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

AK STEEL CORPORATION

and

Cases 6–CA–36963
6–CA–37052
6–CA–37092

UNITED AUTO WORKERS LOCAL 3303 a/w
UNITED AUTOMOBILE, AEROSPACE,
AGRICULTURAL AND IMPLEMENT WORKERS OF
AMERICA

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DECISION

Statement of the Case

Eric M. Fine, Administrative Law Judge. This case was tried in Pittsburgh, Pennsylvania on March 16, 2011. The charges were filed by United Auto Workers Local 3303 a/w United Automobile, Aerospace, Agricultural and Implement Workers of America Local 3303 (Local 3303 or the Union) on June 2, 2010, August 11, 2010, and September 9, 2010 against AK Steel Corporation (Respondent).[1] An amended consolidated complaint issued on March 4, 2011, alleging Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide the Union with relevant and necessary requested information.[2] Respondent filed an answer to the amended consolidated complaint on March 16, 2011, in which it denied violating the Act, and raised certain affirmative defenses.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and Respondent,[3] I make the

[1] All dates are in 2010 unless otherwise stated.

[2] The parties entered into a partial settlement agreement on March 15, 2011, approved by the Regional Director on March 16, 2011. Matters covered within the scope of the settlement agreement were not brought before me for resolution as part of this litigation.

[3] Respondent initially raised a deferral defense in its answer to the consolidated complaint filed on March 16, 2011. The post-hearing briefs were filed on April 27, 2011, in which

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following[4]

Findings of Fact

I. Jurisdiction

Respondent, a corporation, with an office and place of business in Butler, Pennsylvania, has been engaged in the manufacture and non-retail sale of steel and steel products. During the 12 month period ending May 31, 2010, Respondent in conducting the described business operations has sold and shipped from its Butler, Pennsylvania facility products, goods and materials valued in excess of $50,000 directly to points outside the state of Pennsylvania. Respondent admits and I find it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

The current collective-bargaining agreement between Local 3303 and Respondent covering the Butler facility has effective dates of October 1, 2006 to September 30, 2012. The collective-bargaining agreement provides at article VI, section B(1)(b), that "if any question arises as to whether a particular dispute is or is not a proper grievance within the meaning of these provisions, the question may be reserved throughout the Dispute Resolution Procedure and determined, if necessary, by the arbitrator." It is provided at article VI, section B(4)(b) that a "grievance filed with respect to rate establishment or change, incentive establishment or change, or any general plant rule applicable in more than one department will be filed in Step III." It is provided in article VI, section C(1) that:

> Any grievance which is to be initiated directly in Step III of the procedure must be filed within 30 calendar days after the inception and occurrence thereof except as otherwise set forth in this Agreement; otherwise, it shall not be entitled to consideration.

The profit sharing plan, which concerns Local 3303's information request in dispute here, is set forth in full in the Appendix B of the collective-bargaining agreement, beginning at page 151. The plan by its terms provides a method for employees to share in the profits of the "Butler and Zanesville Works." It begins "with the first dollar of profit generated by the Butler and Zanesville Works." "There is no cap on how much profit can be shared with the employees." "Effective January 1, 2007, and terminating December 31, 2012, the profit sharing pool for hourly employees will consist of an amount equal to ten (10) percent of the profits as defined in Section C below." It stated in section C of the plan that:

> "Profits" will be that amount reported as pretax operating profit plus all cumulative profit sharing accruals. Pretax operating profit is reported in the Financial and Operating

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Respondent argued its deferral defense. Counsel for the Acting General Counsel subsequently filed a motion to file a reply brief to address Respondent's deferral defense. I issued an order denying the request to file a reply brief on May 2, 2011.

[4] In making the findings herein, I have considered the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corporation,* 179 F. 2d 749, 754 (C.A. 2), reversed on other grounds 340 U.S. 474 (1951). Further discussions of the witnesses' credibility are reviewed as warranted.

Results for the Butler and Zanesville Works. The cumulative profit sharing accrual is an item in the general ledger.

The plan states at sections F and G that:

> F. **Information Confidentiality** In order to protect the confidential nature of AK Steel's financial results, certain restrictions must be recognized. Specific financial information will be shared with union personnel who are bound by secrecy agreements (and their CPA, if requested). Payment results will be communicated, as available, to all employees.
> G. **Changes in the Plan** It is not anticipated that any change will need to be made in any features of the plan. However, changes in accounting procedures may be prescribed by the Internal Revenue Service, Securities and Exchange Commission, Financial Standards Board, the Vice President of Corporate Finance, or others. Also, major changes in capital facilities or product processing could all have some major impact on financial results. All such changes will be reviewed and mutually agreed to by the appropriate union personnel, along with the necessary adjustments to the plan to enable it to continue to provide results equitable to those that would have otherwise been obtained.

Jerry Ehrman is employed by Respondent at its Butler Works location. Respondent purchased the operations from Armco in 1999. Erhman, whose job classification is janitor leader, was originally hired at the facility by Armco. Ehrman has been the president of Local 3303 since August 4, 2008, has been a union officer for about 19 years. Ehrman testified that during the time he has been a union officer, the Union had previously challenged the profit sharing plan's administration. Ehrman testified he was aware that the Union audited the plan in 2002, and that there had been audits prior to that. Ehrman was not involved with the prior audits, and he did not know their results. Daniel Green was hired at the Butler facility on April 24, 1989 by Armco. At the time of the hearing, Green was employed by Respondent as a maintenance tech, iron worker. Green testified he has been the financial secretary, treasurer for Local 3303 since April 2002. Local 3303's office is inside Respondent's Butler facility.[5] Green testified there are about 1,210 to 1,220 bargaining unit employees at the Butler facility.

Green testified that when the Union speaks of payouts under the profit sharing plan it is in terms of percentages to the entire bargaining unit. Green testified payouts to employees are made on a quarterly basis 15 days after the end of the each quarter. For example, the employees receive a payout for the first quarter ending March 31, on or about April 15. The fourth quarter contains a year-end adjustment, and is paid around February 20 of the following year. Green testified the payouts to individual employees are calculated based on the employee's base wages, including overtime. Green testified 2008 was a high payout year for the profit sharing plan and that profit sharing payout was between 60 and 80% of the employee's base wages. Green testified that as an example if someone's base wage and overtime was $50,000, for an 80% payout they would receive another $40,000. Green testified that in 2009 the profit sharing plan payout percentage was around 45%. Green testified the payout percentage for the first quarter of 2010 was 16% which would have been paid on April 15, 2010. He testified that in 2010 the plan yearly payout percentage was 8%.

Green identified a letter to Ehrman from Patrick Bennett, manager-labor relations at

[5] Both Ehrman and Green, while employees of Respondent, worked full time for Local 3303 in their capacities as union officials.

Butler Works, dated April 27, 2009. In the letter Bennett stated:

> As you are aware, there are a number of factors that are considered by the Company when it performs the quarterly profit-sharing calculation. For example, in Appendix B, Exhibit 5, the parties have set forth several functions that have been historically allocated to the various operating units by Corporate Finance. While we have no intention of using overhead categories other than those identified in the foregoing exhibit, from time to time the Company may reevaluate the allocations to ascertain whether they are being distributed among the plants in the proper proportions.
>
> This letter is to provide notice that in the event that a revised allocation results in a profit-sharing payment that differs from the profit-sharing payment announced for the first quarter of this year, it will be recouped in the fourth quarter annual adjustments set forth in Appendix B, Exhibit 1.
>
> If you have any questions or comments regarding this matter, please give me a call.

Green responded to Bennett's April 27, 2009 letter by letter to Bennett dated May 12, 2009. Green credibly testified he sent the letter to Bennett by interplant mail and by email. The subject of Green's May 12, 2009, letter to Bennett was the profit sharing calculation. Green stated in his letter that, "It is the Union's expectation that any information used to 'reevaluate the allocations to ascertain whether they are being distributed among the plants in the proper proportions' will be shared with the Union as soon as possible." Green stated, "Further, it is the Union's expectation that *all* areas of re-allocation be considered in profit-sharing calculations, including any areas of re-allocation that would result in a beneficial judgment to the profit-sharing calculation." Green asked when the Union can expect to receive the information used to reevaluate the allocations. Green testified he never received a response to his May 12, letter, and that it was not unusual for the Union not to get responses from Respondent.[6] Green testified when the Union did not receive a response to the May 12, 2009 letter, they did not file a grievance. Green testified, "I assumed they looked at the costs and thought they were fairly allocated or else they would have notified us." Green testified that between May 12, 2009, and a meeting between Respondent and Union officials that took place on April 27, 2010, Respondent never notified the Union that any changes were made to the profit sharing plan.

