (Tr. 2016 102:24-103:1; 179:16-19; Tr. 2017 339:15-25; Petitioner Ex. 9 at 42).

8. The Purchasing and Contracts Supervisor assigns each requisition to a Buyer, depending on the request and the Buyer's expertise and familiarity with the commodities and suppliers. (Tr. 2016 103:6-18; 179:16-180:4; Petitioner Ex. 8 p. 18 at 5.1).
9. Once the Buyer receives the requisition, the buyer determines whether it will be competitively bid. (Tr. 2016 103:19-104:12; 105:12-110:14; 130:20-131:9; 180:5-8; Tr. 2017 325:11-326:4).
10. Where the value of the goods or services exceeds \$5,000, the Buyer is to issue a competitive bid.⁶ (Tr. 2016 132:16-25; 180:9-20; Tr. 2017 325; 437:11-438:15).
11. A competitive bid is not required for limited source items or recently purchased items. (Tr. 2016 181:18; Tr. 2017 437:11-438:15).
12. When a request is to be competitively bid, the buyer compiles a list of potential suppliers from whom he will seek a bid. (Tr. 2016 151:20-152:6; 166:4-18; 175:15-20; 180:24-181:3; Tr. 2017 399:21-25; 375:18-25; Petitioner Ex. 8 p. 17 at 4.0).
13. The competitive bid list may be comprised of past successful bidders, suppliers of other commodities who have informed the Buyer of their desire to competitively bid, suppliers listed in trade journals, or suppliers found on internet sources. (Tr. 2016 150:9-151:19; 166:19-23; 181:4-160).
14. For safety related items, buyers are limited to a prescribed list of suppliers. Buyers can seek to expand this list. (Tr. 2016 181:17-182:12; Tr. 2017 413:18-414:13; 400:5-11 Petitioner Ex. 8 p. 20 at 6.3, 6.5.2; Petitioner Ex. 9 p. 21 at 5.7.2.4).
15. Buyers determine how many suppliers are placed on the competitive bid list. A minimum of three suppliers are to be included in the bid. (Tr. 2016 182:13-15).
16. Buyers issue a request for quote to potential suppliers. (Tr. 2016 175:15-20; 182:16-21; 190:21-25).
17. The request for quote identifies the requirements of the goods or services and a bid date, which the Buyer selects. (Tr. 2016 182:16-21).
18. Potential vendors may submit exceptions to the bid's requirements. (Tr. 2016 110:15-113:14; 116:13-117:23; 182:24-183:1).
19. The Buyer evaluates whether the exception is acceptable and may seek the assistance of the Employer's departments. (Tr. 2016 183:2-21; Petitioner Ex. 9 p. 44 at B.1.1-B.2).

⁶ Since the 2000 Decision, Wolf Creek, with input from the Buyers, increased the amount of the value of the goods or services requiring a competitive bid from \$5,000 to \$50,000. (Tr. 437:11-438:15).

20. The Buyer performs a commercial evaluation to determine the most beneficial bid based on price, delivery, performance schedule, payment terms, warranties, exceptions, etc. (Tr. 2016 175:15-20; 183:15-184:3; Tr. 2017 400:16-20).
21. Cost is the most important factor in determining which vendor is awarded the bid, but cost alone is not determinative. Factors such as scheduling or the cost of freight may result in the bid being awarded to a supplier other than the lowest cost bidder. (Tr. 2016 118:18-14; 152:22; 153:4-154:12; 184:4-11; Tr. 2017 327:23-25; 400:12-14).
22. Buyers use a bid evaluation template. (Tr. 2016 184:12-185:11; Petitioner Ex. 8 p. 17 at 4.2-4.3).
23. When the bid is not awarded to the lowest bidder, or the sole source supplier, the Buyer must document the reason for selecting that vendor. (Tr. 2016 118:25-119:5; 185:12-186:5; Tr. 2017 328:1-9).
24. Without seeking prior approval the Buyer determines to whom the bid is awarded. (Tr. 2016 186:25-187:3; Tr. 2017 328:10-15; 367:10-24).
25. Buyers issue purchase orders. (Tr. 2016 102:1-6; 118:15; 158:10-17; 175:15-20; 186:25-187:3; 190:21-25; Tr. 2017 331:2-5; 336:1-3; Petitioner Ex. 8 p. 19 at 6.0).
26. Purchase Orders are not reviewed by the Purchasing and Contracts Supervisor prior to their issuance. (Tr. 2016 187:4-7; Petitioner Ex. 8 p. 19 at 6.2).
27. If the Purchasing and Contracts Supervisor reviews the purchase order and disagrees with it, he can cancel the order without the suppliers' agreement. (Tr. 2016 187:8-13).
28. With the aid of a software program, Buyers determine which carrier will be used for delivery of products. (Tr. 2016 119:6-122:8; Tr. 2017 330:12-16).
29. Buyers input relevant information (e.g., zip code of origin, weight, number of packages, etc.) into the software program, and the program outputs all of the carriers that are able to handle the run, the contract price cost for delivery, and the number of days for transit. (Tr. 2016 187:19-188:5).
30. Buyers select the carrier from the output list. (Tr. 2016 119:24).
31. Buyers may seek competitive bids when expedited delivery service is needed. (Tr. 2016 188:6-24).
32. Buyers track the purchase and ensure delivery according to the purchase order. (Tr. 2016 189:16-190:3; Tr. 2017 336:4-14).

33. Buyers negotiate the purchase price for goods and services. (Tr. 2016 161:13-18; Tr. 2017 326:24-326:1; 327:9-13; Petitioner Ex. 8 p. 19 at 6.2).
34. Without prior approval or necessarily subsequent review, the Buyers initiate purchase orders committing the Employer's credit in amounts that are substantial. (Tr. 2016 102:7-17; 124:22-125:2; 169:6-17; Tr. 2017 337:1-5; Petitioner Ex. 8 p. 19 at 6.2).
35. Although the Buyer cannot expend more on any particular requisition than the spending authority of the signatory requisition manager, the Buyer has discretion to spend any amount within that authority. (Tr. 2016 67:7; 179:9-15; Tr. 2017 331:15-333:18; 382:15-20; 401:6-12).

As evidenced by this list, the Buyers are performing the *same* job duties and responsibilities today, as they did in 2000. (02/16/16 Decision at 3-7). The *only* change in the Buyers' job duties is the alleged rise in efficiency in how these *same* tasks were performed, as a result of EMPAC.

The Board repeatedly has found that an increase in efficiency is wholly insufficient as a matter of law to significantly alter the fundamental characteristics of an employee's job duties. *See e.g., Constellation Power Source Generation, Inc.*, 2000 NLRB LEXIS 942, *104-05 (2000) (ALJ Shuster) (concluding that although the job has become more computerized since 1996, it has otherwise not changed); *United Tech. Corp.*, 287 N.L.R.B. 198, 204 (1987) (finding technological advancements did not significantly alter job duties); *John P. Scripps Newspaper Corp.*, 329 NLRB 854, 861 (1999) (finding "differences in the methodology or the manner in which they perform their job, including use of technology [] however, do not change the fundamental character of their job duties or their primary function of making advertisements ready for insertion into the newspaper.").

Betty Saylor ("Saylor"), retired Lead Buyer, was a Buyer when the 2000 Decision issued and testified that "[t]he process of being a buyer is the same no matter what system you're in" and that although EMPAC "gave us automation what we did to do our job didn't change."

(Tr. 2016 175:12-20; 186:6-12). In sum, Sayler provided un rebutted testimony that over the past 28 years, the fundamental character of the Buyers' job duties did not change in any material respect. Neither did EMPAC have any impact whatsoever on the Buyers' discretion or level of authority. (Tr. 2016 186:13-24).

Accordingly, the fundamental character of the Buyers' job duties, level of independence, and discretion remains unchanged and mandates review.

