

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

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

WOLF CREEK NUCLEAR OPERATING CORPORATION

Respondent

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

ELIZABETH A. HEANEY

Supervisory Attorney

BARBARA A. SHEEHY

Attorney

National Labor Relations Board

1015 Half Street, SE

Washington, DC 20570

(202) 273-1743

(202) 273-0094

PETER B. ROBB

General Counsel

JOHN W. KYLE

Deputy General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

TABLE OF CONTENTS

Headings	Page(s)
Statement of Jurisdiction.....	1
Statement of the Issue Presented.....	3
Statement of the Case.....	3
I. The Board’s Findings of Fact	4
A. Overview of the Company’s operation; Buyer qualifications and training	4
B. Buyers must adhere to the Company’s strict guidelines governing the requisition and procurement process; that process begins with authorized individuals submitting a requisition to the Purchasing Department.....	5
C. A supervisor assigns Buyers requisitions based on particular areas of focus; Buyers attempt to competitively bid requisitions exceeding \$50,000; many items, however, are only available from a few potential vendors or from a single source	7
D. Buyers evaluate bids from suppliers and make selections based on cost and availability; consult with requesting department if a potential supplier requests an exception; and complete purchasing orders consistent with procurement guidelines and approved spending authority	10
E. The representation proceeding	12
F. The unfair-labor-practice proceeding.....	15
II. The Board’s Conclusions and Order	16
Summary of argument.....	17
Argument.....	19

TABLE OF CONTENTS (cont'd)

Headings	Page(s)
A. Due to material changed circumstances, the 2000 unit-clarification decision did not preclude the Union’s 2016 election petition to represent the Company’s Buyers	19
1. Standard of review	19
2. Representation issues decided in prior proceedings may be re-litigated in a subsequent representation proceeding if the party opposing preclusion demonstrates material changed circumstances	21
3. Substantial evidence supports the Board’s finding of material changed circumstances	22
4. The Company’s challenges are without merit	27
B. The Company’s Buyers are not managerial employees	34
1. Applicable principles and standard of review	34
2. Managerial employees are excluded from the Act’s coverage.....	36
3. Substantial evidence supports the Board’s finding that the Company failed to show that Buyers are managerial employees.....	39
a. The Company’s Buyers lack discretion and independence	40
b. The Buyers’ interests are not sufficiently aligned with management to render them managerial employees inasmuch as they have no involvement with development or implementation of company policies	45
4. The Company’s remaining challenges are without merit.....	47
Conclusion	54

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Allentown Mack Sales & Service v. NLRB</i> , 522 U.S. 359 (1998).....	20
<i>American Locomotive Co.</i> , 92 NLRB 115 (1950).....	52
<i>Boire v. Greyhound Corp.</i> , 376 U.S. 473 (1964).....	2
<i>Carry Cos. Of Illinois</i> , 310 NLRB 860 (1993).....	21
<i>Concepts & Designs, Inc.</i> 318 NLRB 948 (1995).....	45, 46, 47, 48
<i>David Wolcott Kendall Memorial School v. NLRB</i> , 866 F.2d 157 (6th Cir. 1989).....	35, 39
<i>Edison Co. v. NLRB</i> , 460 U.S. 693 (1983).....	34
<i>Federal Telephone & Radio Co.</i> , 120 NLRB 1652 (1958).....	52
<i>Freund Baking Co.</i> , 330 NLRB 17 (1999).....	2
<i>Girdler Co.</i> , 115 NLRB 726 (1956).....	52
<i>Good N' Fresh Foods</i> , 287 NLRB 1231 (1988).....	30
<i>Grocers Supply Co.</i> , 160 NLRB 485 (1966).....	52

TABLE OF AUTHORITIES (cont'd)

Cases	Page(s)
<i>Harvey's Resort Hotel</i> , 271 NLRB 306 (1984)	21
<i>Holly Farms Corp. v. NLRB</i> , 517 U.S. 392 (1996).....	36
<i>Hunt & Mottett Co.</i> , 206 NLRB 285 (1973)	52
<i>Iowa Southern Utilities Co.</i> , 207 NLRB 341 (1973)	41, 45
<i>FES</i> , 333 NLRB 66 (2001).....	47
<i>Kearney & Trecker Corp.</i> , 121 NLRB 817 (1958)	48
<i>Kitsap County Automobile Dealers Association</i> , 124 NLRB 933 (1959)	40
<i>Leach Corp.</i> , 312 NLRB 990 (1993), <i>enforced</i> , 54 F.3d 802 (D.C. Cir. 1995).....	33
<i>Local No. 207, International Association of Bridge, Structural & Ornamental Iron Workers Union v. Perko</i> , 373 U.S. 701 (1963).....	34, 35
<i>Lockheed-California Co.</i> , 217 NLRB 573 (1975)	40, 41, 44, 49
<i>Loretto Heights College v. NLRB</i> , 742 F.2d 1245 (10th Cir. 1984)	35, 38, 39

TABLE OF AUTHORITIES (cont'd)

Cases	Page(s)
<i>Mack Trucks, Inc.</i> , 116 NLRB 1576 (1956).....	48
<i>Miller’s Ale House, Inc. v. Boynton Carolina Ale House</i> , 702 F.3d 1312 (11th Cir. 2012)	22
<i>NLRB v. Bell Aerospace Co., Division of Textron, Inc.</i> , 416 U.S. 267 (1974).....	37, 38, 39, 40
<i>NLRB v. Case Corp.</i> , 304 NLRB 939 (1991), <i>enforced</i> , 995 F.2d 700 (7th Cir. 1993)	43, 46, 51
<i>NLRB v. Cooper Union for the Advancement of Science & Art</i> , 783 F.2d 29 (2d Cir. 1986)	35
<i>NLRB v. Dillon Stores</i> , 643 F.2d 687 (10th Cir. 1981)	20
<i>NLRB v. Donna-Lee Sportswear Co.</i> , 836 F.2d 31 (1st Cir. 1978).....	21
<i>NLRB v. Hearst Publications</i> , 322 U.S. 111 (1944).....	34, 35
<i>NLRB v. Kentucky River Community Care, Inc.</i> , 532 U.S. 706 (2001).....	35
<i>NLRB v. Town & Country Electric, Inc.</i> , 516 U.S. 85 (1995).....	36
<i>NLRB v. Yeshiva University</i> 444 U.S. 672 (1980).....	37, 38, 45
<i>Noranda Aluminum, Inc. v. NLRB</i> , 751 F.2d 268 (8th Cir. 1984)	39

TABLE OF AUTHORITIES (cont'd)

Cases	Page(s)
<i>Ohio Edison Co.</i> , 2014 WL 204210 (NLRB Jan. 17, 2014)	47
<i>Oil, Chemical & Atomic Workers International Union v. NLRB</i> , 445 F.2d 237 (D.C. Cir. 1971).....	36
<i>Palace Laundry Dry Cleaning Corp.</i> , 75 NLRB 320 (1947).....	38vi
<i>Passaic Daily News v. NLRB</i> , 736 F.2d 1543 (D.C. Cir. 1984).....	38
<i>Phelps Dodge Mining Co. v. NLRB</i> , 22 F.3d 1493 (10th Cir. 1994)	20
<i>Pittsburgh Plate Glass Co. v. NLRB</i> 313 U.S. 146 (1941).....	27
<i>Luke's Medical Center v. NLRB</i> , 723 F. 2d 1468 (10th Cir. 1993)	35
<i>Salinas Newspapers, Inc.</i> , 279 NLRB 1007 (1986).....	52
<i>Sampson Steel & Supply</i> , 289 NLRB 481 (1988).....	40
<i>Simplex Industries, Inc.</i> , 243 NLRB 111 (1979).....	52
<i>Solartec, Inc.</i> , 352 NLRB 331 (2008), <i>enforced</i> , 310 Fed. App'x 829 (6th Cir. 2009)	49
<i>Teamsters United Parcel Service</i> , 346 NLRB 484 (2006)	32

TABLE OF AUTHORITIES (cont'd)

Cases	Page(s)
<i>The Sun</i> , 329 NLRB 854 (1991)	23
<i>Titeflex, Inc.</i> , 103 NLRB 223 (1953)	48
<i>United Technologies Corp.</i> , 287 NLRB 198 (1987), <i>enforced</i> , 884 F.2d 1569 (2d Cir. 1989)	23, 33
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	20, 35
<i>Washington Post</i> , 254 NLRB 168 (1981)	40, 43, 44, 50
<i>Webcro Industries, Inc. v. NLRB</i> , 217 F.3d 1306 (10th Cir. 2000)	20
<i>Western Gear Corp.</i> , 160 NLRB 272 (1966)	52
<i>Westinghouse Electric Corp. v. NLRB</i> , 424 F.2d 1151 (7th Cir. 1970)	40
<i>Winchell Co.</i> , 315 NLRB 526, <i>enforced</i> , 74 F.3d 1227 (3d Cir. 1995)	33
<i>Wolf Creek Nuclear Operating Corp.</i> , 365 NLRB No. 55, 2017 WL 1330299 (Apr. 7, 2017)	13

TABLE OF AUTHORITIES (cont'd)

Statutes	Page(s)
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 2(3) (29 U.S.C. § 152(3)).....	36
Section 2(11) (29 U.S.C. § 152(11)).....	36
Section 7 (29 U.S.C. § 157)	16
Section 8(a)(1)(29 U.S.C. § 158(a)(1)).....	3, 4, 15, 16, 19, 34
Section 8(a)(5)(29 U.S.C. § 158(a)(5)).....	3, 4, 15, 16, 19, 34
Section 9(c)(29 U.S.C. § 159(c))	2
Section 9(d)(29 U.S.C. § 159(d)).....	2
Section 10(a)(29 U.S.C. § 160(a))	1, 2
Section 10(e)(29 U.S.C. § 160(e))	2, 20
 Railway Labor Act (45 U.S.C §§ 151, et seq.).....	 36

Other Authorities	Page(s)
H.R. Rep. No. 245, 80th Cong., 1st Sess., 13 (1947)	37

Statement of Related Cases

No prior or related cases

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

No. 18-9521

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

WOLF CREEK NUCLEAR OPERATING CORPORATION

Respondent

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the National Labor Relations Board's application to enforce a Board Order issued against Wolf Creek Nuclear Operating Corporation ("the Company") finding that it unlawfully refused to bargain with the International Brotherhood of Electrical Workers, Local 225 ("the Union") and provide the Union with requested information. The Board had jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151,

160(a)) (the Act). The Board’s Decision and Order issued on March 13, 2018, and is reported at 366 NLRB No. 30. (D&O 1-4.)¹

The Board filed its application on April 4, 2018. The Court has jurisdiction over this proceeding because the Board’s Order is final under Section 10(e) of the Act, 29 U.S.C. § 160(e), and venue is proper because the unfair labor practices occurred in Burlington, Kansas. The application was timely, as the Act provides no time limits for such filings.