Ehrman testified that on July 30, 2009, he was in Human Resource Representative Leslie Bergbigler's office.[7] While Ehrman was in the office talking with Bergbigler, Ehrman received an anonymous phone call asking him if he was Ehrman, the president of Local 3303. Ehrman stepped outside Bergbigler's office to take the call. Following the call, Ehrman testified he told Bergbigler that he received an anonymous phone call from a woman telling him that she

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[6] Bennett testified he did not have a recollection of seeing Green's May 12, 2009 letter in May 2009, and the first time Bennett admitted seeing it was during a February 25, 2011 settlement conference at Region 6's office. Bennett testified that following the settlement conference he had a search done of his office but he could not locate a copy of the letter. When further questioned about the May 12 letter, Bennett testified "I don't recall receiving it at the time—on or about the time it was mailed or dated." I found Green to be a credible witness with good recall. Green was also thorough in his approach in dealing with Respondent and I have concluded he sent the May 12, 2009 letter to Bennett as Green described and that it was received by Bennett's office in that time frame in the ordinary course of business. Given the ambiguous nature of his testimony, I do not credit Bennett's denial of the receipt of the May 12, 2009 letter in May 2009.

[7] Respondent admits Bergbigler, at the time of the above conversation, was an agent of Respondent.

was calling him from a restricted number and he should not try to determine who placed the call. Ehrman stated to Bergbigler that the caller told him that Respondent was going to try to reduce employees' profit sharing by slowing units down, moving coil products, delaying units, and that they were going to change accounting practices. Ehrman testified Bergbigler did not respond to the statement. Following his conversation with Bergbigler, Ehrman called Local 3303's attorneys John Murtagh, Jr.,[8] Marianne Oliver, and UAW representative Jim Gallagher and reported to them the contents of the anonymous call to Ehrman. Ehrman also told various local union officials about the call.

Green testified the Local 3303 officials met with the Respondent representatives on April 27, 2010, to discuss the profit sharing payout. Green credibly testified as follows: The meeting was initiated by a phone call from Ehrman to Bennett. Green and Ehrman attended the meeting for the Union. Respondent was represented by Bennett, John Vichich, manager of the finance department for the Butler facility, and Rick Weber, who works in accounting. During the meeting, Respondent's officials explained some of the reasons why the profit sharing payout had dropped so dramatically. The Union was told costs were up, the sales price was down, buying was down, and health care costs were up. The union officials were allowed to review a one page financial document but were told they could not have a copy of it. Towards the end of the meeting, Green tried to hand copy some of the information on the document which showed percentages of shipments comparing the years 2007, 2008, and 2009, and the differences in volume and percentages for some of the different products. The union officials said they understood what they were being told but there were a lot of questions from the membership who were probably going to want to know more, and the Union will probably want to do an audit of the profit sharing plan. The union officials stated they wanted to do an audit from 2009 through the first quarter of 2010 to see if there were any changes. Green credibly testified the union officials were told Respondent probably would not want to give out any first-quarter 2010 information because it was preliminary. The Union was told they could do an audit for 2009; however 2010 would have to be done at the end of 2010 when those numbers had been confirmed as they were just projections at that point in time. Green testified that when the Respondent's officials said this he recalled discussions along those lines in the past and agreed with it. Green testified that during the meeting no one from Respondent stated it was too late for the Union to review the 2009 records.

Green credibly testified that, during the April 27, 2010 meeting, Green referenced the April 2009 correspondence, and Green asked Vichich if there had been any changes as to how costs were allocated concerning the profit sharing plan. Green testified Vichich stated,"Yes, there were some changes." The Union asked what the changes were, but Vichich was not clear. Green stated the Union needed to know more about the changes.[9] Green testified that

[8] Counsel for the Acting General Counsel points out in her brief that Murtagh, who appeared as a witness in this proceeding's name is incorrectly spelled in the transcript as Murtheh.

[9] Green testified the April 27 meeting lasted around an hour. He identified a one page handwritten document which were his notes made during the meeting. Green testified the notes encompassed mostly what he tried to copy from the document he was shown by Respondent during the meeting. Respondent placed into evidence a one page typewritten document stating "Butler Workers First Quarter 2010 General Financial Information" which was represented as the document shown to Green during the April 27 meeting. A comparison with Green's notes, reveals they were in large part dedicated to recording what was in Respondent's financial document as Green testified. Thus, I do not place any credence to any argument that any omission from Green's notes concerning what else transpired during the meeting would serve to undermine Green's credible testimony about the event. It is to be noted that while Respondent

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when he asked Vichich if Respondent made any changes, and Vichich said yes that Green was shocked because the contract says any changes had to be negotiated, and the Union was not previously informed.

I have credited Green's description of the April 27, 2010, meeting in full. Green had good recall, and he testified in a straight forward and credible fashion that the Union stated during the meeting that they will probably want to do an audit of the profit sharing plan for the year 2009 and the first quarter of 2010. Green credibly testified the Union was told by Respondent they could do an audit for 2009; however 2010 would have to be done at the end of 2010 when those numbers had been confirmed. Bennett did not deny this aspect of Green's testimony. Rather, Bennett claimed he could not recall whether the Union's request for an audit was discussed during the meeting.[10] Since I have credited Green's testimony that an audit was discussed, I find it unlikely that Bennett would not have recalled the discussion occurred for a matter that has taken on such significance for Respondent.[11]

Green testified that, following the April 27 meeting, he contacted the accounting firm of Alpern Rosenthal (AR) and he engaged AR to help the Union. Green testified he was referred to Lawrence Barger, and another partner in AR. Green described the profit sharing plan to the accountants, and stated the Union wanted an audit to make sure it was running properly. Green testified they probably discussed the anonymous phone call Ehrman had received, that the profit sharing was dropping off, and the reasons the Union wanted an audit. Green testified they met with Barger and one of his partners once and had a few phone calls. Green testified the meeting would have been before April 30, 2010. Green testified that, during the meeting, they discussed what the Union wanted to accomplish and the Union followed it up with some documentation. Green identified a letter from AR dated April 30, discussing the terms of AR's engagement with Local 3303. The agreement was executed by Ehrman and Green on May 5.

Green testified the reason he contacted AR to conduct the audit was the Union wanted to get a fresh look using a new accounting firm to make sure the profit sharing was being paid correctly. Green testified the Union was not satisfied with the explanation they received during the April 27 meeting so they decided to conduct an audit. Green testified he gave a couple of the Union's prior audit reports to AR, including the last one done in 2002, and another one for either 1999 or 1996. Green testified the Union told AR the prior audits were basically just checking Respondent's math, and the Union wanted to dig deeper with this audit to make sure they were being paid properly. Green testified because the Union did it wrong a few years in a row did not mean the Union was agreeing to prior audits as precedent for future audits. Green testified, "we just wanted to change the process and look at it differently."[12]

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had no qualms about placing this particular financial document into the public record, the Union was reduced to making cryptic notes about it during the April 27, 2010 meeting because Respondent refused to provide the Union with a copy.

[10] Bennett testified there was no request on April 27 to extend the time for filing of a grievance over the profit sharing and there was no granting of a request to extend the time for it. Bennett testified concerning the time limit for filing a grievance that under the collective-bargaining agreement a grievance must be filed within 30 days of the occurrence that leads to the grievance. Bennett testified Respondent did not grant any request to extend the time for filing a grievance over the profit sharing plan. There was no claim by Green that the Union had discussed an extension of time for filing a grievance during the April 27 meeting.

[11] Neither Ehrman nor Vichich testified as to the contents of the April 27 meeting.

[12] The audits of the profit sharing plan prior to 2002, were done when Armco was the owner of the Butler Works. The Union doing the auditing was not Local 3303, but an independent

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Green wrote Bennett a letter dated April 29 referencing the April 27 meeting in which Green stated:

> As a result of that meeting, and questions raised by the membership with respect to the most recent profit-sharing payout, the Union has engaged an accounting firm of Alpern Rosenthal to conduct an audit as approved for in Appendix B., Exhibit 1 to the 2006 Basic Labor Agreement. Please expect correspondence from Lawrence P. Barger, C.P.A., Alexander Paul, C.P.A. and/or their designee and cooperate with their requests for information and assistance in conducting the audit. Of course, the Union is prepared to sign a confidentiality agreement consistent with Section F of Appendix B, Exhibit 1 and we ask that your office begin preparation of such an agreement promptly so that there is no delay while the parties wait for the execution of the same.
>
> During the course of the meeting on Tuesday, company participants mentioned, without explanation, that there had been some "changes" in the Plan. No detail was provided about the type of changes, when they were made, and/or what impact they had on the calculation, methodology, or resultant dollar payout.
>
> Under Section G of Appendix B, Exhibit 1 the Company is obligated to review those changes with the Union and secure mutual agreement. It would appear that this may not have been done with respect to these unspecified changes alluded to by the company personnel on Tuesday, April 27. Due to the lack of specifics, the Union must ask the company to agree, in writing, to an extension of time within which to file a grievance at Step III of the dispute resolution process. This extension would run until 30 days after the Union has been provided with all information necessary to determine if a grievance should be filed for a violation of Appendix B, Exhibit 1. Please be assured that the Union is not suggesting that such a violation, or violations, has occurred, but we must be certain, as I am sure you can understand, that the contract was complied with and so find this request to be necessary.
>
> Thank you very much for your courtesy and anticipated cooperation. I look forward to receiving the confidentiality agreement, and requested extension from you at your very first opportunity.[13]

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union at Armco,

[13] Green testified he referenced the signing of a confidentiality agreement in the April 29 letter because the Union had done so in the past. He testified, "if there is any question or any concerns about confidentiality, we always sign an agreement so there is not."