B. The Regional Director Erred In Concluding That The Buyers Are Not Managerial Employees.

It is well-settled that managerial employees are not covered by the Act. Indeed, over 40 years ago, the U.S. Supreme Court held:

In sum, the Board's early decisions, the purposes and legislative history of the Taft-Hartley Act of 1947, the Board's subsequent and consistent construction of the Act for more than two decades, and the decisions of the courts of appeals all point *unmistakably to the conclusion that "managerial employees" are not covered by the Act.*

NLRB v. Bell Aerospace Co. Div. of Textron, Inc., 416 U.S. 267, 289 (1974) (emphasis added).

In *NLRB v. Yeshiva, Univ.*, 444 U.S. 672, 682-83 (1980), the U.S. Supreme Court defined managerial employees and set forth the following test:

Managerial employees are defined as those who "*formulate and effectuate management policies by expressing and making operative the decisions of their employer.*" *Bell Aerospace Co.*, 416 U. S. at 289 (quoting *Palace Laundry Dry Cleaning Corp.*, 75 NLRB 320, 323, n.4 (1947)). . . . Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management... Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he *represents management interest by taking or recommending discretionary actions that effectively control or implement employer policy.*

Id. (emphasis added).

In *Yeshiva*, the Court explained that managerial employees, like supervisors, “are excluded from the categories of employees entitled to the benefits of collective bargaining” under the Act, because “both exemptions grow out of the same concern: that an employer is entitled to undivided loyalty of its representatives.” (*Id.* at 682).

For the reasons that follow, the Buyers are “managerial employees” and, therefore, the Regional Director erred in concluding to the contrary and this error prejudiced the Employer.

1. The Regional Director’s 2016 Decision And Order Fails To Correctly Apply *Concepts & Designs, Inc.* In Finding That The Buyers Do Not Exercise The Necessary Discretion And Authority Of Managerial Employees.⁷

In his 2016 Decision and Order, the Regional Director cited *Concepts & Designs, Inc.*, 318 NLRB 948 (1995) but failed to correctly apply it to the facts in this matter. (2/16/16 Decision at 12). In *Concepts & Designs*, a purchasing employee was responsible for ordering manufacturing parts based upon bills of materials for such projects. (*Id.* at 956). The Board concluded that the employee’s “discretion and the magnitude of its impact on Respondent’s overall business” demonstrated “managerial status.” (*Id.* at 957).⁸

Importantly, the Board noted that although the employee typically ordered parts from the vendors listed on the employer’s inventory cards, she maintained the discretion to change vendors based upon the price and time of delivery. (*Id.*). This included identifying additional vendors outside the employer’s inventory cards. (*Id.*). Importantly, the inventory cards, similar to EMPAC, “identified the part, the minimum number needed in inventory, the vendor from whom it is usually ordered, as well as its price and the normal time needed for that vendor to deliver it, and, finally the names of other vendors who can supply that same part.” (*Id.* at 956).

⁷ In its April 7, 2017, Decision on Review and Order Remanding, the Board declined to grant review on the Regional Director’s finding that the Buyers were not managerial employees.

⁸ In a stroke of supreme irony, the Acting Regional Director who authored the 2000 Decision also relied heavily on *Concepts and Designs*, but to reach the opposite conclusion regarding the Buyers’ managerial status.

As part of this process, the employee consulted with the employer's "technically knowledgeable personnel" as well as with her supervisor if she was unable to locate a supplier. (*Id.* at 957). However, the Board noted that "even statutory Supervisors will confer with their superiors whenever unusual situations arise; that does not strip them of their supervisory status based upon powers which they ordinarily exercise." (*Id.*). The employee was further authorized to confer with vendors regarding any potential purchases. (*Id.*).

In his 2016 Decision, the Regional Director concluded that the Buyers' exercise of discretion in identifying suppliers to participate in the competitive bidding process, as well as the Buyers' ultimate selection of vendor was not determinative of their managerial status. (2/16/16 Decision at 9). The Regional Director reasoned that "although Buyers do exercise discretion with regard to who they offer RFQ's, the discretion takes place within the confines of Employer policy." (*Id.* at 10).

The Regional Director's findings are wholly inconsistent with the Board's decision in *Concepts & Designs, Inc.* For example, the buyer in *Concepts & Designs*, like the Buyers in this matter, purchased items following receipt of a requisition or "based upon bills of materials for such projects." (*Id.* at 956; Tr. at 42:23-43:19; 97:12-18). To assist in these purchases, the buyer in *Concepts & Designs* utilized the Employer's inventory cards, which "identified the part, the minimum number needed in inventory, the vendor from whom it is usually ordered, as well as its price and the normal time needed for that vendor to deliver it, and, finally, the names of other vendors who can supply that same part." (*Id.*).

Here, the Employer's EMPAC database provides the same information as the inventory cards in *Concepts & Designs, Inc.* (Tr. at 55:6-22; 108:9-24; 181:7-16; 182:6-15). Similar to the Buyers in this matter, who consult with project engineers on safety and engineered items, the

buyer in *Concepts & Design* regularly consulted with “technically knowledgeable personnel” as well as her supervisor. (*Id.* at 957; Tr. at 182:24-183:14). However, the Board expressly held that “that does not strip them of their supervisory status based upon powers which they ordinarily exercise.” The buyer also conferred with, negotiated and resolved disputes with vendors without management assistance—conduct engaged in by the Wolf Creek Buyers—and conduct found by the Board as indicative of the managerial status of the employee in *Concepts & Designs*. (Tr. at 113:10-114:3; 161:13-18).

The Buyers in this matter engage in additional tasks that exceed the level of discretion and authority exhibited by the buyer in *Concepts & Designs*. Not only have they continued to engage in 35 enumerated duties for the past 18 years, *see Supra* Part IV.A.iv., they do so acting as representatives of the Employer. (Tr. 2017 401:8).

Indeed, the Board consistently has found employees who exercise this level of discretion and authority to be managerial employees. *See e.g., Mack Trucks, Inc.*, 116 NLRB 1576, 1578 (1956) (excluding buyers as managerial employees because they had authority to negotiate prices, change delivery dates, and adjust disputes with suppliers over rejected items); *Kearney & Trecker Corp.*, 121 NLRB 817, 822 (1958) (finding buyers’ authority to place orders with alternative suppliers if deliveries were not made on time indicative of a managerial employee). For example, in *Titeflex, Inc.*, 103 NLRB 223 (1953), the Board found a buyer to be a managerial employee based on similar job duties:

He receives requisitions that have been prepared by the planning department, countersigned by the person in charge of the department, and he places them with an approved list of vendors. Although he cannot go outside that list of vendors he may use his discretion as to which of those vendors will receive the order. He has final authority over such deals and is able to **responsibly commit** the credit of the Employer. We find that he is a managerial employee and we shall exclude him from the unit.

(*Id.* at 225) (emphasis added).

The Board's decision in *Concepts & Designs* is controlling and the Regional Director's failure to correctly apply it to the facts in this matter raises substantial questions of law and policy. Accordingly, the Regional Director's departure from well-settled Board precedent raises a substantial question of law and policy for review.

2. **The Regional Director's 2017 Supplemental Decision Fails To Correctly Apply *Lockheed-California Company, Et Al.* In Finding That The Buyers Do Not Exercise The Necessary Discretion And Authority Of Managerial Employees.**

a. **The Regional Director Misapplied *Lockheed-California Company***

In his 2017 Supplemental Decision, the Regional Director again misapplied numerous cases to the facts and failed to give any credence to witness testimony in support of finding the Buyers to have managerial status. (5/9/17 Decision at 10).

First, in *Lockheed-California Co.*, 217 NLRB 573 (1975) the sole issue decided by the Board was whether the buyers were in fact managerial employees. (*Id.* at 574). Importantly, in finding the buyers did not have managerial status, the Board relied on a number of factors which the Regional Director failed to consider in the instant matter. First, the *Lockheed* buyers had no formal educational requirements. Interestingly, some of the *Lockheed* buyers "do not actually engage in procuring of material." (*Id.* at n.8). All of the Buyers in the instant case engage in procuring material and are required to have both formal and informal educational requirements, certifications, and continuous training. (Tr. 2016 26:19-30:1; 31:5-22; Petitioner's Ex. 1).