Because the Board’s Order is based on findings made in a representation (election) proceeding, the record in that proceeding (Board Case No. 14-RC-168543), is before the Court pursuant to Section 9(d) of the Act, which provides the Court with jurisdiction to review the Board’s actions in the representation case solely for the purpose of “enforcing, modifying, or setting aside in whole or in part the [unfair labor practice] order of the Board.” 29 U.S.C. § 159(d); *see also Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). The Board retains authority to resume processing the representation case in a manner consistent with the Court’s rulings. 29 U.S.C. § 159(c); *see also Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

¹ “D&O” refers to the Board’s Decision and Order in this case. “DDE” refers to the Board’s Decision and Direction of Election. “Tr.” refers to the hearing transcripts. And exhibits from the hearing are referred to as follows: “UX” is a Union exhibit, “CoX” is a company exhibit, and “BX” is a Board exhibit. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

STATEMENT OF THE ISSUE PRESENTED

The ultimate issue is whether the Board reasonably found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the Union or to provide it with requested information.

That issue turns on two subsidiary questions:

(1) Whether substantial evidence supports the Board's finding that the Union met its burden of showing material changed circumstances in the duties of the Buyer position so as to vitiate the preclusive effect of a prior representation decision finding the Buyers to be managerial employees.

(2) Whether substantial evidence supports the Board's finding that Company failed to carry its burden of proving that the job classifications of Buyer I, Buyer II, Buyer III, and Lead Buyer (collectively the "Buyers") are managerial employees excluded from the Act's protections.

STATEMENT OF THE CASE

This case marks the second time that the Board has been asked to resolve the managerial status of the Company's Buyers. In 2000, the Company sought to exclude the Buyers from the unit as managerial employees. The Board agreed with the Company, and, in a unit-clarification decision that issued on May 4, 2000, the Board classified the Buyers as managerial and exempt from the Act's coverage.

Nearly two decades later, the Union filed an election petition seeking to represent the Company's Buyers. After the Union won the election, the Company refused the Union's request to bargain and to provide it with information, claiming that the 2000 representation decision precluded the Board from revisiting the Buyers' status or, alternatively, that the Buyers are managerial employees. The Board rejected those claims, finding instead that the Union demonstrated that material changed circumstances since the 2000 decision have vitiated any preclusive effect of that decision, and that substantial evidence now shows that the Buyers are managerial employees. The Board then ordered the Company to bargain with the Union as the Buyer's representative, but the Company refused. The Board now seeks enforcement of its Order finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union or provide it with requested information.

I. THE BOARD'S FINDINGS OF FACT

A. Overview of the Company's Operation; Buyer Qualifications and Training

The Company operates the Wolf Creek Generating Station, a nuclear power generating station in Kansas. It employs four buyers who work in the Supply Chain Division, Purchasing Department. Buyers are responsible for completing requests for quotations and purchase orders for goods and services that the

Company uses. Buyers do not supervise any employees and report to Everette Weems, Supervisor of Purchasing and Contracts. (2016 DDE 3; Tr. 33, 86; BX 2.)

There are three buyer classifications, all of which require a combination of school and experience. The Buyer I classification requires an associate's degree or high school diploma and four years' experience in procurement/supply chain or office environment. The Buyer II classification a bachelor's degree and two years' experience, an associate's degree and six years' experience, or a high school diploma and ten years' experience. The Buyer III classification requires a bachelor's degree and four years' experience, an associate's degree and eight years' experience, or a high school diploma and twelve years' experience. Buyers are trained and certified through the Institute of Supply Management. The Company pays to maintain Buyers certifications. (2016 DDE 3-4; Tr. 25-32, 137, UX 1.)

B. Buyers Must Adhere to the Company's Strict Guidelines Governing the Requisition and Procurement Process; that Process Begins with Authorized Individuals Submitting a Requisition to the Purchasing Department

The Company has developed a Requisition and Procurement Process, or Administrative Control Procedure, which sets forth the guidelines governing the procurement of materials. The Administrative Control Procedure applies to all employees involved in the requisition and procurement process, including Buyers.

Employees must follow the detailed guidelines. (2017 DDE 3; Tr. 37-42, UX2, UX3.)

Since 1998, the Company has used a procurement software program called EMPAC that has increasingly automated the procurement process. (2017 DE 4; Tr. 250.) Like most technology, EMPAC has evolved and been modified as additional enhancements, capabilities, and improvements have been made possible. (2017 DDE 4-5; Tr. 72-75, 91, 127, 10-44, 157, 184, 195, 277-94.) A system that was once “bare bones” (Tr. 141) has, over the last nearly two decades and as detailed below, developed into a fully functional system that “does most of the work for [the Buyers].” (Tr. 74.)

The procurement process begins by an authorized individual completing an electronic requisition form in EMPAC seeking particular items. Requisitions generally indicate which items are being requested; the number of requested items; commodity code, which specifically identifies materials; whether the item is engineered or safety-related; the price; and prior purchase history and cost, if any. The requisition may include notes and more detailed information about a particular supplier or material. All requisitions originate outside of the Purchasing Department; Buyers do not initiate requisitions. Once the requisition has received authorization by the appropriate supervisor or manager of the requesting

department, EMPAC electronically routes it to the Purchasing Department for processing. (2017 DDE 3-4, 2016 DDE 4; Tr. 41-45; UX2.)

C. A Supervisor Assigns Buyers Requisitions Based on Particular Areas of Focus; Buyers Attempt To Competitively Bid Requisitions Exceeding \$50,000; Many Items, However, Are Only Available from a Few Potential Vendors or from a Single Source

Once the Purchasing Department receives the requisition, Supervisor Weems assigns it to a Buyer depending on the type of item requested. Buyers each have particular areas of materials expertise. For instance, one buyer handles pump repairs and refurbishments and valve purchases. Another buyer handles electrical and Westinghouse purchases. The remaining areas of focus are motor repairs and chemicals, piping, plate, and metal purchases. (2017 DDE 3, 2016 DDE 4-5; Tr. 93-96.)

Buyers first determine whether the item must, under the Company's strict procurement guidelines, be competitively bid. (2016 DDE 5; Tr. 105-07, UX2.) When the goods and services sought exceed \$50,000, Buyers must competitively bid the request. (2016 DDE 5; Tr. 105-07, UX2.) Consistent with the Administrative Control Procedure, Buyers weigh commercial, technical, and quality considerations in deciding which suppliers will be solicited for a bid.² (2016 DDE 5; Tr. 109, UX2.) EMPAC automatically provides both the Original

² Prior to January 2016, Buyers were required to competitively bid any item in excess of \$5,000. Buyers were not involved in the decision to raise the minimum threshold for competitive bidding to \$50,000. (2016 DDE 5 n.2; Tr. 376.)

Equipment Manufacturer (“OEM”), which represents the company that produces the requisitioned part or equipment, and prior purchase history. (2016 DDE 5; Tr. 69-73.) Buyers solicit bids from the OEM or other Company-authorized distributors and must obtain approval to use a new company. (2016 DDE 5; Tr. 56.) Buyers use EMPAC to search for all approved vendors and research prior purchase history rather than rely on memory. (2017 DDE 5; Tr. 69-73.)

Over the past decade or so, the competitive bidding process has changed. (2017 DDE 7; Tr. 81-83, 104, 325-26, 396-400.) What was once a more robust process has been gradually replaced with a less frequently used procedure that often includes only a “very narrow selection” of possible suppliers. (2017 DDE 7-8; Tr. 82.) Limited selection results from several factors. For instance, the material needed may limit the pool of potential supplies. (2017 DDE 7; Tr. 81.) For safety-related items, Buyers may only purchase from suppliers on a specific list created by particular departments or engineers. (2016 DDE 5; Tr. 81, 104.) Other items only have a single supplier so Buyers do not have the ability to competitively bid. (2017 DDE 7, 2016 DDE 5; Tr. 81, 375.) Additionally, various contracts that the Company has negotiated may restrict the pool of potential suppliers. (2017 DDE 7-8; Tr. 396-99.) In 2006, the Company began entering into alliance agreements covering “everything from gaskets to electrical purchases.” (Tr. 398.) The alliance agreements, which the Buyers adhere to but do not

negotiate, dictate particular suppliers that must be used. (2017 DDE 7-8; Tr. 399.) The age of the Company's nuclear plant number and its equipment also affects the number of available suppliers. (Tr. 398-99.) Many of the systems installed in the plant are 30 years old, and the suppliers who can provide necessary equipment has decreased. (Tr. 398.)