Green testified the first year he was in office was in 2002, and the Union had done an audit that year. Green testified there was different information requested at different times pertaining to the prior audits. He testified the 1986 audit was a little more in depth than the 1999 audit. He testified that in general, the Union did not feel there was sufficient information for the prior audits to do a fair audit. Green testified there was no audit or review of the profit sharing plan done by the Union between 2002 and 2009 for several reasons. Green testified that in 2003 Respondent was on the verge of bankruptcy, and Respondent had come to the Union for concessions. Green testified the Union did an extensive study on Respondent's corporate finances in 2004, and the Union did not think there was a reason to conduct an audit of the profit sharing that year. Green testified that in 2005 to 2006, possibly 2007, the profit sharing did not pay at all. Green testified Respondent was doing poorly and the Union knew it. Green testified Respondent did well in 2008 and 2009, and the employees received good profit sharing. He testified that starting between 2008, 2009, and 2010 it began dropping off, and the Union knew there were some changes in the business. Green testified between the first quarter in 2010 and 2009, the Union learned information from employees concerning the amount of material leaving

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On May 3, Green sent Bennett a letter attaching an information request from AR, the Union's accounting firm.[14] Included in the information request were the following items:

1. Provide internal financial statements for Butler/Zanesville and Consolidated AK Steel internal financial statements.
6. Provide the 2009 sales journal and reconciliation of net sales from sales journal to the general ledger.
7. Provide a 2009 schedule of average gross margin by product.
10. Provide the December 31, 2009 perpetual inventory report. We will provide a listing of inventory items selected for testing from the December 31, 2009 inventory report and request that the most recent invoices/purchase orders for the items selected for testing to be provided to us.
17. Provide a schedule of depreciation expense as a percentage of total property, plant and equipment by plant and on a consolidated level.
18. Provide the general ledger detail of 2009 repairs and maintenance. We will make a sample selection of repair and maintenance expenditures and request that the invoice and related documentation be provided to us.
24. Provide 2009 schedule of expenses as a percentage of tonnage sold and revenues for the Butler/Zanesville plants and on a consolidated basis.

Bennett wrote Green a letter dated May 11, in which Bennett stated:

> I am in receipt of your correspondence of April 29, 2010 in which you requested a review of "specific financial information", which you referred to as an "audit". With respect to questions raised by your constituents concerning the first quarter 2010 profit-sharing payment, the Company concludes that the Union's request is premature with respect to 2010 financial results which are preliminary estimates and subject to an annual adjustment in the fourth quarter as noted in Appendix B, Exhibit 1C. Also, as I stated previously and reaffirm herein, a request to review 2009 financial information made on April 29, 2010 is untimely made.
>
> However if you wish the Company to regard the foregoing letter as a timely request to review the appropriate 2010 year-end financial information in early 2011, I would be pleased to do so. Such review would be conducted pursuant to the execution of nondisclosure agreements by the Union and its accounting firm.

Green testified in reference to Bennett's May 11 letter that Respondent's position that a request for the 2010 financial results was premature was previously discussed during the April 27 meeting. Green testified that during the meeting the Union was told that the first quarter for 2010 was not hard numbers and that the Union was agreeable to that position. However, Green disagreed with Bennett's assertion in the letter that Green had been told during April 27 meeting that a request for the 2009 information was untimely. Green testified that following the April 27 meeting, the Union had no reason to believe that there would be any issue concerning the

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the Butler plant creating questions for the Union. Green testified there was enough of the Union's membership saying they wanted to make sure this was right, and the Union decided they needed to act.

[14] The only items in dispute in the current proceeding from the May 3 information request are items, 1, 6, 7, 10, 17, 18, and 24. The parties entered a partial settlement agreement approved by the Regional Director on March 16, 2011, resolving all other outstanding information requests contained in the consolidated complaint.

receipt of the 2009 information. Green testified there is no time limit in the contract for an audit, or any time limit for information requests. Green testified that during the April 27 meeting no one from Respondent stated they would not give the Union information for an audit because it was too confidential. Green testified that as of May 11, Respondent had not provided the Union with a confidentiality agreement for the requested information.

Green wrote Bennett a letter dated May 18, in which he stated concerning the profit sharing plan:

> In response to your letter of May 11, 2010, I am renewing my request to have our accountants conduct an audit. Additionally, I am forwarding to you the Information Request List that our accountants have prepared in order to perform the audit.[15] I am also requesting that you provide to me, in writing, any changes that have been made in the Plan. During the course of our meeting on Tuesday, April 27, company participants at the meeting mentioned that there had been some changes in the Plan. Please provide an explanation concerning the type of changes, when they were made, what impact the changes had upon the calculation, methodology, and resulting dollar payout for the quarters in 2009 and the first quarter and 2010.
>
> The information we are requesting is relevant to police the collective bargaining agreement at Appendix B, and specifically to ensure that the correct payouts have been made in 2009 and 2010.

Green identified a grievance filed by the Union, dated May 24, listing articles: I, section A; II, section H; IV section A; and Appendix B as provisions of the collective-bargaining agreement violated or relied upon. The grievance asserts that on April 27, 2010, the Union was informed that the company had made changes to the profit-sharing plan without the mutual agreement of the Union in the year 2009, and that the Company made incorrect payouts in 2009 and 2010. The remedy sought was to be paid the proper profit-sharing; to require any changes to the profit sharing plan be made only with mutual agreement; and to be made whole in all respects. Green testified that he, Green, presented the grievance at the third step. Green testified that at the time of the unfair labor practice trial on March 16, 2011, the grievance had been through step 4 of the grievance procedure and was pending arbitration. The Union filed an unfair labor practice charge on June 2, in case 6-CA-36963, relating to its information request concerning the profit sharing plan.

Bennett wrote Green a letter dated November 18, in which Bennett stated:

> In an attempt to reach a compromise in the dispute concerning the Union's request to conduct a financial audit related to the profit-sharing payment, the Company is prepared to provide the following information which was identified as an attachment to the April 30, 2010 letter from Alpern Rosenthal, the accounting firm engaged by the Union.
>
> As you know, the Company does not agree that the Union has a right to conduct a financial audit. Rather, Appendix B (at page 153) of the Collective Bargaining Agreement states that the Union may review "specific financial information" under a confidentiality agreement. The vast majority of the information requested in the April 30 letter is unrelated to the Butler Works' profit-sharing calculation and is of a highly confidential nature. The Company is prepared at this time to provide information that is related to the profit-sharing plan: items 2 through 5, item 13, items 19 and 20, and items

[15] Green testified he reattached the information request list that had been previously sent to Bennett with Green's May 3, 2010 letter.

> 25 through 27 on the referenced attachment upon execution of the attached confidentiality agreement.
>
> The Company makes this proposal without waiving any defenses regarding the timeliness of the Union's request for information regarding 2009 profit-sharing contributions, and other defenses of a procedural or substantive nature. In exchange for the provision of this information please confirm that the Union will request withdrawal of the pending NLRB Charge 6-CA-36963.

Green testified he received no other correspondence between May 11 and November 18 from Respondent about the Union's information request incorporated in Green's May 3 and May 18 letters. Green could not recall any conversation about the matter, except for the possibility that he renewed the Union's request during the step 3 grievance meeting. Green testified he received no confidentiality agreement from Respondent prior to November 18. Green testified Respondent never explained to him why they considered the information confidential.

Green sent Bennett a letter dated December 9 in response to Bennett's November 18 letter. Green stated he enclosed a revised confidentiality agreement that the Union was willing to sign. However, Green renewed the Union's prior information request and declined to narrow that request in accord with the terms of the November 18 letter. By letter dated December 16 to Green, Bennett attached what he labeled as the standard confidentiality agreement which he stated the Union and its agents have executed in the past years prior to being provided with Respondent's proprietary information. Bennett stated Respondent rejected the modifications to the confidentiality agreement suggested by the Union. Bennett stated upon execution of the confidentiality agreement by the Union, Respondent would provide the information they had previously identified that is items 2 through 5, 13, 19, 20, and 25 through 27 referenced in the April 30 letter from AR. Bennett stated if there is additional information that you believe you need after reviewing the information provided, the Respondent was willing to meet and discuss it. Bennett stated:

> To reiterate the point noted in my letter of November 18, 2010, the Company does not agree that the Union has a right to conduct a financial audit and the Company makes this proposal without waiving any defenses regarding the timeliness of the Union's request for information regarding 2009 nonprofit sharing contributions, and any other defenses of a procedural or substantive nature.

