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 affirmance 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.

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]

[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' as-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).

[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 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-

[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.

[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 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 precedent[6] and with the doctrine of res judicata.[7]

[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.

[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]

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

[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.