Upon receipt of the purchasing assignment, the *Lockheed* buyers were responsible for initiating the necessary steps of the procurement process, but they, unlike the Wolf Creek Buyers, had little to no discretion in formulating the bid list. (*Id.*). Unlike the Buyers in the instant matter, the *Lockheed* bid list required "approv[er] before the Buyer [] [could] send out

invitations to bid.” (*Id.*). Here, the Buyers create the bid and provide the bid to vendors of the Buyers’ choosing—with the exception of safety and engineered parts. (Tr. 2016 103:19-104:12; 105:12-110:14; 130:20-131:9; 150:9-152:6; 166:4-23; 175:15-20; 180:5-8; 180:24-181:3-182:12; 181:18; Tr. 2017 325:11-326:4; 399:21-25; 375:18-25; 400:5-11; 413:18-414:13; 437:11-438:15; Petitioner Ex. 8 p. 17 at 4.0; p. 20 at 6.3, 6.5.2; Petitioner Ex. 9 p. 21 at 5.7.2.4).

The *Lockheed* buyers “level of authorization depends on the estimated cost of the procurement.” (*Id.*). Wolf Creek Buyers have no such requirements. Instead the level of authorization depends on the authorizer’s purchasing power, up to and including items costing \$250,000. (Tr. 2016 98:19-100-11; 146:10-147:4; 158:4-9; 179:9-15; Tr. 2017 270:16-24; 356:17-25; 364:9-15; 416:16-20; 356:17-25; 364:9-15; 270:16-24; Petitioner Ex. 9 at 42).

Importantly, as part of the *Lockheed* purchasing process, “numerous organizations [within Lockheed] evaluate different sections of *each* bid. . . . on the basis of this data, the buyer selects the supplier to be used.” (*Id.*) (emphasis added). In other words, the *Lockheed* buyers’ “selection is subject to review” of multiple layers of corporate scrutiny. (*Id.*). The *Lockheed* bid process is in complete contravention to Wolf Creek’s, where the Buyer has the authority, absent input, to determine which vendor to award the bid. (Tr. 2016 186:25-187:3; Tr. 2017 328:10-15; 367:10-24). For example, upon receiving the purchase order, the Wolf Creek Buyers move through the requisition process absent organizational input and scrutiny as to whom should receive the bid. (*Id.*). The Buyers in the instant matter use their experience and independent judgment to determine to whom the bid is awarded. (*Id.*; Tr. 2016 187:4-7; Petitioner Ex. 8 p. 19 at 6.2).

Indeed, the Board emphasized that the “Buyer’s selection of a source is subject to review and disputes along the way are all ultimately ruled on by [an] authority higher than the Buyers.”

Lockheed at 575. Importantly, *Lockheed* placed additional limitations on its buyers by requiring authorization of each request to purchase, which is issued after vendor selection. (*Id.*). These facts could not be further from those in the instant case where the Buyers alone are responsible for resolving issues, including negotiating price and delivery disputes. (Tr. 2016 161:13-18; Tr. 2017 326:24-326:1; 327:9-13; Petitioner Ex. 8 p. 19 at 6.2). Buyers in the instant case have no such requirements. (Tr. 2016 102:7-17; 124:22-125:2; 169:6-17; Tr. 2017 337:1-5; Petitioner Ex. 8 p. 19 at 6.2). See *Solartec, Inc.*, 352 NLRB 331 (2008), *enf'd* at *NLRB v Solartec, Inc.*, 310 F. App'x. 829, (6th Cir. 2009) (machine Superintendent's "right hand man" found not to be managerial where duties included making routine tool purchases, non-routine purchases of testing tools and conveying price quotes to management when tool salesmen visited the shop, but had no involvement in the selection of vendors, or adjusting disputes with vendors and was required to seek approval for finalizing purchase orders); *Mack Trucks, Inc.*, 116 NLRB 1576 (1956) (finding buyers and assistant buyers managerial because they received requisitions which they filed by placing purchase orders, pledged the Employer's credit in amounts ranging from \$800,000 to \$6,000,000, negotiate prices, change delivery dates, and adjust disputes with suppliers over rejected items).

In his supplemental Decision, the Regional Director erred in concluding that the Wolf Creek Buyers were like the buyers in *Lockheed* in that the Wolf Creek "Buyers have little if any independent purchasing authority and they often rely on others within the Employer's organization to determine which supplier to use. (5/9/17 Decision at 10). Indeed, the Buyers in the instant matter issue purchase orders; independently issue a competitive bid if needed; absent approval, select the vendor; and complete the purchase. (*Id.*; Tr. 2016 102:7-17; 124:22-125:2; 151:20-152:6; 166:4-18; 169:6-17; 175:15-20; 180:24-181:3; 183:15-184:3; Tr. 2017 337:1-5;

399:21-25; 375:18-25; 400:16-20 Petitioner Ex. 8 p. 17 at 4.0; p. 19 at 6.2). The Wolf Creek Buyers are not laden with the limitations and oversight placed upon the *Lockheed* buyers. The Regional Director's inability to see such discrepancy is prejudicial to the Employer.

b. The Regional Director's 5/9/17 Supplemental Decision Misapplies A Number Of Additional Cases.

The Regional Director erred in comparing the Wolf Creek Buyers to non-managerial employees whose duties and authority are not parallel. First, the Regional Director compared the Buyers in the instant matter to a "Supervisor of Transportation and Work Equipment" who, having no "discretion or authority to make the ultimate determination, independent of Company consideration and approval, was found to not have managerial authority." *Iowa Southern Utilities Co.*, 207 NLRB 341, 345 (1973). *Contra EDP Med. Computer Sys.*, 284 NLRB 1232 (1987) (employee who held himself out to the public as a representative of management, found to be a managerial employee as it was clear the Employer placed him in a position where employees could reasonably believe that he spoke on its behalf). Further controlling the Board's decision is that the supervisor "did not 'formulate, determine, and effectuate Respondent's policies.'" *Iowa Southern Utilities Co* at 345.

The Regional Director, ignoring on the record testimony, found that "they (the Buyers) neither make the ultimate decision to acquire materials or approve the acquisition of materials." (5/9/2017 Decision at 10). It is uncontested that the Buyers in the instant matter, have, for at least the last 18 years, made the ultimate decision concerning the acquisition of materials. (Tr. 2016 102:7-17; 119:24; 124:22-125:2; 169:6-17; 186:25-187:7; Tr. 2017 328:10-15; 337:1-5; 367:10-24; Petitioner Ex. 8 p. 19 at 6.2). In fact, Wolf Creek recently relied on the Buyers' input and opinion when formulating, determining, and increasing the monetary limitations of items to be competitively bid from \$5,000 to \$50,000. (Tr. 2017 437:15-438:5).

Lastly, in determining that the Buyers are not managerial employees, the Regional Director erred in his reliance on *The Washington Post Co.* 254 NLRB 168 (1981). In *The Washington Post* the assistant purchasing manager was responsible for the “acquisition of stock items.” (*Id.* at 189). Such items included scotch tape, paper, and preprinted forms for date processing. (*Id.*) The assistant purchasing manager spent approximately “half of his time in the stock area determining the need for items and reordering them.” (*Id.*) Using only “price and quality as guidelines, [the assistant manager] selects the most appropriate vendor for the Employer.” (*Id.*)

The Regional Director reasoned that the Buyers in the instant matter are like the assistant purchasing manager in *The Washington Post* in that “they have little if any independent purchasing authority, and they often rely on others within the Employer’s organization to determine which supplier to use.” (5/9/16 Decision). Indeed, the Buyers in the instant matter purchase items beyond tape and paper, they purchase items for a nuclear power facility, including single valves costing \$83,000 a piece. (Tr. 2016 63:6). They do so with the authority to purchase items up to \$250,000 absent any additional approval. (Tr. 2016 67:7; 102:7-17; 124:22-125:2; 158:4-9; 169:6-17; 179:9-15; Tr. 2017 270:16-24; 331:15-333:18; 337:1-5; 356:17-25; 364:9-15; 382:15-20; 401:6-12; 416:16-20; Petitioner Ex. 8 p. 19 at 6.2; Petitioner Ex. 9 at 42).