On December 21, Union attorney Oliver wrote Bennett responding to Bennett's December 16 letter to Green. In the letter Oliver discussed the Union's proposed changes to Respondent's confidentiality agreement. Oliver also stated:

> Finally, you agreed to provide only a portion of what the Union desires to receive. The Union has grievances filed concerning the profit-sharing amount and the safety add-on. These grievances challenge whether the amounts calculated are accurate. The reason that the Union needs #1 is to confirm that the internal financial statements are consistent with the actual 10(k) filing and/or other financial statements of the Company. This is particularly important given that the Union was told anonymously that the Employer intended to "take" the union member's profit-sharing by slowing down units and changing accounting practices. Numbers 6 through 12, 14 through 18, and 21 through 24 are also needed to verify that the profit-sharing calculations are accurate and consistent with the work performed at the Butler and Zanesville plants, and that the unit employees are properly being credited for work performed at the Butler and Zanesville plants.

Bennett responded to Oliver by letter dated February 2, 2011. Therein, Bennett stated:

> Please find enclosed a revised confidentiality agreement. The Company has withdrawn its objections to the changes you asked for in your December 21, 2010 letter (attached for your convenience) and has revised the agreement consistent with your request.
>
> At your convenience, please ask the appropriate Union Officers, as well as its accountants or others with whom confidential information is to be shared, to sign the attached and return it to me. (Please attach additional signature pages if required.) Upon receipt of the executed agreement, the Company will provide the relevant requested information concerning the profit sharing.

Green testified Respondent first made a proposal to resolve requested information items such as 1, 6, 7, 8, and the other items not identified in Bennett's November 18, 2010 within the past few weeks prior to March 11, 2011, during settlement negotiations. He testified the first settlement discussion was held on February 25, 2011 at the Regional Office. Green testified that during the February 25 meeting, there was talk of providing some further explanation for the changes to the profit sharing plan. On February 28, 2011, Oliver forwarded to Bennett via express mail a "fully executed confidentiality agreement." The confidentiality agreement was signed by four representatives of Local 3303, and by Barger, who confirmed in his testimony that he signed the agreement.

On March 1, 2011, Bennett sent Ehrman a letter containing Respondent's third step answer to the Union's profit sharing grievance. The letter stated the third step meeting was held on January 5, 2011. The letter states Green resubmitted the Union's May 3, 2010 information request during the third step meeting, while stating the information Respondent had offered to provide the Union at that time would do little more than ensure that Respondent did the math correctly. Green raised other arguments at the meeting, which were incorporated in Bennett's summary, but which will not be repeated here. In his response, Bennett stated Respondent reserves its position that the grievance filed on May 24, 2010, was untimely filed. The explanation for Respondent's timeliness argument was the profit sharing plan for the fourth quarter of 2009 was paid on February 18, 2010, and that in order to be timely filed it would have to have been filed within 30 days of the payment being issued. Bennett asserted that a grievance concerning payment of the profit sharing amount for the first three quarters of 2009 is similarly time barred. Bennett also made other procedural and substantive arguments to the viability of the grievance. Bennett stated regarding the Union's allegations that Respondent changed the plan that, "The only 'change' that has been made by the Company is an entirely permissible reallocation of overhead functions that is consistent with the Company's rights under Exhibit 5 of Appendix B and the Management Rights Clause. In April 2009, the Company advised the Union by letter (attached) that it may revise administrative overhead allocations pursuant to Exhibit 5 to assure proper distribution among the various plants." Bennett went on to state the administrative allocation revision was made in the second quarter of 2009. Bennett stated the Union never properly and timely asserted through the grievance procedure a challenge to the Company's right to revise the allocations to assure proper and appropriate distribution among the plants." Bennett went on to state Respondent has offered to provide relevant information to the Union pursuant to receipt of a confidentiality agreement signed by the Union and its agents.

Green testified the profit sharing plan is paid quarterly, but the final quarter for 2009 was not paid until February 10, 2010 because it is a true-up payment. Green explained the first three quarters are paid based on projections. He testified that after Respondent finalizes all the numbers at the end of the year sometimes there is an adjustment. Green testified the Union's May 24 grievance covered years 2009 and 2010. Green testified that they usually use a 30 day

time limit from the time "we become aware of it" for the filing of a grievance. Green testified that in this instance the Union went by April 27, 2010, the date they became aware that there were changes to the profit sharing plan for the running of the 30 day time limit, so they filed on May 24. Green testified there was no written extension of time for the time for filing a grievance. He testified the Union had no reason to ask for an extension of time for filing a grievance.

Union Attorney Murtagh represents four UAW locals associated with Respondent in Butler, Coshocton, Zanesville, and Rockport, Indiana. Murtagh testified he attended a meeting with Barger and another account from Barger's firm, Ehrman and Green. Murtagh testified, prior to the meeting, Green had told Murtagh that Respondent had advised Green that there were changes made to the method of calculating profit sharing at the Butler facility. Murtagh testified he had also been told that Butler steel coils were going to Zanesville and Coshocton for further processing. Murtagh explained Butler is a fully integrated mill in that they melt, cast, roll and then finished steel there. Murtagh testified the other two plants can finish the steel coils but they do not melt the steel, so some of Butler coils would go to those plants for finishing. Murtagh testified there was question of whether Butler was receiving proper credit in their profit sharing plan for work they had done that was finished at the other plants. Murtagh told Local 3303 officers and the accountants at AR that he was concerned about this. Murtagh testified employees at the two other plants told Murtagh that they are receiving Butler coils for processing. Murtagh testified some coils have been going from Butler to the other plants since 1977 when Murtagh began representing employees of Butler. Murtagh testified he spoke with local union presidents, secretary treasurers, financial people at other plants and they told him there seemed to be an increase in the number of Butler coils going there in the relevant time frame. This coupled with the remark to Ehrman through an anonymous call concerning the profit sharing plan to the effect that Respondent was "cooking the books" in Murtagh's words made Murtagh suspicious.

Murtagh testified that Respondent took over for Armco on September 30, 1999. He testified that, under Armco, the Butler and Zanesville plants were considered to be one plant even though they were several hundred miles apart. Murtagh testified the Butler plant's profit sharing plan is still called the Butler/Zanesville profit sharing plan, although the Zanesville plant employees sold out their participation in the plan for about $10,000 per man some years ago. Murtagh testified that now Zanesville has a different way of calculating profit sharing which is not part of the "Butler/Zanesville profit sharing plan." Murtagh testified the employees at the Coshocton and Zanesville plants are not represented by Local 3303, but are represented by other unions. Murtagh testified that Local 3303 was formed in 2003, and the predecessor union there was a Butler Armco independent union, which Murtagh represented since 1977. Murtagh testified the union at Butler never had a problem before in receiving information as they had signed confidentiality agreements on a number of issues and had received the requested information. Murtagh testified the union had a very good relationship with Armco. Murtagh testified the relationship changed with Respondent as Local 3303's information requests were no longer decided as to compliance at the Butler facility, rather the decision was being made in Middletown. Murtagh testified it was a much more difficult relationship administratively, and it took more time to get information.

Barger is a certified public accountant employed by AR. Barger testified AR has about 200 employees and it is a top 100 accounting firm in size in the United States. Barger testified he is a shareholder in AR, and there are about 32 shareholders in the firm. Barger is the director of AR's manufacturing services group, and he specializes in manufacturing and distribution companies and in employee benefits plans. Barger testified he became involved with Local 3303 in April 2010 and that he met with Green, Ehrman, and Murtagh at that time. Barger testified that following the meeting the Union provided him with an excerpt from the

collective-bargaining agreement that contained the definition of the profit sharing calculations, and with a 2002 Ernst & Young prior audit for the Union of the plan. Barger may have also received other materials from the Union.

Barger testified the Union explained to him that they were interested in engaging AR to verify the profit sharing calculation and give them some level of assurance of the accuracy and validity of the calculation. Barger testified he was told the profit sharing amount had dropped, and beyond that there were some specific concerns related to a phone call that had been received by one of the union officers; also as to how accounting was being done as far as transfers of steel coils. He testified there was a concern as to whether Butler was being credited as to work it performed for profit sharing purposes concerning the transfer of coil from one facility to other. Barger testified he entered into an engagement agreement with the Union dated April 30, 2010. Barger testified he reviewed the Ernst & Young 2002 report. Barger testified AR's engagement with Local 3303 differs from Ernst & Young's engagement based on his review of the 2002 report. Barger testified, "I believe our engagement, as outlined in the engagement order, would be more in depth, more weighted towards verifying the profit sharing calculation, a bit less weighted to only checking the mathematical accuracy."

Barger explained his need for the outstanding requested information items as follows. Item 1 reads, "Provide internal financial statements for Butler/Zanesville and Consolidated AK Steel internal financial statements." Barger testified he was looking for the year 2009. Barger testified he thought the time period was explained to Respondent during their February 25, 2011 settlement conference.[16] Barger testified he needed this information because the profit sharing was based on the statement of operations. He testified this information was necessary to gain assurance that the statements of operations rolled up and agreed to the internal Butler Zanesville financial statements and the internal consolidated financial statements agreed to and rolled up into the ultimately filed audited financial statements, which were the AK Steel consolidated statements. Barger testified if there was a discrepancy it can potentially indicate an error or miscalculation in the profit sharing calculation. Barger testified he did not just use Respondent's publicly filed documents because there is a different level of detail in the internal non public documents. He testified the purpose of the information request is to create a trail to get to the lowest level up to the highest level to make sure there is agreement. Barger testified that in March 2011, there was discussion of an offer by Respondent to provide the internal financial statements.