Buyer III, Tracy Beard, does very little bid solicitation because her area of focus involves items for which there is really only "one place." (Tr. 81, 104.) Beard estimates that competitive bidding accounted for only 10 per cent of the Company's total purchase orders. (Tr. 398.) Likewise, Buyer III, Sean Nelson, only uses the competitive bidding process a few times per month. (Tr. 166.) Buyer III, Sandra Somerhalder, also testified that over the years, "competitive bidding has decreased," (Tr. 325), and the process is "mostly single source now." (Tr. 375.) And retired Lead Buyer Betty Sayler testified that her competitive bidding was "limited" because she was "stuck with an OEM rather than having options to go out for competitive bid." (Tr. 196.)

For those requisitions in excess of \$50,000 that have more than one possible supplier, the Buyer compiles the list of potential suppliers and generates a request for quotation using EMPAC. (2016 DDE 5; UX2.) EMPAC automatically tailors the bid solicitation information to match the requisition and inserts relevant purchasing clauses in the requests for quotation. (2016 DDE 6-7, 2017 DDE 4-5;

Tr. 73, 361-62, UX6.) For example, if the requisition provides for expedited handling or delivery, EMPAC will include that clause in the request for quotation. (2017 DDE 4-5, 2016 DDE 6-7; Tr. 73, 361-62, UX6.) The Buyer includes a bid due date that depends on the requested dates in the original requisition. (2016 DDE 6; Tr. 114, 124.)

D. Buyers Evaluate Bids from Suppliers and Make Selections Based on Cost and Availability; Consult with Requesting Department if a Potential Supplier Requests an Exception; and Complete Purchasing Orders Consistent with Procurement Guidelines and Approved Spending Authority

Potential suppliers offer bids in response to the request for quotation, and Buyers enter the responses into EMPAC. (2017 DDE 3, 2016 DDE 6; UX3, UX6.) EMPAC then generates a bid analysis. (2016 DDE 6; Tr. 184.) According to Lead Buyer Sayler, “automatically, [EMPAC]’s going to calculate low bidder, it’s going to give me FOB [shipping] terms and it’s going to give me payment terms.” (Tr. 184.) Generally, Buyers select the lowest bid within the approved spending amount absent “an overriding consideration.” (2017 DDE 9, 2016 DDE 6; Tr. 85, 167, UX3.) The most common reason for rejecting the lowest bid is the need for the item sooner than that supplier can provide. (Tr. 85, 167.) In making bid determinations, Buyers rely on experience, training, knowledge, peer advice, and certifications. (2016 DDE 6; Tr. 109, 131, 154.) Buyers must document any purchases that are not awarded to the lowest bidder. (2016 DDE 6; UX2.)

In those situations where a bid exceeds the approved amount, Buyers must obtain additional funding approval from the originating requisitioner. There is an exception to this rule if the bid amount exceeds the approved amount by less than \$1000 per line item. In these instances, Buyers are authorized to make the purchase. (2016 DDE 6-7; Tr. 101, 148-49, 197, UX3.)

If a potential supplier submits an exception to the request for quotation, meaning, the supplier is seeking a deviation from the items sought, the Buyer consults with the original requisitioner to determine whether the proposed change is acceptable. Exceptions can be as simple as a supplier proposing to provide blue notebooks instead of red, and Buyers typically, though are not required to, seek the approval of the original requisitioner in these instances. And exceptions can involve technical changes to equipment being sought, which require approval. Buyers do not have the authority to approve exceptions that alter technical requirements. (2016 DDE 6; Tr. 111-13, 118, 196, UX3.)

Once a supplier is selected, Buyers draft a purchasing order in EMPAC. EMPAC assists Buyers with entering all the appropriate information, including certain clauses or conditions that must be included. EMPAC also ensures that Buyers are reminded to obtain all necessary approvals and enter all necessary information by generating automatic pop-up dialog boxes as the Buyer completes the purchase order electronically. Buyers are responsible for arranging for

shipping of the materials and for ensuring that shipping costs are reasonably priced. Buyers must use shipping carriers pursuant to alliance agreements that the Company has negotiated. Throughout the procurement process, EMPAC interfaces with an online filing system and creates an audit trail documenting all changes to the requisition. (2017 DDE 4-5, 2016 DDE 6-7; Tr. 73, 120, 218, 168, 170-71, 188, 200, UX3, UX12.)

E. The Representation Proceeding

On January 28, 2016, the Union filed an election petition with the Board seeking to represent the Buyers, a four-person unit of the Company's employees. The Company objected, arguing that the May 4, 2000 unit-clarification decision, which found the Buyers to be managerial employees, barred the 2016 petition under the doctrine of preclusion. In other words, the Company argued that the Board's prior decision precluded the Union from trying to represent employees that the Board had already determined to be managers outside the scope of the Act's protection. Alternatively, the Company argued that the Board should dismiss the petition because its Buyers are managerial employees not covered by the Act.

On February 16, following a one-day hearing, the Board's Regional Director issued a Decision and Direction of Election rejecting the Company's preclusion and managerial status arguments. (2016 DDE.) The Regional Director reasoned that the 2000 decision was not final for purposes of preclusion and then concluded

on the merits that the Buyers are not managerial employees excluded from the Act's coverage. (2016 DDE 2-3, 12-13.) The Regional Director therefore directed an election, which the Board conducted on February 24. (2016 DDE 14.) The employees voted 3-1 in favor of union representation. (Tally of Ballots.) Accordingly, the Regional Director issued a Certification of Representative certifying the results. (D&O 2.) Thereafter, the Union requested that the Company meet and bargain with the Union and provide certain information regarding the Buyers' terms and conditions of employment, including salary and seniority. (D&O 2.) The Company refused. (D&O 2.)

On March 1, the Company requested that the Board review the Regional Director's Decision and Direction of Election. (Req. Rev. 1-29.) The Board (Acting Chairman Miscimarra and Member McFerran; Member Pearce dissenting) granted that request in part with respect to the Company's claim that the preclusion doctrine mandated dismissal of the 2016 petition. *Wolf Creek Nuclear Op. Corp.*, 365 NLRB No. 55, 2017 WL 1330299 (Apr. 7, 2017) ("Remand D&O."). The Board determined that the Regional Director improperly concluded that the 2000 decision was not final, and therefore failed to consider in sufficient detail whether there were changed circumstances since 2000 with respect to the Buyers' managerial status. (Remand D&O 1.) The Board held "there must be an affirmative finding of material changed circumstances when an identical issue was

decided in an earlier proceeding involving the same parties.” (Remand D&O 3.) Accordingly, the Board remanded the case to the Regional Director to “consider whether changed circumstances warrant declining to give the 2000 decision preclusive effect and to issue an appropriate supplemental decision.” (Remand D&O 3.)

Consistent with the Board’s remand, the Regional Director exercised his discretion and reopened the record to take additional evidence. (D&O 1 n.1; BX1e.) A hearing was held on April 25, 2017, where the parties presented evidence as to whether the Buyers’ jobs had materially changed since the 2000 decision. (D&O 1 n.1.) On May 9, the Regional Director issued a supplemental decision determining that material changed circumstances warranted reconsideration of the Buyers’ managerial status and that the Buyers are not managerial employees. (2017 DDE.)

On October 27, the Board (Chairman Miscimarra and Members Pearce and McFerran) denied the Company’s request for review of the supplemental decision. (Denial Req. Rev. 1-2.) In agreeing with the Regional Director’s decision not to give preclusive effect to the 2000 decision, the Board particularly noted that the Company’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.” (Denial Req. Rev. 1 n.1.) That “material[ly]

differentiating fact,” explained the Board, was “more than sufficient to meet the [Union’s] burden and warrant relitigation.”³ (Denial Req. Rev. 1 n.1.) On October 30, the Union renewed its request to bargain, and the Company continued its refusal to recognize the Union. (MSJ GCX15.)⁴

F. The Unfair-Labor-Practice Proceeding

On November 28, the Board’s General Counsel issued a complaint, based on a charge filed by the Union, alleging that the Company’s refusal to bargain and to furnish relevant information violated Section 8(a)(5) and (1) of the Act. (D&O 1; Compl. 1-5.) In its answer, the Company admitted its refusal to bargain but denied that the refusal was unlawful, contending that the 2000 decision precludes consideration of the Buyers’ managerial status and, alternatively, that the Buyers are managerial employees and thus the Union was not properly certified as their representative. (D&O 1; Ans. 1-3.) On December 20, the General Counsel filed a motion for summary judgment with the Board. (D&O 1; MSJ 1-11.) The Board issued an order transferring the case to itself and directed the Company to show cause why the motion should not be granted. (D&O 1.) The Company filed a response. (D&O 1; Co. Resp. 1-6.)

³ Chairman Miscimarra agreed that reduced competitive bidding amounted to material changed circumstances warranting review of the prior decision, but did not rely on any changes related to EMPAC. (Denial Req. Rev. 1 n.1.)

⁴ “MSJ” refers to the General Counsel’s Motion for Summary Judgment, and “GCX” refers to the General Counsel’s exhibits attached to the motion.

II. THE BOARD'S CONCLUSIONS AND ORDER

On March 23, 2018, the Board (then-Chairman Kaplan and Members Pearce and McFerran) issued a Decision and Order granting the General Counsel's motion for summary judgment. (D&O 1.) The Board found that all representation issues raised by the Company were or could have been litigated in the representation proceeding, and that the Company did not offer to adduce any newly discovered and previously unavailable evidence, or allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. (D&O 1.) Accordingly, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union and by failing and refusing to furnish it with requested information. (D&O 1.)