While price is an important factor, it is by far not the only factor relied on by the Buyers in determining to whom the bid will be awarded. Factors such as scheduling or the cost of freight may result in the bid being awarded to a supplier other than the lowest cost bidder. (Tr. 2016 118:18-14; 152:22; 153:4-154:12; 184:4-11; Tr. 2017 327:23-25; 400:12-14). Again, the Buyers use their independent judgment in making those determinations. (*Id.*)

The facts in *Lockheed* and similar cases cited by the Regional Director do not align with the facts in the instant case. Such cases are not controlling and the Regional Director prejudiced Wolf Creek by incorrectly applying the facts in these cases to the facts in this matter, raising substantial questions of law and policy.

3. The Regional Director Erred In Failing To Give Appropriate Weight To The Substantial Amount Of Funds The Buyers Commit On Behalf Of The Employer.

Both the 2016 and 2017 Decision discount the Buyers' ability to commit significant amounts of the Employer's funds and failed to give credence to well established law highlighting the same.

In *Concepts and Designs*, the Board emphasized an employee's ability to commit substantial sums of money on behalf of the employer as indicative of managerial status. *Concepts and Designs*, at 957. ("Ability to commit an employer's credit in amounts which are substantial, especially where done through exercise of discretion which is not ordinarily reviewed, is *strong evidence of managerial status*.") (citing *Swift & Co.*, 115 NLRB 752, 753 (1956); *American Locomotive Co.*, 92 NLRB 115, 116-17 (1950)) (emphasis added) (concluding that "in carrying out these duties she 'represents management interests by taking . . . discretionary actions that effectively . . . implement employer policy."); *Girdler Company*, 115 NLRB 726 (1956) (buyers found to be managerial because they had the final authority to commit the employer's credit up to \$2,000).

In *Federal Tel. & Tel. Co.*, 120 NLRB 1652 (1958), the Board excluded buyers as managerial where, without approval, they were authorized to order merchandise in the amount of \$2,500 or less, and purchase large quantities of merchandise. The Board found this authority demonstrated a prerogative of management and interests aligned with management; *See also Western Gear Corporation*, 160 NLRB 272 (1966) (buyers excluded as managerial where they

had discretion to pledge employer's credit up to \$5,000); *The Grocers Supply Co. Inc.*, 160 NLRB 485 (1966) (buyers excluded as managerial where they exercised judgment in purchasing decisions and pledged Employer's credit, purchased products supplied to employer's customers, handled ordering, checking, filing, and other functions incident to buying, including negotiations with suppliers); *Salinas Newspapers, Inc.*, 279 NLRB 1007 (May 19, 1986) (credit managers excluded as managerial where they extended and denied credit of the employer, and where they exercised discretion independence in making these decisions, subject to limited oversight).

In an attempt to distinguish the Board's decision in *Concepts & Designs*, the Regional Director, in his 2/16/16 Decision, emphasized but failed to rely on evidence that the employee in *Concepts & Designs*, attended management meetings, "meetings with vendors" and "committed the employer's credit, regardless of amount, without being reviewed by other officials of the employer." (02/16/16 Decision at 12).

Contrary to the Regional Director's analysis, the Board in *Concepts & Designs*, did not find the employee's ability to commit employer funds to be limitless. (*Id.*). Nor did the Board find the buyer's purchases to be immune from management review. (*Id.*). Rather, the Board in *Concepts & Designs*, expressly noted that "those purchasing duties [are] not *ordinarily reviewed* by any other official of Respondent." (*Id.* at 957) (emphasis added). Likewise, in this matter, Buyers testified that although management possessed the ability, it did not regularly review purchase orders. (Tr. 2016 86:2-14; 102:7-17; 124:22-125:2; 169:6-17; 187:4-7).

In his 5/9/17 Supplemental Decision, the Regional Director stated that "[a]lthough the [B]uyers still act as the Employer's agent to commit the Employer's funds by issuing purchase orders, they neither make the ultimate decision to acquire materials or approve the acquisition of materials." (5/9/17 Decision at 10). In fact, undisputed testimony supports the exact opposite

claim. Buyers are still responsible for committing funds in the company's best interest and such actions demonstrate that the Buyers are still managerial employees. (Tr. 366:4-18). Indeed, the Buyers financially commit the Employer's funds in substantial amounts. It is uncontested those amounts totaled **\$21 million** in 2015. (Tr. at 124:22-125:2; 169:6-24; 204:22-205:1). Further, the Regional Director ignored the over \$300,000 annual savings the Employer enjoyed due to the Buyers' cost savings measures, as indicative of a managerial employee. (2/16/16 Decision at 11).

The Buyers themselves even testified that without prior approval or necessarily subsequent review, they independently initiate purchase orders committing the Employer's credit in amounts that are substantial. (Tr. 2016 102:7-17; 124:22-125:2; 169:6-17; Tr. 2017 337:1-5; Petitioner Ex. 8 p. 19 at 6.2). Additionally, the Buyers negotiate the final purchase price for goods and services. (Tr. 2016 161:13-18; Tr. 2017 326:24-326:1; 327:9-13; Petitioner Ex. 8 p. 19 at 6.2). These purchase orders are not reviewed prior to their issuance. (Tr. 2016 187:4-7; Petitioner Ex. 8 p. 19 at 6.2). *See Simplex Industries, Inc.*, 243 NLRB 111 (1979) (buyer committed approximately \$5.75 million, found to be managerial based purchasing decisions predicated on "price, delivery, [and] quality," with limitations on quality by the standards established by the quality control department; authority to contract with new vendors and change vendors, provided quality control standards are met); *American Locomotive Co.*, 92 NLRB 115 (1950) (buyers who purchased \$6 million of material each year, found to be managerial in that they negotiated credit and replacements when defective material delivered and tried to direct profitable business to suppliers who give special consideration on orders of critical material). *See Hunt & Mottett Co.*, 206 NLRB 285 (1973) (buyers managerial and therefore excluded from the Act where employer argued that Buyers were vested with a substantial degree of discretion in decision and able to pledge large amounts of employer's credit).

The Regional Director further ignored the overwhelming evidence in the record that the Buyers' interests are sufficiently aligned with management. As in *Concepts & Designs, Inc.*, the Buyers regularly confer with potential suppliers, discuss, and evaluate exceptions to RFQs, and negotiate prices and transportation costs without management intervention. (Tr. at 161:13-18; 170:4-171:10). Despite this compelling evidence and the Petitioner's failure to even come close to satisfying its burden of proof, the Regional Director found that the Buyers are more closely aligned with employees than management, and therefore, entitled to the protection of the Act. (02/16/16 D&O, p. 12-13). This error should be reviewed and reversed.

V. CONCLUSION

As demonstrated in the record, including the transcripts, exhibits, 2016 Decision and Order and 2017 Supplemental Decision, there is ample evidence that Petitioner has failed to meet its burden of material change and that the Buyers are managerial employees, not covered by the Act. Accordingly, the Regional Director's Decision and Order, as it relates to the managerial status of the Buyers, and Supplemental Decision and, warrant review.