Item 6 reads, "Provide the 2009 sales journal and reconciliation of net sales from sales journal to the general ledger." Barger testified he was referring to the Butler and Zanesville plants. Barger testified a sales journal can take many forms. He testified he assumes it would be a computer generated report or some type of report in a level of detail that would show various forms by customers, by invoice for the period, the sales recorded to Butler/Zanesville in 2009. Barger testified he did not believe the Union had an interest in knowing who the customers are as opposed to the sales amount, and he thought that has been conveyed to Respondent.[17] Barger testified the sales journal contains a level of detail in a report, and the general ledger would reflect potentially a single number for a month of sales. Barger testified sometimes there can be differences in a detailed report and a summary report. He testified there can be differences in credits issued to customers or debit memos, and a reconciliation

[16] Some testimony concerning settlement discussions was admitted in evidence during this proceeding as no objections were raised as to its admissibility.

[17] Respondent's counsel stated at the hearing that Respondent had been informed that the Union was not interested in the names of customers. Tr. 920

would identify, starting with the sales journal, what those differences might be up to the general ledger total. Barger testified a reconciliation would explain any difference between the sales journal and the general ledger. Barger testified this related to the profit sharing plan because the statement of operations for Butler/Zanesville is essentially an income statement for the plan, and one of the top lines on the statement is net sales. Barger testified that net sales is clearly a component that would be one of the drivers of the profit sharing information. Barger testified the information requested in item 6 allows him to perform testing to verify the amount of the net sales to the profit sharing. He testified it is a statement of operations that contributes to the profit sharing calculations. He testified without receiving this information, he would not be able to do any testing to assess and verify the sales numbers. Barger testified as to item 6; they wanted access to the sales journal and reconciliation for the Butler/Zanesville plant in sufficient detail to allow Barger to make a sample selection of individual sales items to test. Barger testified the sales journal would include the individual sale prices for all goods going out of the Butler/Zanesville plants for that period. He testified he needed the individual sales prices for the verification aspect of his engagement. Barger testified he last spoke to a representative of Respondent on March 15, 2011, and the statement was they would not provide this information.

Barger testified concerning item 7, which reads "Provide a 2009 schedule of average gross margin by product" that the request was relating to the Butler/Zanesville facilities. He testified gross margin is the profit made on sales of the Respondent's product prior to considering administrative costs, selling costs and other costs. Barger testified gross margin consists of the difference between sales and the cost of goods sold with cost of goods sold being defined as raw materials costs, labor costs, and overhead costs. Barger testified this information relates to the profit sharing plan because the statement of operations calculates from net sales through what is referred to as the base costs, and cost of sales would be part of the base cost in the calculation. He testified if he did not receive that information he could not perform an analytical procedure which would go toward lessening the verification aspect of the procedure he had agreed to perform for the Union. Barger testified to his knowledge Respondent did not offer to make any accommodations with respect to item 7.

Barger testified concerning item 10, which reads "Provide the December 31, 2009 perpetual inventory report. We will provide a listing of inventory items selected for testing from the December 31, 2009 inventory report and request that the most recent invoices/purchase orders for the items selected for testing to be provided to us." Barger testified this was a request for the Butler/Zanesville facilities. Barger testified the perpetual inventory report is similar to the sales journal. It contains a detailed listing of the plant's inventory, raw materials, work in process, finished goods, at a very detailed level. Barger testified the Union did not have any interest in the sources of the material that would identify any of the suppliers, or the customer the finished goods would be provided too. Barger testified this information request is another verification type procedure because if the Union obtained the perpetual inventory report, they wanted to make some selection of inventory purchases, invoices, to verify that the cost recorded in the perpetual inventory report are the true cost of that product, that is the costs that were paid. Barger testified if he did not have this information, he did not believe he could verify the costs of the product. The absence of the information reduces the verification aspect of Barger's engagement and it moves it more towards a mathematical accuracy calculated engagement. Barger testified in conversations with Respondent there was no offer to make an accommodation to provide this type of information to Barger. Barger testified item 10 would give him access to the composition of the inventory in quantities and dollars. He testified he would be able to determine what Respondent paid for their raw materials by making selections and verifying them on a sample basis from the information that is in the report. Barger testified in his auditing experience he has learned that material suppliers may provide different rates to different customers. Barger testified in conducting his audits, he does not have any issues

obtaining that information. Barger testified, "I assume it is sensitive to some level, but audits are conducted confidentially, and/or sign a confidentiality agreement, so it is typically not an issue."

Item 17 reads, "Provide a schedule of depreciation expense as a percentage of total property, plant and equipment by plant and on a consolidated level." Barger testified a schedule of depreciation expense is a schedule with some level of detail summarizing the fixed assets of the plant, their useful lives, their depreciation method and the actual amount of depreciation expense calculated on them in total. Barger testified that after he made the request, he learned from Respondent the information for the plants was not maintained separately rather Butler and Zanesville were combined and the only way he would be able to receive the information was for Butler/Zanesville on a consolidated basis. Barger testified this was agreeable to the Union. Barger testified depreciation expense is a deduction from net sales for purposes of calculating the profit share on a statement of operations. He testified this item would allow him to analyze the percentage of depreciation by plant in this case, since it is only available on a consolidated level and then compare it with the consolidated financials with the 10K looking for reasonableness. Barger testified the risk in not receiving this item if there was not a reasonable relationship analytically in the depreciation expense, it could raise a question as to the accuracy of the depreciation expense included in the statement of operations to calculate the profit sharing amount. Barger testified if he did not have the information he could not complete the procedures as set forth in his April 30, 2010 engagement letter with the Union. He testified he would not be able to verify to the degree he planned and he would be reduced to mathematical calculations.

Item 18 reads, "Provide the general ledger detail of 2009 repairs and maintenance. We will make sample selection of repair and maintenance expenditures and request that the invoice and related documentation be provided to us." Barger testified the request applied just to Butler/Zanesville. Barger testified the general ledger detail should show the entries that were made to the general ledger account to expense, repairs and maintenance for the plant during 2009. He testified repairs and maintenance are an expense that would be deducted and included in the statement of operations for the purposes of calculating the profit sharing amount. Barger testified the purpose of the request would be to gain some assurance that items that were expensed as repairs and maintenance were properly expensed versus possibly being capitalized and depreciated which would result in less expense in a given year; and to ensure that repairs and maintenance expenses related to other plants were not improperly included in the Butler/Zanesville plant. Barger testified Respondent never offered to make any accommodations as far as providing this information.

Item 24, reads, "Provide 2009 schedule of expenses as a percentage of tonnage sold and revenues for the Butler/Zanesville plants and on a consolidated basis." Barger testified schedule of expenses summarizes all the expenses, most likely by major categories that would be included in the statement of operations and part of the profit sharing calculation. This would include repairs and maintenance, depreciation, taxes, property taxes, insurance, and other administrative and selling expenses. Barger testified this information would be used as part of the verification process to gain some assurance over the analytical relationships to various expenses, related to tons sold and revenue dollars at the plant. He testified there was no accommodation offered by Respondent to provide Barger with the requested information.

Barger testified he cannot complete the procedures he was engaged to perform in his April 30, 2010 engagement letter with the Union without the seven items of information in dispute, despite the information Respondent has agreed to provide pursuant to the partial settlement agreement. Barger testified there are verification steps included in the April 30 letter specific to the seven items that were requested. However, Barger then testified the Union could

live without obtaining item 7, the schedule of average gross margin by product without seriously compromising the engagement. He testified the rest of the items are necessary. Barger testified they conveyed to Respondent during the February 25, 2011 settlement conference that they could do without item 7.