The Board ordered the Company to cease and desist from the unfair labor practices found, and, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 (29 U.S.C. § 157). (D&O 3.) Affirmatively, the Board's Order requires the Company to, on request, bargain with the Union, provide the requested information, and physically and electronically post a remedial notice. (D&O 3.)

SUMMARY OF ARGUMENT

The Company does not dispute that it refused to bargain with the Union or provide it with requested information. Rather, it challenges the validity of the Board's certification of the Union as the Buyers' collective-bargaining representative. In doing so, it contends that the unit-clarification decision, issued almost 20 years ago and finding that Buyers were managerial, precludes the Board from reconsidering that status. Alternatively, the Company claims that the Board wrongly found that it failed to meet its burden of establishing that its Buyers are managerial employees.

Substantial evidence supports the Board's finding that the Union carried its non-onerous burden to show that there have been material changed circumstances in the Buyers' duties to warrant a fresh look at their managerial status. Since 2000, the year of the prior representation decision concerning the Company's Buyers, the Buyers' duties have undergone changes occasioned by technological improvements, a reduced need for both competitive bidding and substantive review of vendor bids, and a lesser role in evaluating vendor responses and awarding bids. EMPAC's enhanced functionality has dramatically altered their job duties inasmuch as EMPAC is now able to do much of the work for the Buyers. Further, an increase in single-source suppliers and alliance agreements, which designate a preferred vendor, has greatly diminished the frequency and need for Buyers to

perform either a competitive bidding process or a substantive review of supplier bids. And Buyers now customarily consult with other departments and managers to evaluate supplier responses and determine an award, which has diminished their role in this part of the procurement process. The Board properly determined that these changes constitute material changed circumstances such that the 2000 representation decision did not bar consideration of the Buyers' current managerial status.

Having decided the preclusion issue, the Board then evaluated whether, in fact, the Company carried its burden of demonstrating that Buyers are managerial employees. Substantial evidence supports the Board's finding that, although Buyers are skilled procurement experts who help ensure that the Company's nuclear power operation functions properly and with all the appropriate services and equipment, they are not managerial employees because they do not have sufficient discretion or independence, formulate management policy, or make operative decisions. Buyers operate only within well-defined employer policy and only with the approval of higher officials. Buyers ultimately complete purchase orders and commit the Company's funds, but their role in the procurement process is heavily circumscribed. For example, they receive requisitions with pre-approved spending authorizations that they cannot generally exceed; they often consult with others on selecting vendors; the vendor is often pre-determined based

on being a single supplier; where the vendor is not pre-determined, Buyers often must simply select the lowest bidder; and EMPAC automatically ensures compliance with procurement policies. Under these circumstances, the Board's determination that the Buyers do not have sufficient discretion or independence to be excluded from the Act's protections is amply supported by substantial evidence.

Likewise, the Company failed to show that the interests of the Company's Buyers are aligned with management. Indeed, there is no record evidence of any alignment. Buyers do not attend any higher-level management meetings, nor do they have any role, much less formulate, procurement policy; rather, they simply follow the guidelines that are given to them. The Board's determination that the Company's Buyers are not managerial employees is fully supported by substantial evidence.

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE COMPANY'S REFUSAL TO BARGAIN VIOLATED SECTION 8(a)(5) AND (a)(1) OF THE ACT

A. Due to Material Changed Circumstances, the 2000 Unit-Clarification Decision Did Not Preclude the Union's 2016 Election Petition To Represent the Company's Buyers

1. Standard of Review

In determining that the 2000 unit-clarification decision, which found that the Company's Buyers were managerial employees not subject to the Act's coverage, did not have preclusive effect over the underlying representation proceeding, the

Board found that the Union met its burden of showing that there were material changed circumstances in the Buyers' job duties. This Court must uphold this finding if it is "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e). The Court's review is therefore narrow, *see NLRB v. Dillon Stores*, 643 F.2d 687, 690 (10th Cir. 1981), and the Court will accept the Board's factual findings unless it "cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." *Phelps Dodge Mining Co. v. NLRB*, 22 F.3d 1493, 1496 (10th Cir. 1994) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). The substantial evidence test "already gives the agency the benefit of the doubt, since it requires not the degree of evidence which satisfies the court that the requisite fact exists, but merely the degree that *could* satisfy a reasonable factfinder." *Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359, 377 (1998) (emphasis in original). Furthermore, the Court will not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera*, 340 U.S. at 488; *accord Webco Indus., Inc. v. NLRB*, 217 F.3d 1306, 1311 (10th Cir. 2000) ("If the Board has made a plausible inference from the evidence we may not overturn its findings, although if deciding the case *de novo* we might have made contrary

findings.”) (internal quotations and citations omitted). As we show below, substantial evidence supports the Board’s finding that the Union demonstrated material changed circumstances such that the Board’s earlier ruling regarding the managerial status of the Buyers did not have preclusive effect.

2. Representation Issues Decided in Prior Proceedings May Be Re-Litigated in a Subsequent Representation Proceeding if the Party Opposing Preclusion Demonstrates Material Changed Circumstances

As a general matter, the Board has held that a party may not re-litigate an identical issue that has been fully litigated and that was decided as an essential component of a prior decision. (Remand D&O 2); *see NLRB v. Donna-Lee Sportswear Co.*, 836 F.2d 31, 34 (1st Cir. 1978) (outlining the elements of issue preclusion). In its remand decision in the underlying representation case here, the Board recognized an exception, however, to its general rule against re-litigation. A prior representation decision will not be entitled to preclusive effect if the party opposing preclusion can show that material changes have occurred since the prior decision. (Remand D&O 3); *see Carry Cos. Of Ill.*, 310 NLRB 860, 860 (1993) (observing “changed circumstances” exception for re-litigation in representation cases); *Harvey’s Resort Hotel*, 271 NLRB 306, 306-07 (1984) (in context of unfair-labor-practice proceedings, preclusion applies unless there is evidence of changed circumstances).

The Board requires the party challenging preclusion to rely on more than the mere passage of time, but the burden to demonstrate changed circumstances “is not an onerous one.” (Remand D&O 3); *see Miller’s Ale House, Inc. v. Boynton Carolina Ale House*, 702 F.3d 1312, 1319 (11th Cir. 2012). Indeed, the Board observed that a party “need only point to one material differentiating fact in order to relitigate [a previously decided representation decision].” (Remand D&O 3 n.7) (internal quotations omitted) (citing *Miller’s Ale House*, 702 F.3d at 1319).⁵

3. Substantial Evidence Supports the Board’s Finding of Material Changed Circumstances

The Board found that during the 2000 unit-clarification proceeding, the parties undoubtedly fully litigated the issue of whether Buyers met the legal definition of managerial employees and the Board issued a final decision on that issue—the very same issue in dispute in the underlying representation case. (Remand D&O 3.) As such, the Board then considered whether the Union had carried its burden to demonstrate material changed circumstances since the prior 2000 decision finding that the Company’s Buyers were managerial employees. The Board’s determination that the Union met this non-onerous burden is fully supported by substantial evidence.

⁵ The Company erroneously states (Br. 21) that *the Board* must prove a substantial change in circumstances. But, the burden of proof is on the party opposing preclusion, here, the Union. And the party opposing preclusion must show *material* changed circumstances, not substantial. (Br. 21, 22, 29, 38.)

The Board found (2017 DDE 8) that the Union had established the existence of at least three changes since 2000 concerning the Buyers' job duties: changes occasioned by technological improvements, reduced competitive bidding and review of price quotes, and less involvement in evaluating responses from suppliers and awarding bids. These changes affected Buyers' discretion, diminished their role in the procurement process, and created "material differences between their current job responsibilities and those they had in 2000." (D&O 6-8.)

With regard to technological improvements, the Board recognized (2017 DDE 6) that these changes alone will not establish a material change in a job classification; *see The Sun*, 329 NLRB 854, 861 (1991) (technology did not fundamentally change nature of certain duties); *United Techs. Corp.*, 287 NLRB 198, 204 (1987) (technological changes that resulted only in increased efficiency and accuracy do not trigger a bargaining obligation); however, EMPAC has done more than simply automate certain functions. Rather, the Board found that EMPAC has dramatically, albeit incrementally, altered how Buyers perform their job.

Indeed, as the Board found, "changes to the EMPAC system, largely a result of technical innovation, have fundamentally limited the [B]uyers' discretion." (2017 DDE 6.) For example, "information that was once available only in the mind of a seasoned [B]uyer or maintained in hardcopy form is now not only easily,

but automatically accessible on a [B]uyer's desktop, as well as to managers and other employees in the requisition and procurement process.” (2017 DDE 7.)

Further, Buyers are no longer “required to memorize[] or physically review[] the [Company's] procurement policies” because EMPAC will automatically generate “pop-up warnings reminding buyers when they need authorization for a particular procurement and assist[] them in including necessary clauses in a [request for quotation] or purchase order.” (2017 DDE 7.) EMPAC also automatically calculates and generates bid lists such that Buyers simply select the lowest cost vendor. (2017 DDE 7.) As the Board found, “[i]n several respects, EMPAC actually performs the functions for which [B]uyers were previously independently responsible.” (2017 DDE 7.)