Respectfully submitted,

/s/ Brian J. Christensen

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Attorneys for the Employer

CERTIFICATE OF SERVICE

The foregoing Employer's Brief on Review of Regional Director's Decision and Order, was electronically served on the following on May 23, 2017:

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Leonard Perez
Regional Director
NLRB Region 14
1222 Spruce Street
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St. Louis, MO 63103-2829
(Sent via NLRB e-filing)

/s/ Brian J. Christensen
Attorney for Employer
Wolf Creek Nuclear Operating Corporation

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WOLF CREEK NUCLEAR OPERATING CORPORATION
Employer

and

Case 14-RC-168543

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
LOCAL 225

Petitioner

ORDER

The Employer's Request for Review of the Regional Director's Supplemental Decision is denied as it raises no substantial issues warranting review.¹

¹ We agree with the Regional Director's decision not to give preclusive effect to a 2000 decision by a former Acting Regional Director that evaluated the managerial status of the Buyer employees at issue here. In doing so, we note that the Employer's progressive changes to its own operating procedures, including increasing the amount of single-source and preferred suppliers, has led to a reduction in competitive bidding and therefore in the discretion Buyers exercise in the procurement process. This "material[ly] differentiating fact" is more than sufficient to meet the Petitioner's burden and warrant relitigation. *Wolf Creek Nuclear Operating Corp.*, 365 NLRB No. 55, slip op. at 3 fn. 7 (2017). Chairman Miscimarra agrees with his colleagues that the Petitioner has proven changed circumstances sufficient to warrant revisiting the Buyers' managerial status. In doing so, Chairman Miscimarra does not rely, as the Regional Director did, on the changes to the Employer's requisition and procurement software, known as EMPAC. In his view, the revisions to EMPAC merely automated certain functions and reminded Buyers of preexisting boundaries on their discretionary authority without actually further diminishing that authority.

Although Member Pearce adheres to the views expressed in his dissent in *Wolf Creek Nuclear Operating Corp.*, Id. slip op. at 4-6, he agrees that the Employer's Request for Review of the Regional Director's Supplemental Decision fails to raise substantial issues warranting review.

In denying review, we do not rely on the Regional Director's citation to *Solartec, Inc.*, 352 NLRB 331 (2008), a two-member Board decision. See *New Process Steel, L. P. v. NLRB*, 560 U.S. 674 (2010). Additionally, we note that the Employer's reliance on *Concepts & Designs, Inc.*, 318 NLRB 948, 957 (1995), enfd. 101 F.3d 1243 (8th Cir. 1996), is misplaced. In that case, the Board did not pass on the issue of managerial status. The respondent prevailed on that issue before the judge, and the respondent was the only party that filed exceptions to the judge's decision.

PHILIP A. MISCIMARRA, CHAIRMAN

MARK GASTON PEARCE, MEMBER

LAUREN McFERRAN, MEMBER

Dated, Washington, D.C., October 27, 2017



LOCAL UNION 225
INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS



MATT KIRK
PRESIDENT

JASON IANACONE
BUSINESS MANAGER

October 30, 2017

Jayne Pearson
1550 Oxen Ln NE
Burlington, KS 66839

Mrs. Pearson:

Subject: Request for Negotiation of Wages and Working Conditions of the Buyers

Enclosed is the final decision of the NLRB. Their ruling in case 14-RC-168543 is that the Company's argument did not raise substantial issues warranting review. They further state that they agree with the former Regional Director.

As stated in Article 9 of the CBA, we would like to begin negotiations for their wages and working conditions as soon as possible. The first items of business are mutually deciding on dates, times, and location of these negotiations.

Please contact me if you have any questions of clarification or would like to meet prior to beginning formal negotiations.

Sincerely,

Jason Ianacone
Business Manager
IBEW Local 225

Enclosures: 1

cc: Adam Heflin, President and CEO
Todd Newkirk, International Representative
Matt Kirk, President IBEW Local 225
Rhonda Bewley, Recording Secretary IBEW Local 225

Covel, Julie

From: Christensen, Brian J. (Kansas City) <Brian.Christensen@jacksonlewis.com>
Sent: Tuesday, November 14, 2017 2:01 PM
To: Coffman, Carla K.; Moore, Trecia (Kansas City)
Subject: Re: 14-CA-181053 and 14-CA-182226 Wolf Creek Nuclear Operating Corp.

Your understanding of the employer's position in this matter is correct.

Please note we have a new Suite number effective November 2, 2017:

Brian J. Christensen

Attorney at Law

Jackson Lewis P.C.

7101 College Blvd.

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Jackson Lewis P.C. is included in the AmLaw 100 law firm ranking and is a proud member of the CEO Action for Diversity and Inclusion initiative

On: 14 November 2017 13:59, "Coffman, Carla K." <Carla.Coffman@nlrb.gov> wrote:

Trecia and Brian,

This email is a follow-up to the voice mail message I just left for Trecia in the above-captioned matters. These cases were formerly assigned to Field Attorney Mike Werner, but have been reassigned to me since he is no longer with the Board. It is my understanding that after the Board issued its decision to deny the Employer's Request for Review of the RD's Decision in Case 14-RC-168543 regarding the managerial status of the Buyers, the Union renewed its request to bargain over the Buyers unit. It is also my understanding that the Employer denied that request and plans to "test cert" via the failure to bargain charge (14-CA-181053). The other charge (14-CA-182226) deals with the alleged retaliatory evaluation issued to one of the Buyers in 2016, and the Employer's position in that case is that the Buyers are managerial and therefore, not protected by Section 7 of the Act.

If you could confirm that this is still the Employer's position in these matters, either via phone or by responding to this email, I would appreciate it. If you have any questions or wish to discuss the matter in more detail, please feel free to give me a call.

Thank you,
Carla



**Carla K. Coffman | Senior Field
Examiner**

National Labor Relations Board, Subregion 17
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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 17**

**WOLF CREEK NUCLEAR OPERATING
CORPORATION**

and

Case 14-CA-181053

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 225**

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by International Brotherhood of Electrical Workers, Local 225 (the Union). It is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that Wolf Creek Nuclear Operating Corporation (Respondent) has violated the Act as described below.

1.

The charge in this proceeding was filed by the Union on July 28, 2016, and a copy was served on Respondent by U.S. mail on that same date.

2.

(a) At all material times, Respondent has been a corporation with an office and place of business in Burlington, Kansas, Respondent's facility, and has been engaged in the production, transmission, and retail sale of electricity.

(b) During the 12-month period ending October 31, 2017, a representative period, Respondent in conducting its operations described above in paragraph 2(a), purchased and received at its Burlington, Kansas facility goods and services valued in excess of \$50,000 directly from points outside the State of Kansas.

(c) During the same period described above in paragraph 2(b), Respondent provided goods and services valued in excess of \$50,000 to States other than the State of Kansas.

(d) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3.

At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

4.

(a) The following employees (the Unit) of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Buyers I, II, III and Lead Buyer employed by the Employer at its facility near Burlington, Kansas, EXCLUDING all office clerical employees, professional employees, managerial employees, guards and supervisors as defined by the Act, and all other employees.

(b) On February 24, 2016, in Case 14-RC-168543, a representation election was conducted among the employees in the Unit and, on March 8, 2016, the Union was certified as the exclusive collective-bargaining representative of the Unit.

(c) At all times since February 24, 2016, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

5.

(a) About February 29, 2016, the Union, by telephone, requested that Respondent recognize it as the exclusive collective-bargaining representative of the Unit and bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

(b) About October 30, 2017, the Union, by letter, renewed its request that Respondent recognize it as the exclusive collective-bargaining representative of the Unit and bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

(b) Since about February 29, 2016, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

6.

(a) About February 29, 2016, the Union, by e-mail, requested that Respondent furnish the Union with the following information:

1. Current pay information for the 4 existing Buyers
2. Salary information for the last 3 years for all Buyers including the recently retired Lead Buyer
3. Classification seniority information, including past titles for the existing buyers
4. Site Seniority information for all the buyers
5. Return of any Employee at will letters in the Current Employee
6. Par Bonus amounts for the last 3 years for all Buyers

(b) The information requested by the Union, as described above in paragraph 6(a), is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit.

(c) Since about February 29, 2016, Respondent has failed and refused to furnish the Union with the information requested by it as described above in paragraph 6(a).

7.

By the conduct described above in paragraphs 5 and 6, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

8.

The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

9.