Barger testified he had a phone call on March 3, 2011 with Respondent's officials concerning Respondent's suggested use of an alternative approach to the Union's requested information. Barger testified that Respondent Attorney Stephanie Bisselberg, Rick Williams, who is Respondent's chief accounting officer, and Roger Koefle, a member of Respondent's finance department at the headquarters facility were on the call along with Barger. Barger testified that, during the call, Respondent explained the general economic circumstances from 2008 to 2009 relating to the economic recession overall as it affected a decline in the profit sharing. They stated there was a dramatic decline in sales prices and tonnage due to the economy. He testified they offered to provide P & L's or income statements for Butler/Zanesville plants for 2008 and 2009. Barger was told if they showed him the profit and loss statement for Butler/Zanesville for 2008, and the same statement for 2009, by looking at the numbers on these statements, Barger would see their operations, sales, tonnage, and profitability had declined and that through the third quarter of 2008, their operations remained strong, but starting in the fourth quarter of 2008 and throughout 2009 those operations declined. However, Barger testified Respondent did not offer him any specific back up information to support the profit and loss statement, or the alleged rapid declines in sales and tonnage. Barger testified there was also a discussion of overhead allocation that there had been some change in the way overhead expenses were being calculated and allocated to the Butler/Zanesville Works between 2008 and 2009. Barger testified Respondent did not explain to Barger what the change was in any detail. Barger testified Respondent offered to provide Barger with a one month selection under their representation that Barger would be able to verify the amounts related to the overhead allocation. Barger testified that since one month would not be enough to give him a comparison point throughout the rest of 2009 or back to 2008 under the prior methodology he asked Respondent if he could be provided a month both before and after the change was made for comparison purposes. However, Respondent was not agreeable to Barger's request. Barger testified the profit and loss statements for Butler/Zanesville that Respondent offered to provide during the call came within information request item 1. Barger testified he had asked for under item 1 for the internal financial statements, which would include the balance sheet, the income statement, and the cash flow. Barger testified Respondent's offering the income statements only just fulfilled part of Barger's request set forth in item 1.[18] Barger testified that during the phone call, Respondent continued to refuse to provide the other requested information items in dispute.[19] Barger testified that by zeroing in on a change in cost of overall

[18] Barger testified that as part of a March 15, 2011 phone call Respondent offered to provide all of the information requested in item 1, on condition that the Union drop the other items of requested information. Respondent maintained that position at the trial on March 16, 2011.

[19] Stephanie Bisselberg is the assistant general counsel of labor for Respondent. She testified concerning the March 3, 2011 call. Bisselberg testified she tried to frame the call by stating they were not really talking about the 27 items of information the Union had requested, rather they were trying to focus on what they thought based on the Union's concerns regarding the changes what Barger would need. Bisselberg testified the finance men were telling him what they would give him to look at concerning what changed in that year, what the factors were that caused the change, and the impact of that on the profit sharing calculation. Bisselberg testified during the call they spoke about the overall economy, the drop in the selling price of electrical steel and that Respondent would provide some documentation on that. They talked about the adjustment, modification, the change to overhead allocations in the profit sharing plan

Continued

materials between 2008 and 2009, he could explain to the Union at the top level what the economic circumstances were, but under the scope of his engagement with the Union it would not allow Barger to test or verify. Barger testified that his scope of engagement with the Union could not be done by merely viewing changes in financial factors from one year to the next to determine that the profit sharing plan was properly allocated.

Barger testified that, during the March 3, 2011 call, the only information Respondent offered to provide him was with item 1 the profit and loss statements for the Butler/Zanesville plants for 2008 and 2009; and a one month selection to verify amounts relating to the change in the overhead allocation. Barger testified the only conversation he had since March 3 with Respondent's officials was on March 15, 2011, and at that time they did not offer to provide him with any additional documents. Barger testified nothing discussed persuaded him that he did not need the outstanding requested items of information to perform within the scope of his engagement with the Union. Barger testified the procedure he had agreed to perform and the information thereby requested were compiled based upon an understanding of the profit-sharing language and calculation, the information provided by the Union, the Union's concerns, and the fact that Union stated they wanted something more detailed than the last audit in 2002 to assist them in verifying the accuracy of the profit sharing plan. Barger testified based on the level of concern expressed by the Union to him this was the procedure he came up with.

Barger testified he was told by Respondent that their financial records have been audited by another company. He testified this means the overall consolidated financial statements have been examined by a CPA firm under the United States auditing standards, and based on Barger's review of the 10K filed for 2009, that accounting firm expressed a clean or standard audit opinion on Respondent's consolidated financial statement. Barger testified this audit would show the top level overall general financial status of Respondent. It would not show whether items were being shifted between plants for accounting purposes pertaining to the profit sharing plan. Barger testified the audit of Respondent's financial statements is at a much higher level than Barger's engagement with the Union. Barger testified his is a very limited engagement directed at the profit sharing calculation as a component of Respondent's financial statements. Barger testified the external auditors hired by Respondent may not have even looked at the profit sharing plan.

In the partial settlement agreement executed by the parties in this case, Exhibit C states:

> The Employer will provide in writing a written account of changes to Respondent's profit-sharing plan, the date of such changes, and an explanation of the impact these changes had on the calculation, methodology, and resultant dollar profit-sharing distributions to employees on a quarterly basis for 2009 and the first quarter of 2010.

Barger testified concerning Exhibit C the information described would assist him with respect to

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and that Respondent would provide what the change was and its impact. Bisselberg testified there were some other items discussed but then the discussion turned back to the list of 27 items requested by the Union. However, Respondent's representatives said they were not talking about that, that they were just looking at the two years and what would it take to show the reasons for the decline. To the extent there was any variation in description between Barger and Bisselberg concerning the March 3, 2011 call, I have credited Barger's version of the event. He testified in greater detail, and understandably had better recollection of the call which involved a discussion of finances which concerned Barger's expertise as opposed to that of Bisselberg who testified in generalities concerning the event.

the specific items, but would not satisfy the requirements of his overall engagement with the Union. He testified this is one aspect of the overall engagement. The other aspects are sales, inventory, depreciation, repairs and maintenance, and other items.

John Vichich is currently manager in finance for the Butler plant. Vichich has a bachelor's degree in accounting and an MBA with a finance major. He testified he has been employed by Respondent for 31 years, during which time he worked in the finance department. Vichich is not a certified public accountant, and he described his auditing experience as primarily limited to the Butler/Zanesville plants. Vichich testified he does not have access to Respondent's financial records outside of Butler/Zanesville.

Vichich testified the Butler/Zanesville plant is basically treated as one plant and the coils have been moving from Butler to Zanesville probably as long as the two plants have been in existence. Vichich testified it is not unusual for coils to move from one plant to another. Vichich testified there was no increase in the movement of coils from Butler to Zanesville from 2008 to 2009 in that the market for electrical steel has gone down and there was less movement to Zanesville from Butler in that year. Vichich testified the P & L for Butler and Zanesville is all treated as one so there is not a separate credit for the profit-sharing accounting. Concerning coils moving from Butler to other plants, Vichich testified that they melt slabs at Butler that go to Middleton then on to either to Rockport or Coshocton. Vichich testified there has been no change in that practice or accounting method for that product movement since 2008.

Vichich testified concerning Union information request item 1 the internal financial statements for Butler and Zanesville contain very sensitive information. He testified there are very few competitors for the product made at the Butler plant. Vichich testified if anything is leaked from the Butler/Zanesville internal financial statements it could be very detrimental to Respondent and to Butler Works. Vichich testified the internal financial statement contains such items as the tons they sell by product, the selling price by product, the cost by product which is all very sensitive information. Vichich testified concerning item 6 requiring the provision of the sales journal and the reconciliation of net sales the confidentiality concerns are the sensitivity of getting sales prices by product that could be leaked to the market and picked up by Respondent's competitors. Vichich testified the leaking the products they make as well as the sale prices they receive would be very detrimental to Respondent. Vichich testified that if a competitor knew what Respondent's sales prices were they could undercut Respondent to get market share. As to item 7, Vichich testified if this information got out to the market, Butler Works would be out of business because they would be giving their competitors their margin by product. Vichich testified if they had product A and Butler Works made $500 as an example and a competitor sells product A they could go down to make $400 by lowering their sales price.

Vichich testified that item 10 relating to the 2009 perpetual inventory report is the opposite of the sales journal in that it states what Respondent's cost is by product. Vichich testified the leak of this information would be very detrimental stating that if a competitor knows what product A is costing Respondent they could react to that. Vichich testified that information here contains information on raw materials and operating costs and a competitor can look and adjust their operations to be more competitive with Butler Works. Vichich testified that item 18 pertaining to repairs and maintenance is very sensitive information concerning the age of Respondent's equipment, the types of operations, and whether they are they spending a lot of money on maintenance. Vichich testified if a competitor obtained information listed in items 1, 6, 7, 10, and 18 there is no remedy for Respondent to fix the problem and Butler Works would be out of business.

Vichich testified Respondent is audited annually by Deloitte & Touche (DT). Vichich

testified that DT comes to Butler and goes over their inventory; they take their sales runs, and make sure they are posting sales correctly as well as looking at inventories on a monthly and quarterly basis. Vichich testified there is more of a risk for Respondent to provide the information to AR than to DT because, unlike DT, AR has no interest or responsibility to the Respondent in making sure everything is kept confidential. However, Vichich testified that DT, as part of their annual audit, would have all of the information that is currently being requested by AR on behalf of the Union. Vichich testified that if DT breached its confidentiality agreement with Respondent it would have the same risks to Respondent as if AR breached its agreement. Vichich testified that DT signs a confidentiality agreement with Respondent and they have a fiduciary responsibility since they are doing the audit directly for Respondent. Vichich testified DT would also have a responsibility to try to make Respondent whole for the breach as part of its agreement with Respondent if they do anything to harm Respondent's business. Vichich was later shown a provision of the signed confidentiality agreement AR provided Respondent which provides Respondent with legal and equitable relief against AR for a breach of the agreement. Vichich was not aware of the paragraph in the AR document prior to his testimony.