Testimony from the Buyers aptly describes the changes EMPAC has had on their duties. Lead Buyer Sayler testified that EMPAC's current functionality is “night and day” from what it was at its inception. (Tr. 186.) And Buyer Nelson described his role as simply having EMPAC “kick out” all necessary documents, and the Buyer then just needing to “go in and clean it up, correct the spacing or whatever, and then send it out.” (Tr. 168.) Such testimony is strong support for the Board's determination that the Buyers' role “as one of the final gatekeepers in the procurement process has been diminished” as EMPAC functionality has increased and improved. (2017 DDE 7.)

The Board also relied on (2017 DDE 7) changes in the competitive bidding process as evidence of material changed circumstances. Substantial evidence supports the Board's finding that, "progressive changes to [the Company's] 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." (Denial Req. Rev. 1 n.1.) Buyers uniformly testified without contradiction that, for various reasons, they no longer engage in the competitive bidding process and meaningful price-quote evaluation. The evidence also established that Buyers often lack any choice of supplier, for several reasons, including the highly technical nature of the equipment needed and the age of parts and equipment that the Company's 30-year old plant needs. (2017 DDE 7-8.) Additionally, the Company has negotiated alliance agreements to obtain goods and services from designated vendors. Buyers have no role in negotiating these agreements or evaluating whether certain materials meet the Company's engineering specifications. (2017 DDE 8.) Because of these agreements, "in many instances a [B]uyer simply has no other alternative than to purchase materials or equipment from a single supplier because it is the only approved source." (2017 DDE 7.) Indeed, Beard, one of the Company's Buyers, pegged the competitive bidding process as representing only 10 percent of the Company's *total* purchase orders. According to the Board,

reduced involvement in the competitive bidding process is a “materially differentiating fact [that] is more than sufficient to meet the [Union’s] burden and warrant relitigation.” (Denial Req. Rev. 1 n.1.)

Relatedly, the Board also found (2017 DDE 8) that the Buyers’ role in evaluating bids has changed since 2000. Today, Buyers no longer exercise much independence in selecting a supplier. (2017 DDE 8.) For one, there is no bid evaluation where there is a single source. Further, where more than one bid is provided, Buyers simply evaluate cost and select, with limited exception, the lowest bidder. (2016 DDE 3.) When Buyers engage in more substantive evaluation, they do not do so independently but rather in connection and consultation with other departments and managers. (2017 DDE 8; Tr. 118, 329, 400.)

Having considered all these changes, the Board determined that the Union had shown “material differences between the Buyers’ current job responsibilities and those they had in 2000.” (2017 DDE 8.) While the Buyers’ core function, preparing and issuing purchase orders, may have remained static since 2000, the Board found that “there has been a sufficient material change in the manner in which they perform those duties to warrant reconsideration of their managerial status.” (2017 DDE 8.) Given the minimal showing required to avoid the

preclusive effect of a prior representation decision, the Board's conclusion here is fully supported by substantial evidence.

4. The Company's Challenges Are Without Merit

The Company challenges the Board's factual findings but fails to show that those findings lack the support of substantial evidence in the record. The Company also cites to inapposite precedent that does not support a finding of managerial status, and in doing so, misstates the burden of proof. As we show below, none of the Company's arguments is persuasive.

As a preliminary matter, we note that the Company invokes (Br. 29) the wrong standard for Board review. Specifically, citing *Pittsburgh Plate Glass Co. v. NLRB*, the Company claims that in order to vitiate the preclusive effect of the prior representation decision, the Union must show "a change in circumstances that was not available during the first proceeding or that other special circumstances existed warranting reconsideration." 313 U.S. 146, 162 (1941). But the standard announced in *Pittsburgh Plate* addresses when the Board will review issues during an unfair-labor-practice proceeding that could have been raised in an earlier, related representation case. That standard has nothing to do with the preclusion doctrine. That is to say, *Pittsburgh Plate* does not govern this case. Here, there is a different rule with an entirely different purpose. In this case, the Board decided when to give preclusive effect of a representation decision to a subsequent

representation proceeding involving the same parties and the same issue. Under these circumstances, the Board has determined that a showing of material changed circumstances warrants denying preclusive effect.

In the face of the specific and detailed factual findings concerning how the Buyers' job has evolved since 2000 (pp. 6-12), the Company cannot credibly claim (Br. 38) that there is no evidence to show material changed circumstances. The Company does not seriously contest that EMPAC has changed the Buyers' role, but argues instead (Br. 25-26) that Buyers still have discretion. However, in finding that the Union showed material changed circumstances, in part, because EMPAC altered how Buyers perform their job, the Board found that Buyer discretion was diminished and not, as the Company asserts (Br. 25, 26), eliminated altogether.

The Company also fails in its attempt to minimize the changes that EMPAC brought to the Buyers' role. Thus, the Company misses the mark with its claim (Br. 25) that the pop-up screens, which warn Buyers of relevant guidelines, simply display rules that have always been in place. While these rules indeed existed before EMPAC, as described above (pp. 4-12), EMPAC's enhanced functionality makes the rules available to everyone and not just in the mind of the Buyer. This shared knowledge has diminished the Buyers' role. (2017 DDE 6-7.) And the Company's assertion (Br. 26) that EMPAC's automatic calculations are not a

material change ignores the Board's finding that "EMPAC actually performs the functions for which Buyers were previously independently responsible." (2017 DDE 7.)

The Company errantly claims (Br. 26-27) that the Board has misinterpreted the facts relating to the Buyers' role in competitive bidding. The Company admits, however, that "the number of purchases subject to competitive bidding has declined." (Br. 27.) The fact that Buyers still manage the vastly fewer number of competitive bids does not undermine the Board's determination that Buyers are simply not as engaged in this duty as they were in 2000. The Board properly considered whether a reduction, which the Company concedes, in a previously prominent duty that involved Buyer discretion leads to a finding of material changed circumstances such that reconsideration of a managerial status is warranted. And, as the Board found (Denial Req. Rev. 1 n.1) this change *alone* was sufficient to vitiate the preclusive effect of the 2000 unit-clarification decision.

Relatedly, the Company erroneously claims (Br. 27) that because Buyers are still involved in the request for quotation process, there can be no material changed circumstances. To be clear, the Board did not find that Buyers are now completely removed from the request for quotation process; rather, the Board found that an increase in single-source suppliers and alliance agreements that designate a preferred supplier caused a decrease in the need for Buyers to submit requests for

quotation. And as such, the existence of a single, unique supplier has obviated the need for Buyers to evaluate bids. The Company ignores these express findings and their effect on Buyer duties. Further, the Company wrongly asserts (Br. 28) that only the manner in which Buyers perform their work has changed.⁶ With respect to competitive bidding and reviewing bids, it is not simply *how* Buyers conduct these functions, but whether they conduct them at all. The Board relied on undisputed evidence that these functions have been reduced since 2000, for several reasons.

The Company's detailed list of the steps in the procurement process (Br. 30-37) does nothing to undermine the substantial evidence in the record showing that the Union demonstrated material changed circumstances. Indeed, many of the "duties" in the list are not Buyer duties at all.⁷ Other items in the list are merely broad, general statements of Buyer duties and supervisory structure that do not reflect one way or the other whether there have been material changed

⁶ The Company misplaces its reliance (Br. 28) on *Good N' Fresh Foods*, 287 NLRB 1231 (1988), to support its claim that changes in the manner an employee performs tasks does not warrant reclassification. That case addressed the entirely different issue of whether a successor employer has incurred a bargaining obligation with the representative of its predecessor's employees—an inquiry that looks at whether the successor is continuing the predecessor's business without substantial change. *Id.* at 1233. It has no bearing on managerial status.

⁷ Items 3, 4, 5 (Br. 30); 6, 7, 8 (Br. 31); 17 (Br. 33); 25, and 26 (Br. 35).

circumstances.⁸ Several of the remaining items in the list represent Buyer duties, but fail to account for changes that have occurred with respect to those duties since 2000. For example, Items 9-15 (Br. 31-33) relate to whether a Buyer will competitively bid a requisition. As discussed above (pp. 7-10), an increase in single-source suppliers and alliance agreements and other factors have greatly reduced whether Buyers will competitively bid a requisition. So, while these items accurately recount the competitive bidding process, that process is now associated with only 10 percent of all purchase orders issued by Buyers. The bulleted list fails to address or consider changes in the competitive bidding process since 2000.⁹ The vast majority of the remaining items reflect duties that, while perhaps unchanged from 2000, the Board did not rely on for finding material changed circumstances.¹⁰

⁸ Items 1, 2 (Br. 30); 16 (Br. 33); 21 (Br. 34); and 31 (Br. 36).

⁹ Likewise, Items 19, 20, and 22 (Br. 34) fail to account for EMPAC's role in this part of the process. Given EMPAC's enhancements, the Buyers' responsibility with respect to bid evaluation has been reduced. *See* pp. 10-12.

¹⁰ Items 23, 24, 27, 28 (Br. 35); 29, 30, and 34 (Br. 36). The last two items (Items 32 and 33) are misleading. There is no evidence in the record that Buyers "negotiate the purchase price for goods and services." (Br. 36; Item 32.) Rather, Buyers engage in the competitive bid process to varying degrees and frequency, and as noted, they do not negotiate the alliance agreements. Further, Buyers only complete purchase orders within the prescribed spending limits that have been set and approved by higher-level management at the beginning of the procurement process. (Br. 36; Item 33.)

The Company relies on (Br. 23-25) inapposite cases to argue that neither changes in the manner in which employees perform their jobs nor technological advances provide a basis for a change in managerial status. Notably, none of the cases cited by the Company involve the issue presented in this case: whether a party opposing preclusion has overcome the non-onerous burden of showing material changed circumstances such that a fresh review of a position's managerial status is warranted.