As part of the remedy for Respondent's unfair labor practices alleged above in paragraphs 5 and 6, the General Counsel seeks an Order requiring Respondent to bargain in good faith with the Union, on request, for the period required by *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), as the recognized bargaining representative in the appropriate unit. The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations; it must file an answer to the complaint. The answer must be **received by this office on or before December 12, 2017, or postmarked on or before December 11, 2017.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused

on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on a date and time to be determined, at the Sharon K. Evans Hearing Room, National Labor Relations Board Subregion 17, 8600 Farley Street – Suite 100, Overland Park, Kansas, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated: November 28, 2017

LEONARD J. PEREZ
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 14, BY:

/s/ MARY G. TAVES

MARY G. TAVES
OFFICER-IN-CHARGE
NATIONAL LABOR RELATIONS BOARD
SUBREGION 17
8600 Farley St Ste 100
Overland Park, KS 66212-4677

Attachments

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 17**

**WOLF CREEK NUCLEAR OPERATING
CORPORATION**

and

Case 14-CA-181053

**THE INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 225**

AFFIDAVIT OF SERVICE OF: Complaint and Notice of Hearing (with forms NLRB-4338 and NLRB-4668 attached)

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on November 28, 2017, I served the above-entitled document(s) by **certified or regular mail**, as noted below, upon the following persons, addressed to them at the following addresses:

Jayne Pearson , Labor Relations
Wolf Creek Nuclear Operating Corporation
1550 Oxen Lane
Burlington, KS 66839

**CERTIFIED MAIL, RETURN
RECEIPT REQUESTED
7016 0600 0000 6126 7828**

Brian J. Christensen , Attorney
Jackson Lewis P.C.
7101 College Blvd Ste 1200
Overland Park, KS 66210-2153

FIRST CLASS MAIL

Trecia L. Moore , Attorney
Jackson Lewis P.C.
7101 College Blvd Ste 1200
Overland Park, KS 66210-2153

FIRST CLASS MAIL

William R. Lawrence , Attorney
Lawrence & Associates
1405 George Court, Apt 7
Lawrence, KS 66044

FIRST CLASS MAIL

Jason Ianacone , Business Manager
International Brotherhood of Electrical Workers,
Local 225
P.O. Box 404
Burlington, KS 66839

**CERTIFIED MAIL
7016 0600 0000 6126 7835**

November 28, 2017

Date

Karen Clemoens, Designated Agent of NLRB

Name

/s/ Karen Clemoens

Signature

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Case 14-CA-181053

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements *will not be granted* unless good and sufficient grounds are shown *and* the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).
- (2) Grounds must be set forth in *detail*;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and
- (5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

Jayne Pearson, Labor Relations
Wolf Creek Nuclear Operating Corporation
1550 Oxen Lane
Burlington, KS 66839

William R. Lawrence , Attorney
Lawrence & Associates
1405 George Court, Apt 7
Lawrence, KS 66044

Brian J. Christensen, Attorney
Jackson Lewis P.C.
7101 College Blvd Ste 1200
Overland Park, KS 66210-2153

Jason Ianacone , Business Manager
International Brotherhood of Electrical Workers,
Local 225
P.O. Box 404
Burlington, KS 66839

Trecia L. Moore, Attorney
Jackson Lewis P.C.
7101 College Blvd Ste 1200
Overland Park, KS 66210-2153

Procedures in NLRB Unfair Labor Practice Hearings

The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. **You may be represented at this hearing by an attorney or other representative.** If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link: www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf.

The NLRB allows you to file certain documents electronically and you are encouraged to do so because it ensures that your government resources are used efficiently. To e-file go to the NLRB's website at www.nlr.gov, click on "e-file documents," enter the 10-digit case number on the complaint (the first number if there is more than one), and follow the prompts. You will receive a confirmation number and an e-mail notification that the documents were successfully filed.

Although this matter is set for trial, this does not mean that this matter cannot be resolved through a settlement agreement. The NLRB recognizes that adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations and encourages the parties to engage in settlement efforts.

I. BEFORE THE HEARING

The rules pertaining to the Board's pre-hearing procedures, including rules concerning filing an answer, requesting a postponement, filing other motions, and obtaining subpoenas to compel the attendance of witnesses and production of documents from other parties, may be found at Sections 102.20 through 102.32 of the Board's Rules and Regulations. In addition, you should be aware of the following:

- **Special Needs:** If you or any of the witnesses you wish to have testify at the hearing have special needs and require auxiliary aids to participate in the hearing, you should notify the Regional Director as soon as possible and request the necessary assistance. Assistance will be provided to persons who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603.
- **Pre-hearing Conference:** One or more weeks before the hearing, the ALJ may conduct a telephonic prehearing conference with the parties. During the conference, the ALJ will explore whether the case may be settled, discuss the issues to be litigated and any logistical issues related to the hearing, and attempt to resolve or narrow outstanding issues, such as disputes relating to subpoenaed witnesses and documents. This conference is usually not recorded, but during the hearing the ALJ or the parties sometimes refer to discussions at the pre-hearing conference. You do not have to wait until the prehearing conference to meet with the other parties to discuss settling this case or any other issues.

II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- **Witnesses and Evidence:** At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.
- **Exhibits:** Each exhibit offered in evidence must be provided in duplicate to the court reporter and a copy of each of each exhibit should be supplied to the ALJ and each party when the exhibit is offered

in evidence. If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing. If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

- **Transcripts:** An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.
- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, if it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.
- **Date for Filing Post-Hearing Brief:** Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and to will set a deadline for filing, up to 35 days.

III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.
- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.
- **Exceptions to the ALJ's Decision:** The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 17**

WOLF CREEK NUCLEAR OPERATING)	
COROPORATION)	
)	
and)	Case 14-CA-181053
)	
INTERNATIONAL BROTHERHOOD OF)	
ELECTRICAL WORKERS, LOCAL 225)	

RESPONDENT'S ANSWER TO COMPLAINT

Wolf Creek Nuclear Operating Corporation ("WCNOC"), Respondent in the above-captioned matter files this Answer to the Complaint dated November 28, 2017.

1. Admitted.

2(a). Admitted.

2(b). Admitted.

2(c). Admitted.

2(d). Admitted.

3. Admitted.

4(a). Denied.

4(b). Admitted.

4(c). Admit that an election was conducted but denied that the Unit was properly certified.

5(a). Admitted.

5(b). Admitted.

5(b)[sic]. Admitted that WCNOC has declined to recognize the Union as the collective bargaining representative of the Unit and to bargain collectively because the

employees within the purported Unit are not covered by the Act and, therefore, do not constitute an appropriate unit for bargaining. The remaining allegations in this paragraph are denied.

6(a). Admitted.

6(b). Denied.

6(c). Admitted that WCNOG has declined to provide the Union information about the purported Unit because the employees within the purported Unit are not covered by the Act and, therefore, do not constitute an appropriate unit for bargaining. The remaining allegations in this paragraph are denied.

7. Admitted that WCNOG has declined to recognize the Union as the collective bargaining representative of the purported Unit and to bargain collectively because the employees within the purported Unit are not covered by the Act and, therefore, do not constitute an appropriate unit for bargaining. WCNOG denies having violated the Act. The remaining allegations in this paragraph are denied.

8. Denied.

9. Because WCNOG has not engaged in any unlawful conduct, it denies the General Counsel's claims for relief and denies that the General Counsel is entitled to the relief sought. The remaining allegations in this paragraph are denied.

10. Respondent denies each and every allegation not specifically admitted in its Answer and further denies that the General Counsel is entitled to any remedy against Respondent.

11. Having fully answered all counts of the Complaint in accordance with the Board's Rules and Regulations, Respondent submits that the allegations of the Complaint have no merit and should be dismissed in their entirety.

AFFIRMATIVE AND OTHER DEFENSES

1. The Complaint should be dismissed because the allegations contained within it are barred by the doctrine of res judicata and/or collateral estoppel.
2. The Complaint fails to state a claim upon which relief may be granted.
3. At all relevant times WCNOG has acted lawfully and in good faith and has not violated any rights that may be secured to any individual or labor organization under the Act.
4. The employees at issue are managerial as defined by the Act and, therefore, are not properly included in the purported bargaining unit.
5. The Bargaining Unit at issue was not properly certified because it is comprised of employees who are not covered by the Act.

WHEREFORE, having fully answered all allegations of this Complaint in accordance with Sections 102.20 and 102.21 of the Board's Rules and Regulations, Respondent submits that the allegations of the Complaint have no merit and should be dismissed.