Vichich testified that his concerns were that if the information was leaked to competitors they could actually cause the Butler/Zanesville Works to close in which case the employees would have no profit and they probably would not have a job. Vichich testified Respondent's concerns were heightened by the small number of competitors to Respondent for the type of steel product produced by Butler Works. Vichich testified that in prior audits conducted by the Union there have been confidentiality agreements. Vichich testified he is not aware of any problems concerning breach of those agreements. Vichich also disputed various aspects of Barger's information request as not being necessary to complete Barger's engagement.

A. Analysis

1. Legal principles

In *A-Plus Roofing, Inc.*, 295 NLRB 967, 970 (1989), enfd. *NLRB v. A-Plus Roofing, Inc.,* 39 F.3d 1410 (9th Cir. 1994),[20] the applicable principles concerning requests for information were set forth as follows:

> An employer, pursuant to Section 8(a)(5) of the Act, has an obligation to provide requested information needed by the bargaining representative of its employees for the effective performance of the representative's duties and responsibilities. *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 435-436 (1967). The employer's obligation includes the duty to supply information necessary to administer and police an existing collective-bargaining agreement. (Id. at 435-438), and if the requested information relates to an existing contract provision it thus is "information that is demonstrably necessary to the union if it is to perform its duty to enforce the agreement…." *A. S. Abell Co.*, 230 NLRB 1112, 113 (1977). Where the requested information concerns employees … within the bargaining unit covered by the agreement, this information is presumptively relevant and the employer has the burden of proving lack of relevance…. Where the request is for information concerning employees outside the bargaining unit, the Union must show that the information is relevant. *Brooklyn Union Gas Co.*, 220 NLRB 189 (1975); *Curtiss-Wright Corp.*, 145 NLRB 152 (1963), enfd. 347 F.2d 61, 69 (3d Cir. 1965). In either situation, however, the standard for discovery is the same: "a liberal discovery-type

[20] These principles have continued to be applied by the Board, see *National Grid USA Service Co.,* 348 NLRB 1235, 1242-1243 (2006).

> standard." *Loral Electronic Systems*, 253 NLRB 851; 853 (1980); *Acme Industrial*, supra at 432, 437. Thus information need not necessarily be dispositive of the issue between the parties; it need only have some bearing on it.
> ....
> Once the initial showing of relevance has been made, "the employer has the burden to prove a lack of relevance … or to provide adequate reasons as to why he cannot, in good faith, supply such information." *San Diego Newspaper Guild*, supra at 863, 867. Where the relevance of requested information has been established, an employer can meet its burden of showing an adequate reason for refusing to supply the information by demonstrating a "legitimate and substantial" concern for employee confidentiality interests which might be compromised by disclosure. *Detroit Edison v. NLRB,* 440 U.S. 301, 315, 318-320 [(1979)]. In resolving issues of asserted confidentiality, the Board first determines if the employer has established any legitimate and substantial confidentiality interest and then balances that interest against the union's need for the information. *Detroit Edison*, id. at 315, 318; *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 30 (1982); *Pfizer Inc.*, 268 NLRB 916 (1984). However, where the employer fails to demonstrate a legitimate and substantial confidentiality interest, the union's right to the information is effectively unchallenged, and the employer is under a duty to furnish the information. *Oil Workers Local 6-418 v. NLRB,* 711 F.2d 348, 360 (D.C. Cir. 1983); *NLRB v. Jag-gars-Chiles-Stovall, Inc.,* 639 F.2d 1344, 1346-1347 (5th Cir. 1981); *NLRB v. Associated General Contractors of California,* 633 F.2d 766 (9th Cir. 1980).

A respondent's defense raising unsupported claims of confidentiality must be rejected. *See Ormet Aluminum Mill Products,* 335 NLRB 788, 803 (2001); *Public Service Co. of Colorado,* 301 NLRB 238, 247 (1991); and *Richard Mellow Electrical Contractors Corp.,* 327 NLRB 1112 (1999). In *Pulaski Construction Co.*, 345 NLRB 931, 937-938 (2005), the following was stated pertaining to confidential information:

> If it is determined that the information sought to be protected is confidential, the issue then becomes whether the defense was timely raised by the employer so that the parties could attempt to seek an accommodation of the employer's confidentiality concerns. It is not enough that an employer raise a confidentiality concern; it must then come forward with some offer to accommodate both its concern and its bargaining obligation.
>
> It does not appear that any of the information requested by the union falls within the description of confidential information as the Board has defined that concept. Even assuming that the request did encompass confidential information, Respondent had an obligation to discuss its confidentiality concerns with the union so as to try to develop mutually agreeable protective conditions for disclosure of that information. *The Good Life Beverage Co.*, 312 NLRB 1060, 1062 (1993). Respondent's failure to raise this concern with the union vitiates its attempt to raise it now.'

In *Stella D'oro Biscuit Co.,* 355 NLRB No. 158 slip op. at 5-6 (2010) the Board stated:

> Second, the Union offered to sign a confidentiality agreement, and Stella has never claimed grounds for believing that the Union would not honor such an agreement. Indeed, Jacoby conceded in his testimony that he had no reason not to trust the Union in this regard. Accordingly, we adopt the judge's conclusion that Stella did not satisfy its duty to furnish the 2007 audited financial statement and therefore violated Section 8(a)(5) and (1) of the Act.

The Board noted in *Stella D'oro Biscuit Co.,* affirming the judge that:

The judge rejected Stella's assertion that it needed to keep the information in the financial statement confidential to prevent its competitors, vendors and suppliers from either refusing to deal with it or taking advantage of its financial weakness. The judge found that although these were legitimate concerns, the Union met them by offering to sign a confidentiality agreement, and there was no evidence that the Union could not be expected to honor such an agreement. *Island Creek Coal Co.*, 289 NLRB 851, 851 fn. 1 (1988) ("Absent proof that the [u]nion was unreliable in respecting confidentiality agreements, the [r]espondent's failure to test its willingness to treat the information confidentially weighs heavily against its defense."), petition for review denied sub nom. *Mine Workers District 31 v. NLRB*, 879 F.2d 939 (D.C. Cir. 1989); *Facet Enterprises,* 290 NLRB 152, 165 (1988), enfd. in relevant part 907 F.2d 963 (10th Cir. 1990).

In *A-1 Door & Building Solutions,* 356 NLRB No. 76 (2011), an expiring collective-bargaining agreement created a companywide profit sharing plan for all salaried and hourly employees, including non unit employees. In negotiations the respondent employer proposed cutting the employees' share of the net profits under the plan from 10 to 5 percent. By letter dated April 26, 2007 the union requested the respondent disclose its net profit for each of the previous 3 years and the total amount of profit that was distributed to all employees during each of the past 3 years, along with the number of employees who received part of the distribution. The respondent only provided in response the amount of profit distributed to bargaining unit employees over the three year period asserting it was not required to provide the rest of the information. After the union's initial request a union official was given a pay stub for a non unit employee leading him to believe the employee was receiving unusually large profit sharing bonuses, which the union concluded could have an adverse impact on the funds available to bargaining unit employees. By letter dated August 8, 2007, the union requested information relating to the profit sharing plan covering a three year period for all salaried employees and hourly bargaining unit and non bargaining unit employees. The respondent did not produce any of the requested information. On August 31, 2007, at a negotiation session, the respondent presented the union with a proposal that the union select an accountant to examine respondent's books and records to determine whether respondent's profit and loss was calculated according to generally accepted accounting procedures, and to determine whether the allocation of profit sharing funds to union and nonunion employees was equal and made according to the same criteria. The parties discussed the proposal at that meeting, but did not discuss it further.

The Board concurred with the judge's finding that the requested profit sharing information was presumptively relevant concerning unit employees and that the General Counsel demonstrated relevance concerning the nonunit employees. The Board stated the information remained relevant even after the respondent dropped its bargaining demand for cuts to the program because the union still needed the information to administer and enforce the contractual provision which remained a term and condition of employment following the contract's expiration. The Board rejected the respondent's argument that the union's information request was triggered by mere suspicion premised on the receipt of a pay stub, stating that while the premise of the request for non unit information needs to be based on more than mere suspicion it need not be accurate or ultimately reliable.

The Board also rejected the respondent's confidentiality argument noting it failed to raise the argument until its amended answer many months after it initially refused to provide the requested information noting that failure to raise a confidentiality defense in a timely fashion undermines the legitimacy of the defense. The Board also rejected the respondent's argument that respondent's alternative proposal to have an accountant audit respondent's books as satisfying the union's request. It was concluded that since the respondent only belatedly

asserted confidentiality the respondent was offering the union less than it requested for no articulated reason.