The Company makes the broad and overreaching claim that technological innovation will not justify a managerial reclassification if that innovation results only in increased efficiency, and that, instead, the innovation must be so significant that "the position no longer exists." (Br. 24-25.) But the cases relied upon by the Company for this far-reaching principle do not support its claim and do not address the effect of technological changes on managerial status. Instead, these cases address a wide range of issues, from unit accretion to unilateral layoffs—all of which involve an analysis entirely separate and distinct from a determination of whether material changes have occurred so as to warrant reconsideration of managerial status. Therefore, none of the Company's cited cases compels a different outcome in this case. *See, e.g., Teamsters United Parcel Serv.*, 346 NLRB 484 (2006) (considering whether a union had violated the Act by accreting certain employees into the unit without first making a majority showing of

interest); *John P. Scripps Newspaper Corp.*, 329 NLRB 854 (1999) (evaluating whether new employees perform sufficiently similar work to an existing unit such that they should be included in that unit); *Winchell Co.*, 315 NLRB 526, *enforced*, 74 F.3d 1227 (3d Cir. 1995) (examining whether unilateral layoffs arose due to changes in the employers' "scope and direction"); *Leach Corp.*, 312 NLRB 990 (1993), *enforced*, 54 F.3d 802 (D.C. Cir. 1995) (considering whether a new facility was the same operation such that an existing collective-bargaining agreement remained in effect); *United Techs. Corp.*, 287 NLRB 198, 204 (1987), *enforced*, 884 F.2d 1569 (2d Cir. 1989) (analyzing an employer's refusal to bargain over the elimination of one job and replacing that position with non-union personnel).¹¹

These cases shed no light on whether the Union here met its burden to show material changed circumstances such that the Board could consider managerial status anew.

In sum, the Company relies on facts and cases that have no bearing on the ultimate issue to be decided and do not defeat the Board's finding that the Union carried its non-onerous burden to show that the Buyers' duties have undergone material changed circumstances since 2000. The Company has failed to show that

¹¹ The Company also relies on (Br. 37) *United Technologies* and *John P. Scripps* for the proposition that an increase in efficiency is insufficient "as a matter of law" to warrant a change in position classification. As shown above (pp. 32-33), neither of these cases addresses material changed circumstances warranting a fresh look at managerial status, and the Company thus overstates their holdings.

the Board's findings with respect to technological changes brought about by EMPAC, reductions in the frequency of competitive bidding and reviews of vendor bids, as well as diminished roles in bid evaluation and award are unsupported by substantial evidence. Therefore, the Board's finding of non-preclusion is eminently reasonable.

B. The Company's Buyers Are Not Managerial Employees

Section 8(a)(5) and (1) of the Act prohibit an employer from refusing to bargain collectively with the representative of its employees.¹² The Company admits (Br. 6, 9, 10) that it has refused to bargain with the Union. Nevertheless, it asserts that its refusal does not violate Section 8(a)(5) and (1) of the Act because its Buyers are managerial employees excluded from the Act's coverage. Substantial evidence supports the Board's finding that the Company failed to prove that Buyers are managerial.

1. Applicable Principles and Standard of Review

The Board has been given the primary task of defining which workers qualify as employees covered by the Act's protections. *See NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 130 (1944). Indeed, the "difficult problems" inherent

¹² A violation of Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the[ir] statutory rights," is "derivative" of a violation of Section 8(a)(5) of the Act. *See Met. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

in determining whether an individual is an “employee” within the meaning of the Act are “precisely of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole.” *Local No. 207, Int’l Ass’n of Bridge, Structural & Ornamental Iron Workers Union v. Perko*, 373 U.S. 701, 706 (1963) (internal quotation omitted); accord *Presbyterian/St. Luke’s Med. Ctr. v. NLRB*, 723 F. 2d 1468, 1471 (10th Cir. 1993). Therefore, deference to the Board’s determination of which workers are employees covered by the Act is warranted because it is a matter within the Board’s special expertise. *Local No. 207, Iron Workers v. Perko*, 373 U.S. 701, 706 (1963); accord *Loretto Heights Coll. v. NLRB*, 742 F.2d 1245, 1255 (10th Cir. 1984).

The Board makes a “factually based assessment” when resolving a claim of managerial status. *David Wolcott Kendall Mem’l School v. NLRB*, 866 F.2d 157, 160 (6th Cir. 1989); *NLRB v. Cooper Union for the Advancement of Science & Art*, 783 F.2d 29, 31 (2d Cir. 1986) (managerial status involves an “intensive fact-based” analysis). As discussed above, this Court upholds the Board’s determination of an employee’s status if the Board’s decision is supported by substantial evidence, see *Hearst Publ’ns*, 322 U.S. at 131, and will not “displace the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera*, 340 U.S. at 488. Consistent with assertions of other

exclusions from the Act, the party claiming managerial status bears the burden of showing that the workers in question are excluded from the Act's coverage. *See, e.g., NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 711-12 (2001) (party claiming supervisory status had burden of proof). To meet this burden, the party must support its claim with specific examples based on record evidence. *See Oil, Chem. & Atomic Workers Int'l Union v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971).

2. Managerial Employees Are Excluded from the Act's Coverage

The Act covers all workers who meet its definition of "employee." *See* Section 2(3) of the Act (29 U.S.C. § 152(3)). The Supreme Court has observed that the term "employee" is strikingly broad, and that it generally includes "any person who works for another in return for financial or other compensation." *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 90 (1995) (internal marks omitted); *see* 29 U.S.C. § 152(3) ("The term 'employee' shall include any employee . . ."). Moreover, the Supreme Court has cautioned "that [the Board] and reviewing courts must take care to assure that exemptions from [the Act's] coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach." *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996) (interpreting the Act's exclusion for agricultural laborers).

Although the Act excludes several categories of workers from the definition of “employee,” it does not expressly exclude “managerial employees.”¹³ The Supreme Court has, however, agreed with the Board that such individuals fall outside the protection of the Act. *See NLRB v. Bell Aerospace Co., Div. of Textron, Inc.*, 416 U.S. 267, 274-75 (1974). As the Supreme Court observed, Congress, in passing the Act, was “concerned . . . with the welfare of “workers” and “wage earners,” not of the boss,” nor other individuals “clearly within the managerial hierarchy.” *Id.* at 281-82 (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess., 13 (1947)). The Court recounted that “[a]mong those mentioned as impliedly excluded were persons working in ‘labor relations, personnel and employment departments,’ and ‘confidential employees,’” as well as “other employees, much higher in the managerial structure, who were likewise regarded as so clearly outside the Act that no specific exclusionary provision was thought necessary.” *Bell Aerospace*, 416 U.S. at 283. Moreover, as the Supreme Court explained in *NLRB v. Yeshiva University*, Congress wanted “rank-and-file employees” to be able to select their leaders freely without the undue influence of supervisors and managers. 444 U.S. 672, 694-95 (1980). And Congress sought to protect employers’ right to the “undivided loyalty” of supervisors and managers

¹³ For example, the Act excludes supervisors, independent contractors, agricultural laborers, certain domestic workers, individuals employed by a parent or spouse, or individuals working for an employer that is subject to the Railway Labor Act (45 U.S.C. §§ 151, et seq.). *See* 29 U.S.C. § 152(3) and (11).

and to guard against interference with their ability to discipline and control bargaining-unit employees. *Id.* at 695.

The Supreme Court adopted the Board's standard that managerial employees are those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." *Bell Aerospace*, 416 U.S. at 288 (quoting *Palace Laundry Dry Cleaning Corp.*, 75 NLRB 320, 323 n.4 (1947)); accord *Loretto Heights*, 742 F.2d at 1246; *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1550 (D.C. Cir. 1984). Therefore, "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." *Yeshiva Univ.*, 444 U.S. at 683; accord *Loretto Heights*, 742 F.2d at 1247. In exercising that discretion, managerial employees must do so "within, or even independently of, established employer policy and must be aligned with management." *Yeshiva Univ.*, 444 U.S. at 683; accord *Loretto Heights*, 742 F.2d at 1247. As the Supreme Court has noted, the Board properly excludes as managerial employees "those who have discretion in the performance of their jobs, but not if the discretion must conform to an employer's established policy." *Bell Aerospace*, 416 U.S. at 288 n.16 (citations omitted); accord *Loretto Heights*, 742 F.2d at 1247 ("[E]mployees whose decision making is limited to the routine discharge of professional duties in projects to which they have been assigned

cannot be excluded from coverage even if union membership arguably may involve some divided loyalty.”) (quoting *Yeshiva Univ.*, 444 U.S. at 690).

The question of whether particular employees are managerial must be answered on a case-by-case basis by examining their “actual job responsibilities, authority, and relationship to management.” *Bell Aerospace*, 416 at 290 n.19; *accord Noranda Aluminum, Inc. v. NLRB*, 751 F.2d 268, 269 (8th Cir. 1984). In making this factual assessment, the Board must examine the nature and overall structure of the employer’s business and the role of asserted managerial employees in its operation. *See Loretto Heights*, 742 F.2d at 1248. Because the managerial employee exclusion is an implied, rather than express, exemption from the Act’s coverage, “the exception must be narrowly construed to avoid conflict with the broad language of the Act.” *David Wolcott*, 866 F.2d at 160.