Dated at Overland Park, Kansas this 8th day of December 2017.

Respectfully submitted,

JACKSON LEWIS P.C.

By /s/ Brian J. Christensen

Brian J. Christensen

7101 College Boulevard

Suite 1200

Overland Park, KS 66210

Telephone (913) 981-1018

Fax (913) 981-1019

Brian.Christensen@jacksonlewis.com

Attorneys for Respondent Wolf Creek
Nuclear Operating Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 8, 2017:

The Answer of Respondent was electronically filed with the Subregion, via the agency's website:

Mary Taves
Officer-In-Charge
National Labor Relations Board, Subregion 17
8600 Farley, Suite 100
Overland Park, KS 66212

A copy of the Answer of Respondent was served via First Class U.S. Mail, postage prepaid to:

William R. Lawrence, Attorney
Lawrence & Associates
1405 George Court, Apt. 7
Lawrence, KS 66044

/s/ Brian J. Christensen
Brian J. Christensen, Attorney

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

WOLF CREEK NUCLEAR OPERATING CORP.

and

Case 14-CA-181053

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 225**

**ORDER TRANSFERRING PROCEEDING TO THE BOARD
and
NOTICE TO SHOW CAUSE**

On December 20, 2017, the General Counsel filed with the National Labor Relations Board Motions to Transfer Case to Board and for Summary Judgment, on the ground that the Respondent is attempting to relitigate the issues in Case 14-RC-168543. Having duly considered the matter,

IT IS ORDERED that the above-entitled proceeding be transferred to and continued before the Board in Washington, D.C.

NOTICE IS GIVEN that any party seeking to show cause why the General Counsel's motion should not be granted must do so in writing, filed with the Board in Washington, D.C., on or before January 4, 2018 (with affidavit of service on the parties to this proceeding). Any briefs or statements in support of the motion shall be filed by the same date.

Dated, Washington, D.C., December 21, 2017.

By direction of the Board:

Roxanne Rothschild
Deputy Executive Secretary

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

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 225,

-and-

WOLF CREEK NUCLEAR OPERATING
CORPORATION.

Case 14-CA-181053

**EMPLOYER’S RESPONSE TO GENERAL COUNSEL’S MOTION TO
TRANSFER CASE TO BOARD AND FOR SUMMARY JUDGMENT AND
NOTICE TO SHOW CAUSE**

On December 20, 2017, Counsel for the General Counsel filed a Motion To Transfer Case To Board And For Summary Judgment Decision And Order On Test Of Certification. On December 21, 2017, the Board issued an Order Transferring Proceeding to the Board and Notice To Show Cause.

Wolf Creek Nuclear Operating Corporation (“Wolf Creek” or “Respondent”) generally agrees with the General Counsel’s procedural timeline and that this case involves a test of certification. Respondent is challenging the Regional Director’s certification of Charging Party as the collective bargaining representative of the employees in the unit found appropriate in case 14-RC-168543. Respondent also challenges the Regional Director’s Supplemental Decision of May 9, 2017, wherein the Regional Director erroneously determined that the certified employees are not managerial employees and, therefore, are eligible for representation under the Act.

Wolf Creek reasserts, preserves, and does not waive any and all arguments presented by it in 14-RC-168543.

Wolf Creek hereby responds in opposition to Counsel for the General Counsel's motion:

I. Summary Judgment Should Be Denied Because the Regional Director Erred in Finding that the Petitioned for Employees Are Not Managerial and He Erred in Certifying the Election in Case 14-RC-168543.

Summary Judgment should be denied and the Region's Certification of Representative in Case 14-RC-168543 should be revoked. As argued in Wolf Creek's Request for Review of the Regional Director's Decision and Order of February 16, 2016, and in its Request for Review of the Regional Director's Supplemental Decision of May 9, 2017, the Board should deny the General Counsel's Motion for Summary Judgment. The Regional Director erroneously determined that the petitioned for employees are not managerial employees and, therefore, are eligible to seek representation under the Act.

In 2000, the (Region 17) Acting Regional Director issued a Decision, Order and Clarification of Bargaining Unit in Case 17-UC-210 ("Decision"). In that Decision, the Acting Regional Director found the *same* group of employees petitioned for in Case 14-RC-168543 to be "managerial employees," and thereby excluded from coverage under the Act. Today, the certified group of employees continue to perform the same essential duties and the same functions as they performed at the time of the 2000 Decision.

Summary Judgment should be denied because the Regional Director erred in finding that a computer system (EMPAC), used by the petitioned for employees in 2000, and still used today, materially changed the employees' jobs so as to render them employees under the Act—in fact, as witness testimony established—it did not. Instead, employees continue to perform the same duties, using the same system, as they did at the time of the Decision in 17-UD-210. The Decision enumerates thirty-five essential functions and tasks assigned to the petitioned for employees. Those duties and assignments have not changed and continue to be a central part of

the Buyers' job. Technological advances may have made the Buyer position more efficient but they did not alter the Buyers' managerial status. The Regional Director, ignoring key facts and legal authority, failed to recognize that computerization of a job does not amount to removal of an employee's managerial status. *Constellation Power Source Generation, Inc.*, 2000 NLRB Lexis 942, *104-05 (2000); *United Tech. Corp.*, 287 N.L.R.B. 198, 204 (1987) (finding technological advancements did not significantly alter job duties); *John P. Scripps Newspaper Corp.*, 329 NLRB 854, 861 (1999) (finding "differences in the methodology or the manner in which they perform their job, including use of technology . . . [] however, do not change the fundamental character of their job duties or their primary function of making advertisements ready for insertion into the newspaper."). This misapplication of facts and law by the Regional Director is an error that should not stand.

II. The Regional Director Incorrectly Applied *Concepts & Designs, Inc.*, and *Lockheed-California Company* to Support His Finding That the Petitioned For Unit Constituted an Appropriate Unit For Representation.

The Regional Director erred in failing to properly apply applicable Board precedent set forth in *Concepts & Designs, Inc.*, 318 NLRB 948 (1995), and in *Lockheed-California Co.*, 217 NLRB 573 (1975).

Like the Buyers in the instant case, the managerial Buyers in *Concepts & Designs* purchased items on behalf of their employer using a process strikingly similar to that used by Wolf Creek Buyers. Despite the almost identical duties and processes between the *Concepts & Designs* managerial buyers and the Wolf Creek managerial Buyers, the Regional Director mistakenly found that such similarities in duties were not determinative of whether the petitioned for Buyers were managerial employees under the Act.

As for his misapplication of *Lockheed*, the Regional Director ignored substantial and material evidence that the Wolf Creek Buyers engage in managerial duties and responsibilities beyond the scope of the non-managerial *Lockheed* buyers. Important is that the Wolf Creek Buyers exercise substantial discretion in the performance of their duties, whereas the *Lockheed* buyers did not. Instead of comparing the duties of the Wolf Creek Buyer's to those of the Lockheed buyers, the Regional Director erroneously limited his comparison, and made his determination, on only their independent purchasing authority.

As the Regional Director's decision contradicts longstanding Board precedent, Summary Judgment should be denied.

III. Conclusion

For these reasons, and the reasons set forth in Respondent's Request for Review of the Regional Director's Decision and Order of February 16, 2016, and in its Request for Review of the Regional Director's Supplemental Decision of May 9, 2017, which are incorporated herein by reference, and its affirmative defenses to the Complaint, Summary Judgment should be denied, the Complaint should be dismissed, and the previously issued Certification of Representative should be revoked.

Respectfully Submitted,

/s/ Brian J. Christensen

Brian J. Christensen

Trecia L. Moore

Jackson Lewis P.C.

7101 College Blvd, Suite 1200

Overland Park, KS 66210

Tel: 913-981-1018

Fax: 913-981-1018

Brian.Christensen@jacksonlewis.com

Trecia.Moore@jacksonlewis.com

Attorneys for Respondent

December 27, 2017

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

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 225,

-and-

WOLF CREEK NUCLEAR OPERATING
CORPORATION.

Case 14-CA-181053

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2017, served copies of the Employer's Response To General Counsel's Motion To Transfer Case To Board And For Summary Judgment And Notice To Show Cause on all parties listed below, including filing with the National Labor Relations Board and the Regional Director, Region 14, Leonard Perez, by using the National Labor Relations Boards' electronic filing system.

William R. Lawrence, Attorney
Lawrence & Associates
1405 George Court, Apt. 7
Lawrence, KS 66044
will@law-assoc.com

/s/ Brian J. Christensen

Attorney for Respondent
Wolf Creek Nuclear Operating Corporation

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Wolf Creek Nuclear Operating Corporation and International Brotherhood of Electrical Workers, Local 225. Case 14–CA–181053

March 13, 2018

DECISION AND ORDER

BY CHAIRMAN KAPLAN AND MEMBERS PEARCE
AND MCFERRAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union’s certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on July 28, 2016, by International Brotherhood of Electrical Workers, Local 225 (the Union), the General Counsel issued the complaint on November 28, 2017, alleging that Wolf Creek Nuclear Operating Corporation (the Respondent or Wolf Creek) violated Section 8(a)(5) and (1) of the Act by refusing the Union’s request to recognize and bargain with it and to furnish relevant information following the Union’s certification in Case 14–RC–168543.¹ (Official notice is taken of the record in the representation proceeding as defined in the Board’s Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.

On December 20, 2017, the General Counsel filed a Motion for Summary Judgment. On December 21, 2017, the Board issued an order transferring the proceeding to

¹ On February 16, 2016, the Regional Director in Case 14–RC–168543 issued a decision and direction of election in the petitioned-for unit. The Regional Director found that a May 4, 2000 unit-clarification decision in Case 17–UC–210—in which an Acting Regional Director found that Wolf Creek’s Buyers I, II, and III were managers—did not preclude revisiting the managerial status of individuals in these classifications in Case 14–RC–168543. The Regional Director in Case 14–RC–168543 further found that, on the record in that case, Wolf Creek had failed to establish that individuals working in the positions of Buyer I, Buyer II, Buyer III or Lead Buyer are managers. On April 7, 2017, a Board majority granted in part Wolf Creek’s request for review of the Regional Director’s decision in Case 14–RC–168543 and remanded the case to the Regional Director to more fully consider the preclusive effect, if any, of the 2000 unit-clarification decision. 365 NLRB No. 55 (2017). On May 9, 2017, after having reopened the record, the Regional Director issued a supplemental decision reaffirming the conclusions that the doctrine of res judicata did not preclude consideration of the Buyers’ managerial status and that the record failed to show that they are managers. By unpublished order dated October 27, 2017, the Board denied Wolf Creek’s request for review of the Regional Director’s supplemental decision.

the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union’s certification of representative on the basis of its contentions, raised and rejected in the underlying representation proceeding, that the Board may not revisit the Acting Regional Director’s 2000 determination in Case 17–UC–210 that the Buyer I, Buyer II, and Buyer III positions were managerial and, in any event, that the record evidence in Case 14–RC–168543 demonstrated that individuals serving in those positions and in the Lead Buyer position are managers.

As affirmative defenses, Wolf Creek asserts that the complaint should be dismissed because (i) its allegations are barred by res judicata and/or collateral estoppel, (ii) the individuals in the bargaining unit are managers, (iii) the bargaining unit is not appropriate, (iv) the complaint fails to state a claim upon which relief can be granted, and (v) Wolf Creek has acted lawfully and in good faith at all times.²

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

We also find that there are no factual issues warranting a hearing with respect to the Union’s request for information. The complaint alleges, and the Respondent admits, that about February 29, 2016, the Union requested

² The Respondent’s first three affirmative defenses simply recapitulate the arguments raised by the Respondent and rejected by the Board in Case 14–RC–168543. As to the fourth affirmative defense, the complaint does indeed state claims upon which relief can be granted insofar as it alleges that the Respondent violated the Act by refusing to meet and bargain with the Union and by refusing to furnish relevant requested information. Finally, the Respondent’s good faith is not a valid affirmative defense to the allegation that the Respondent unlawfully refused to recognize and bargain with the Union, *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), or that it unlawfully refused to furnish relevant requested information, *Brooklyn Union Gas Co.*, 220 NLRB 189, 191 (1975).

by email that the Respondent furnish it with the following information:

1. Current pay information for the 4 existing Buyers
2. Salary information for the last 3 years for all Buyers including the recently retired Lead Buyer
3. Classification seniority information, including past titles for the existing buyers
4. Site Seniority information for all the buyers
5. Return of any Employee at will letters in the Current Employee
6. Par Bonus amounts for the last 3 years for all Buyers

It is well established that information concerning the terms and conditions of employment of unit employees is presumptively relevant for purposes of collective bargaining and must be furnished on request. See, e.g., *Metro Health Foundation, Inc.*, 338 NLRB 802, 803 (2003). The Respondent has not asserted any basis for rebutting the presumptive relevance of the requested information. Rather, the Respondent contends that the Union was improperly certified, a contention that we have rejected. We find that the Respondent unlawfully refused to furnish the information sought by the Union.

Accordingly, we grant the Motion for Summary Judgment.³

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation with an office and place of business in Burlington, Kansas, and has been engaged in the production, transmission, and retail sale of electricity.

In conducting its operations during the 12-month period ending October 31, 2017, the Respondent purchased and received at its Burlington, Kansas facility goods and services valued in excess of \$50,000 directly from points outside the State of Kansas.

During that same time period, the Respondent provided goods and services valued in excess of \$50,000 to States other than the State of Kansas.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

³ The Respondent's requests that the complaint be dismissed and the certification of representative revoked are therefore denied.

Chairman Kaplan did not participate in the underlying representation case but he agrees that the Respondent has not presented any new matters that are properly litigable in this unfair labor practice proceeding.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held February 24, 2016, the Union was certified on March 8, 2016, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time Buyers I, II, III and Lead Buyer employed by the Employer at its facility near Burlington, Kansas, EXCLUDING all office clerical employees, professional employees, managerial employees, guards and supervisors as defined by the Act, and all other employees.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

About February 29, 2016, the Union, by telephone, requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit employees. The Respondent has failed and refused to meet and bargain with the Union.

About February 29, 2016, the Union requested by email that the Respondent furnish it with the information set forth above, which is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit. The Respondent has failed and refused to furnish the Union with the relevant information.

We find that these failures and refusals constitute an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, and by failing and refusing to provide the Union with the information it requested, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order the Respondent to cease and desist from such conduct. In addition, we shall order the Respondent to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement. We shall also or-

der the Respondent to furnish the Union the information that it requested.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Wolf Creek Nuclear Operating Corporation, Burlington, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Brotherhood of Electrical Workers, Local 225 (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the exclusive collective-bargaining representative of the unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time Buyers I, II, III and Lead Buyer employed by the Employer at its facility near Burlington, Kansas, EXCLUDING all office clerical employees, professional employees, managerial employees, guards and supervisors as defined by the Act, and all other employees.

(b) Furnish to the Union in a timely manner the information requested on or about February 29, 2016.

(c) Within 14 days after service by the Region, post at their facilities in Burlington, Kansas, copies of the attached notice marked "Appendix."⁴ Copies of the notice,

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Na-

on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representatives, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former at any time since February 29, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 14 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 13, 2018

Marvin E. Kaplan, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

tional Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with International Brotherhood of Electrical Workers, Local 225 (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT fail and refuse to furnish the Union with information that is relevant and necessary to its role as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following appropriate bargaining unit:

All full-time and regular part-time Buyers I, II, III and Lead Buyer employed by us at our facility near Burlington, Kansas, EXCLUDING all office clerical employees, professional employees, managerial employees, guards and supervisors as defined by the Act, and all other employees.

WE WILL furnish to the Union in a timely manner the information requested on February 29, 2016.

WOLF CREEK NUCLEAR OPERATING CORP.

The Board's decision can be found at www.nlr.gov/case/14-CA-181053 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