3. Substantial Evidence Supports the Board’s Finding that the Company Failed To Show that Buyers Are Managerial Employees

The record supports the Board’s finding that the Company failed to show that Buyers are managerial employees. Though it is evident that Buyers are technical experts who play an important role in ensuring that the Company’s nuclear power facility has the equipment and repair services needed, they do not “formulate and effectuate management policies by expressing and making operative the decisions of their employer.” *Bell Aerospace*, 416 U.S. at 288. In

short, Buyers lack the requisite discretion and independence, and their interests are not sufficiently aligned with management to render them managerial employees. Buyers exercise discretion only within pre-determined guidelines and regulations that they must adhere to during the procurement process and do not take any actions that implement or control employer policy. As such, they are not excluded from the Act's coverage.

a. The Company's Buyers lack the requisite discretion and independence

A determination of managerial status depends on the extent of an employee's discretion. *See Bell Aerospace*, 416 U.S. at 283. If that discretion is exercised within largely predetermined policies, a finding of managerial status is unwarranted. *See Washington Post*, 254 NLRB 168, 189 (1981); *Kitsap Cnty. Auto. Dealers Assn.*, 124 NLRB 933, 934 (1959).

Board precedent makes clear that buyers and other employees with purchasing authority are not necessarily managerial employees. *See, e.g., Washington Post Co.*, 254 NLRB at 189 (assistant purchasing manager is not managerial despite ability to commit employer to purchasing stock items because employee must conform to employer guidelines and occasionally seek approval); *Lockheed-California Co.*, 217 NLRB 573 (1975) (buyers of aerospace employer are not managerial despite their credit-committing function because established company policy and review power of higher authority circumscribed their

activities). That is to say, the authority to extend an employer's credit does not automatically confer managerial status. *See, e.g., Sampson Steel & Supply*, 289 NLRB 481, 482 (1988) (warehouse supervisor who could pledge employer's credit and who recommended purchase of large warehouse saws was not managerial, but only a knowledgeable employee, who did not formulate or effectuate employer policies); *Westinghouse Elec. Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970) (ability to pledge company's credit did not establish managerial status where engineers did not set policy or modify plans without higher approval). Managerial employees therefore must do more than recommend action or purchases; they must operate independent of the employer's consideration and approval. *See, e.g., Iowa S. Utils. Co.*, 207 NLRB 341, 345 (1973).

Here, substantial evidence supports the Board's finding that Buyers perform their jobs "within the confines of detailed policies." (2017 DDE 10.) The Board evaluated the Buyers' entire job cycle, from receipt of a requisition to completion of a purchase order, and properly found that their duties do not involve sufficient discretion and independence to exclude them from the Act as managerial employees. At the start of the Buyers' role in the procurement process, when they receive a requisition, the requisition has already received higher-level purchasing approval up to a certain dollar amount. At all times, Buyers must abide by the pre-

established spending limit, with limited exception.¹⁴ That is to say, all completed purchase orders must conform to the pre-approved dollar amount set by other company officials and independently of the Buyers. The evidence amply supports the Board's conclusion that this process cabins Buyer discretion and does not warrant a finding of managerial status. (2017 DDE 12); *see also Lockheed-California*, 217 NLRB at 575 (committing employer's funds did not render buyer managerial where task required coordination of established relationships with suppliers and buyer acted only within authority granted by higher-level officials).

Substantial evidence also supports the Board's finding that Buyers do not exercise managerial discretion when processing requisitions and creating requests for quotation. The evidence shows that although Buyers must competitively bid pre-approved requisitions above \$50,000, "their purchasing decisions are dictated by [company] policies and procedures, which rely heavily on the EMPAC system, past practice, and the Buyer's own technical experience, developed over time and with the [Company's] assistance." (2016 DDE 9.) For instance, EMPAC automatically generates a history of prior purchases and suppliers. And, as the Board found, Buyers "rely heavily on past practice to determine [to] which suppliers they should offer [requests for quotation], and, if they deviate from past practice, Buyers must provide a justification for such a departure." (2016 DDE

¹⁴ Buyers have the ability to increase funding by \$1000 per line item. (2016 DDE 10.)

10.) The Board found further that Buyers only “infrequently locate and select vendors without first consulting a manger or members of the department responsible for a requisition.” (2017 DDE 9.) Thus the Buyer’s tasks, circumscribed by policies, procedures, past practice and consultation with superiors, do not evidence the requisite degree of discretion.

In evaluating responses to requests for quotation, Buyers likewise play a limited role. The Board found that Buyers customarily consult with other departments and managers to identify a preferred supplier, rather than select a supplier independently. (2017 DDE 8.) Additionally, Buyers rely on their technical expertise and training in awarding bids, and according to the Board, “dependence on their own expertise, which the [Company] helps nurture through its willingness to help [B]uyers receive [] certifications, is simply not a sign of managerial status.” (2016 DDE 11); *see Case Corp.*, 304 NLRB 939, 948 (1991) (“[T]echnical expertise in administrative functions involving the exercise of judgment and discretion does not confer managerial status upon the performer.”), *enforced*, 995 F.2d 700 (7th Cir. 1993). For more routine and lower-cost purchases, the Board found that Buyers make decisions only within the Company’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.” (2017 DDE 9.); *see Washington Post*, 254 NLRB at 189 (non-

managerial assistant purchasing manager uses cost and department guidelines to select appropriate vendor). Moreover, oftentimes, due to an increase in single-source suppliers and alliance agreements negotiated by the Company that identify a preferred supplier, Buyers simply have “no other alternative than to purchase materials or equipment from a single supplier because it is the only approved source.” (2017 DDE 7.) Given these circumstances, the evidence more than amply supports the Board’s conclusion that any exercise of Buyer discretion with regard to vendor selection “takes place within the confines of [company] policy,” (2016 DDE 10), and that such heavily circumscribed conduct does not support a finding of managerial status. *See, e.g., Lockheed-California*, 217 NLRB at 575 (buyers’ activities are “circumscribed by varying degrees by the Employer’s established policy or by the review power placed in higher authority”); *Washington Post*, 254 NLRB at 189 (no managerial status where employee lacks “discretion and latitude for independent action” outside confines of employer’s directives).

EMPAC’s enhanced functionality likewise circumscribes Buyers’ discretion and independence throughout the procurement process. As Buyers process requisitions, create requests for quotation, and complete purchase orders, EMPAC carefully guides them through the Company’s stringent procurement policies “with automatic pop-up warnings reminding [B]uyers when they need authorization for a particular procurement and assisting them in including necessary clauses.” (2017

DDE 7). Buyers no longer have to commit procurement policies to memory or review written manuals because these policies are built into EMPAC. (2017 DDE 7.) Further, the Board found (2017 DDE 7) that during bid evaluations, EMPAC calculates bids and shipping terms. Substantial evidence therefore supports the Board's conclusion that EMPAC's functional evolution has reduced Buyer independence and discretion, and a system that was once "bare bones" now "does most of the work for [the Buyers]." (Tr. 74.)

In sum, there is substantial evidence to support the Board's conclusion that the Company failed to prove that Buyers exercise the requisite discretion and independence to render them managerial employees. Buyers are certainly highly skilled, but the evidence overwhelmingly establishes that Buyers act within prescribed limits under procurement policies determined and directed by higher officials and only with approval of superior authority. Accordingly, the Board properly concluded that Buyers are not managerial employees excluded from the Act's coverage. *See Iowa S. Utils. Co.*, 207 NLRB at 345.

b. The Buyers' interests are not sufficiently aligned with management to render them managerial employees inasmuch as they have no involvement with development or implementation of company policies

The Board found that there was "no evidence" in the record to show that Buyers "represent management interest by taking or recommending discretionary actions that effectively control or implement employer policy' or that [their]

interests align with management.” 2016 DDE 11 (quoting *Yeshiva Univ.*, 444 U.S. at 683). The Board relied on (2016 DDE 12) the fact that the Company’s Buyers do not have discretion to initiate a requisition, do not attend high-level management meetings, and do not provide input into changes to the procurement process. *See Concepts & Designs*, 318 NLRB at 957 (employee’s interest aligned with management due to unreviewed discretion, attendance at and participation in high-level meetings, ability to determine when to order goods, and unaccompanied representation at meetings with vendors). With respect to involvement in policy changes, the Board observed (2016 DDE 12) that the Company did not consult with the Buyers before increasing both the minimum value of goods that required a competitive bidding process and the amount under which buyers do not need to obtain approval per line item. As the Board found, “the evidence shows that Buyers were told of the changes after the increases had already been implemented.” (2016 DDE 12.)

In light of these findings, the Company cannot credibly claim that the Board ignored “overwhelming evidence” (Br. 56) showing alignment with management’s interests. The Company’s conclusory statement (Br. 56) about Buyer duties does not make it so and overstates the Buyers’ role, minimizes the oversight cabining their discretion, and does not evidence any alignment with management interests. Buyers perform their jobs within prescribed policies, which they neither develop

nor implement. *See NLRB v. Case Corp.*, 995 F.2d 700, 703 (7th Cir. 1993) (employee must be “substantially involved” in employer’s labor policies and formulate and effectuate employer policies to be considered managerial).

4. The Company’s Remaining Challenges Are Without Merit

The Company’s spills much ink (Br. 40-44) asserting that Buyers’ managerial status is “controlled” by *Concepts & Designs, Inc.*, 318 NLRB 948 (1995). At the outset, it bears noting that in its denial of the Company’s request for review, the Board observed that reliance on *Concepts & Designs* is misplaced because the Board in that case never considered the issue of managerial status. (Denial Req. Rev. 1 n.1.) Rather, the employer, who urged managerial status for the purchasing/inventory controller, prevailed on that issue before the judge, and the Union did not file exceptions with the Board. (Denial Req. Rev. 1 n.1); *see Concepts & Designs*, 318 NLRB at 948 (noting that only the employer filed exceptions). As such, that part of *Concepts & Designs* is not binding Board precedent. *See, e.g., Ohio Edison Co.*, 2014 WL 204210, at *2 (NLRB Jan. 17, 2014) (“It is settled Board policy that review of an administrative law judge’s decision is limited to the issues raised by exceptions and that in the absence of exceptions, the Board does not pass on an administrative law judge’s rationale, *FES*, 333 NLRB 66 (2001).”).

In any event, *Concepts & Designs* is readily distinguishable from the present case. The administrative law judge in that case relied predominantly on the employee's purchasing authority, which she exercised with "unreviewed discretion." *Concepts & Designs*, 318 NLRB at 957. The employee had discretion to select, locate, and change vendors; evaluate the quality of parts and supplies; implement purchasing objectives related to anticipated production needs and unusual purchase needs; and represent the company at meetings with vendors. *Id.* Additionally, the employee in question was the only non-supervisor who regularly attended the weekly meetings to discuss, among other matters, purchase needs. *Id.* In concluding that she was a managerial employee, the judge again emphasized the employee's unreviewed discretion in conducting non-routine duties. *Id.*

These characteristics clearly put the employee in *Concepts & Designs* on dramatically different footing than the Buyers here. Foremost, the absence of similar discretion with respect to the Company's Buyers is the primary distinguishing factor. As has been repeatedly underscored, Buyers here only act within authority granted to them by higher-level officials. This type of cabined discretion stands in stark contrast to the *unreviewed* discretion of the employee in *Concepts & Designs*.

The Company wrongly asserts (Br. 43-44, 48) that precedent shows that the Board consistently finds similarly-situated employees to be managerial employees.

The cases cited by the Company offer little guidance on similarly-situated employees inasmuch as there is no analysis beyond a few summary sentences. *Kearney & Trecker Corp.*, 121 NLRB 817, 822 (1958) (three-sentence summary conclusion that buyers are managerial employees with no discussion of discretion or alignment with management); *Mack Trucks, Inc.*, 116 NLRB 1576, 1578 (1956) (four-sentence summary conclusion that buyers are managerial employees with no discussion of whether buyers act within prescribed guidelines or subject to oversight); *Titeflex, Inc.*, 103 NLRB 223, 225 (1953) (four-sentence summary conclusion that buyers are managerial employees because they had “final authority” and discretion to choose any vendor, without mention of whether any purchasing decisions were subject to review).¹⁵

The Company likewise goes to great lengths (Br. 45-47) attempting to distinguish *Lockheed-California* on the ground that buyers in that case were subjected to greater oversight than the Company’s Buyers. The Company is wrong. Nothing in that case demonstrates that the *Lockheed-California* buyers had more oversight. Rather, the oversight is merely occasioned at different points. The buyers in *Lockheed-California* have their individual procurement actions

¹⁵ In its Denial of the Company’s request to review the Decision and Direction of Election, the Board expressly stated that it was not relying on *Solartec, Inc.*, 352 NLRB 331 (2008), *enforced*, 310 Fed. App’x 829 (6th Cir. 2009), because that decision was issued by a two-member Board. (Denial Req. Rev. 1 n.1.) The Company’s discussion, therefore, of that case is misplaced. (Br. 47-48.)

reviewed and approved as they complete the process, including review of vendor selection. 217 NLRB at 574. Here, the Company's exacting guidelines and strict authorization policies obviate the need for independent approval of vendor selection – the rigorous, upfront restrictions ensure that the ultimate selection meets with the Company's approval. The relevant comparison between *Lockheed-California* and the present case remains: buyers in both cases are similarly without discretion and independence because neither can complete a purchase order absent management approval.

The Company tries (Br. 45) to distinguish *Lockheed-California* by highlighting differing educational requirements between the two sets of buyers. The Company does not explain, however, the significance of this difference. Nor does the Company explain why an authorization based on an estimated cost, as opposed to a prescribed set amount, affects any consideration of discretion. (Br. 46.) Whether the spending authority is based on an estimate or set amount, the buyer's purchasing authority is established by another individual, and the buyer cannot exceed that authority.

The Company continues its hyperbolic assault on the cases cited by the Board and argues that *Washington Post*, *Iowa Southern Utilities*, and other cases are “wholly dissimilar.” (Br. 49.) With respect to *Washington Post*, the Company attaches (Br. 49), without case support or explanation, significance to the fact that

its Buyers purchase goods and services for a nuclear power facility rather than a newspaper. In doing so, the Company ignores that the assistant purchasing manager in *Washington Post*, who was found not to be managerial, controlled a \$500,000 inventory. 254 NLRB at 189. The Company also invokes its frequent incantation that its Buyers act without “additional” approval in authorizing purchases (Br. 50) and make “the ultimate decision to acquire materials” (Br. 51), but neglects to clarify that Buyers act only within pre-approved authorized amounts. So, while “additional” approval is not required, that statement begs the more probative question—was initial approval required? The answer is an undeniable “yes.” Further, Buyers are not included in the company document listing which employees have the authority to commit company funds through their approval. (UX 14.) Likewise, to assert that Buyers have “ultimate” decision-making authority glosses over the fact that that authority is only exercised within the parameters and guidelines prescribed by higher-level officials and company policy.

Contrary to the Company’s claim (Br. 54), the Board did not ignore the annual savings that is attributable to the Buyers’ cost saving measures. The Board acknowledged the savings (2016 DDE 11), but determined that it was not determinative of managerial status. *See Case Corp.*, 304 NLRB at 948-49 (suggesting changes to increase efficiency and lower costs does not confer

managerial status, particularly when the recommendations are approved by higher levels of management).

Nor did the Board fail to accord appropriate weight to Buyer authority to commit the Company's funds. (Br. 52-55.) Once again, the Company minimizes or misrepresents the cabined discretion exercised by the Company's Buyers (Br. 52, 54) and ignores the critical fact that, while Buyers can spend up to \$250,000 and have extended \$21M of the Company's credit, they do so *only* "within the scope of the official purchasing policies and procedures." (2016 DDE 11.) The cases cited by the Company offer nothing but conclusory statements concerning the managerial status of buyers (Br. 52, 53, 55) or are easily distinguishable (Br. 53, 55). For instance, *Girdler Co.*, 115 NLRB 726 (1956), *Western Gear Corp.*, 160 NLRB 272 (1966), *American Locomotive Co.*, 92 NLRB 115 (1950), and *Hunt & Mottett Co.*, 206 NLRB 285 (1973), lack any meaningful analysis, and aside from sharing the job classification of buyer, there are few parallels to be gleaned. The remaining cases cited by the Company are distinguishable. The managerial buyers in *Federal Telephone & Radio Co.*, 120 NLRB 1652, 1653 (1958), acted independent of purchasing authorizations; the buyers in *Grocers Supply Co.*, 160 NLRB 485, 488 (1966), negotiated with suppliers and exercised discretion in procurement functions without supervisory oversight, as well as directed the work of their assistants; the credit managers in *Salinas Newspapers, Inc.*, 279 NLRB

1007, 1010 (1986), acted without supervisory oversight and were able to independently extend and revoke credit; and the buyers in *Simplex Industries, Inc.*, 243 NLRB 111, 112 (1979), acted with “complete discretion” and entirely without any employer-imposed procurement policies.

In sum, substantial evidence supports the Board’s findings the Buyers do not formulate management policy or make operative decisions and are thus not managerial employees. Accordingly, the Board’s findings that the Company unlawfully refused to bargain with the Union and provide it with requested information are entitled to affirmance.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

/s Elizabeth A. Heaney
ELIZABETH A. HEANEY
Supervisory Attorney

/s Barbara A. Sheehy
BARBARA A. SHEEHY
Attorney
National Labor Relations Board
1015 Half St., SE
Washington, DC 20570
(202) 273-1743
(202) 273-0094

PETER B. ROBB
General Counsel

JOHN W. KYLE
Deputy General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

July 2018

STATEMENT REGARDING ORAL ARGUMENT

The underlying unfair-labor-practice case involves a determination of whether certain employees are managerial, which is a substantively complex and factually intensive inquiry. The Board believes that oral argument will assist the Court in its consideration of this issue.

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

NATIONAL LABOR RELATIONS BOARD)	
)	
Petitioner)	
)	
v.)	No. 18-9521
)	
WOLF CREEK NUCLEAR OPERATING CORPORATION)	
)	
Respondent)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d)(2), the Board certifies that this motion contains 12,117 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-2960

Dated at Washington, DC
this 12th day of July 2018

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

NATIONAL LABOR RELATIONS BOARD)	
)	
Petitioner)	
)	
v.)	No. 18-9521
)	
WOLF CREEK NUCLEAR OPERATING CORPORATION)	
)	
Respondent)	
)	

CERTIFICATE REGARDING PRIVACY REDACTIONS

Pursuant to Local Rule 25.5, the Board certifies that all privacy redactions have been made.

CERTIFICATE REGARDING DIGITAL COPIES

The Board certifies that the hard copies to be submitted to the Court are the exact copies of the version filed electronically.

CERTIFICATE REGARDING VIRUS SCANNING

The Board certifies that its brief was scanned for viruses with the most recent version of a commercial virus scanning program, and is free of viruses.

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-2960

Dated at Washington, DC
this 12th day of July 2018

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

NATIONAL LABOR RELATIONS BOARD)	
)	
Petitioner)	
)	
v.)	No. 18-9521
)	
WOLF CREEK NUCLEAR OPERATING CORPORATION)	
)	
Respondent)	

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all the parties or their counsel of record through the CM/ECF system.

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 12th day of July 2018