2. The current case

In the present case, the Union's request for information related a profit sharing provision for bargaining unit employees contained in the parties' current collective-bargaining agreement. Thus, the Union's request for information was presumptively relevant. See, *A-1 Door Solutions,* 356 NLRB No. 76 (2011); *National Grid USA Service Co.,* 348 NLRB 1235 (2006); and *A-Plus Roofing, Inc.*, 295 NLRB 967, 970 (1989), enfd. *NLRB v. A-Plus Roofing, Inc.,* 39 F.3d 1410 (9th Cir. 1994). Moreover, the Union's interest in the requested information was heightened by information the Union had garnered which it concluded warranted the information request. Profit sharing payouts are made quarterly to employees based on 10% of the profits as defined more specifically in the collective-bargaining agreement. In 2008, bargaining unit employees received a profit sharing payout of between 60 and 80% of the employee's base wages and overtime. In 2009, the profit sharing plan payout percentage declined to around 45%. Profit sharing payouts to employees are made on a quarterly basis, and by the first quarter of 2010 the payout had further declined to 16% which was paid on April 15, 2010. This decline fostered complaints among unit employees to the union officers.

Union representatives were also receiving reports that there was an increase in the flow of steel from Butler to other facilities for finishing which had the possibility of adversely affecting profit sharing calculations for Butler unit employees. In this regard, Green received a letter from Respondent official Bennett on April 27, 2009 wherein Bennett stated pertaining to profit sharing calculations that "from time to time the Company may reevaluate the (overhead) allocations to ascertain whether they are being distributed among the plants in the proper proportions." Green responded to Bennett by letter dated May 12, 2009 stating "It is the Union's expectation that any information used to 'reevaluate the allocations to ascertain whether they are being distributed among the plants in the proper proportions' will be shared with the Union as soon as possible." Green asked when the Union can expect to receive the information used to reevaluate the allocations. Green never received a response to his May 12, letter which I have concluded was sent and received by Bennett.[21] On July 30, 2009, Ehrman received an anonymous call at the plant. Ehrman was at a meeting with Respondent official Berbigler at the time and he reported the results of the call to Berbigler that Respondent was trying to reduce employees' profit sharing by slowing units down, moving coils, delaying units, and they were going to change accounting practices. Ehrman received no response from Berbigler to these accusations. During a meeting on April 27, 2010, Green and Ehrman were informed for the first time directly by Respondent's officials that there were changes as to how costs were allocated concerning the profit sharing plan. This sequence of events led the Union to hire a private accounting firm and to formulate and make its May 3 and May 18 information requests to Respondent. I find that the General Counsel has established that the requested information was relevant and necessary to the Union's statutory obligations.

[21] Green testified it was not unusual for the Union not to receive responses from Respondent. Likewise, Union Attorney Murtagh testified the Union's ability to get information declined when Respondent took over the Butler facility from Armco in 1999. In fact, Green sent Bennett a letter pertaining to the Union's information request on May 18, 2010, in which Green repeated his request for the profit sharing information and requested additional information. However, Green did not receive a response from Bennett until November 18, 2010, some six months later, and the response was only made after the Union had filed an unfair labor practice charge.

Respondent has raised several defenses to the Union's request for information. Respondent argues that the contractual grievance procedure requires a grievance to be filed within 30 days, and that a grievance filed with respect to the 2009 profit sharing plan should have been filed within 30 days of the notice of true up payment issued on February 10, 2010. However, I have found that the Union was first notified of changes to the accounting practices for the profit sharing plan on April 27, 2010, giving the Union a legitimate argument before an arbitrator that their grievance was timely filed on May 24, 2010 within 30 days of when they were notified of the possibility of a contractual violation concerning the plan. Moreover, Respondent's position concerning the timeliness of the Union's grievance has vacillated. Green's credited testimony establishes that during the April 27, 2010 meeting with Bennett and Vichich, that Green and Ehrman were told they could do an audit of the profit sharing plan for 2009, but that it was premature to do an audit for the first quarter of 2010 as those figures were just projections until the end of 2010 when they would be firmed up and that an audit for 2010 would have to be done at the end of 2010. On May 3, Green attached AR's information request and forwarded it to Bennett. Bennett responded by letter dated May 11, stating that as he previously stated a request to review 2009 financial information made on April 29, 2010 was untimely made, and that it was premature to request to review information pertaining to 2010 as they were just preliminary estimates. As I have found, Bennett had not informed Green during the April 27 meeting that an audit of 2009 was untimely. In fact, I find the Union was told the opposite. As to Respondent's position on the 2010 audit, Respondent appears to have taken a contrary position in its step 3 grievance response. In this regard, in his March 1, 2011 third step response Bennett stated in explanation of Respondent's timeliness argument that the profit sharing plan for the fourth quarter of 2009 was paid on February 18, 2010, and that in order to be timely filed a grievance would have to have been filed within 30 days of the payment being issued. Bennett then stated "Obviously, a grievance concerning payment of the profit sharing amount for the first three quarters of 2009 is similarly barred as untimely." Implicit in Bennett's statement was that the Union had to file a separate grievance at the end of each quarter of 2009, within 30 days after the quarterly payment issued. Thus, Respondent appears to be taking the position that it was too early to request an audit for the first quarter in 2010 in May 2010, but too late to request an audit for each of the quarters in 2009 because a separate grievance had to be filed at the end of each quarter.

Regardless of the bonafides of Respondent's timeliness argument in front of arbitrator concerning the merits of Union's underlying May 24, grievance I reject it here as a defense pertaining to the Union's May 2010 information requests. By letter dated May 18, Green notified Bennett that the Union was requesting the information to police the agreement and to ensure the correct payments were made in both 2009 and 2010. Green's request was not tied to any particular grievance as no grievance had been filed the time. It was a generic request to police the agreement. Regardless of whether the Union filed a timely grievance for the 2009 payments, Respondent informed the Union that changes were made pertaining to accounting for the profit sharing plan for that year, and it would seem the Union would be entitled to a review of Respondent's actions in 2009 for its monitoring of the profit sharing plan for both 2009 and in the future since the plan was incorporated in the collective-bargaining agreement through 2012. In *A-1 Door & Building Solutions,* 356 NLRB No. 76 (2011), the Board held a union was entitled to an information request pertaining to a profit sharing plan covering a 3 year period in order to administer its collective-bargaining agreement with a respondent employer even though the agreement had expired at the time of the request. Moreover, even assuming that the Union's request here with Respondent is tied solely to the May 24, 2010 grievance that grievance was still active at the time of the unfair labor practice trial. While Respondent is raising several procedural arguments to the grievance in its answer, it is not up to me to resolve the merits of the grievance in order to find that the Union is entitled to the requested information.

In this regard, in *Postal Service,* 303 NLRB 502, 508 (1991), it was concluded that a respondent was required to provide requested information even though any grievance pertaining to that information may be time barred. It was concluded that if a resulting grievance was time barred was a decision for an arbitrator. See also *Safeway Stores,* 236 NLRB 1126 fn 1 (1978), enfd 622 F.2d 425 (9th Cir. 1980), cert denied 450 U.S. 913 (1981). In this regard, if a Union receives the underlying information it may decide based on the merits of a grievance not to pursue it to arbitration, and it is not required to bare the costs of litigating the timeliness of a grievance before an arbitrator without having access to the information necessary to determine whether to proceed to arbitration in the first instance. Moreover, I do find that the Union has a reasonable argument as to the timeliness of its May 24, 2010 grievance since Respondent did not notify the Union of any accounting changes concerning the profit sharing plan for 2009 until April 27, 2010.

I also reject Respondent's contention that the Union's information request should be deferred to the parties' grievance-arbitration procedures. For the Board does not favor a two-tiered approach which would inevitably encumber the parties' grievance-arbitration machinery if a union were required to take its information request to arbitration, as a precursor to arbitrating its underlying contract dispute. See *Ormet Aluminum Mill Products,* supra at 790 citing *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 438 (1967); *Pertec Computer,* 284 NLRB 810, 820 (1987); and *AK Steel Corp.,* 324 NLRB 173, 184 (1997). In this regard, the Board has long held that deferral is inappropriate when the 8(a)(5) allegations pertain to failure to provide information. See, *National Broadcasting Co.,* 352 NLRB 90 fn. 1 (2008); *Medco Health Solutions of Spokane,* 352 NLRB 640, 641 (2008); *Team Clean, Inc.,* 348 NLRB 1231 fn. 1 (2006); *Shaw's Supermarkets,* 339 NLRB 871, 871 (2003); and *Chesapeake and Potomac Telephone Company,* 259 NLRB 225 (1981), enfd. 687 F.2d 633 (2nd Cir. 1982). In this instance deferral is particularly unwarranted because the Board will not defer a matter, whereas here, when a respondent contests the timeliness of the grievance. See, *Hallmor, Inc.,* 327 NLRB 292, 292-293 (1998) where it was stated:

> A key element of the deferral policy is the parties' expressed willingness to waive contractual time limitations in order to ensure that the arbitrator addresses the merits of the dispute. See *Johnson-Bateman Co.*, 295 NLRB 180, 181 fn. 6 (1989), and cases cited therein; *Pilot Freight Carriers, Inc.*, 224 NLRB 341, 345 (1976). When the Board reaffirmed the *Collyer* doctrine in *United Technologies Corp.*, 268 NLRB 557 (1984), it specifically held that the party seeking deferral "must, of course, waive any timeliness provisions of the grievance-arbitration clauses of the collective-bargaining agreement." Id. at 560 fn. 22.

Respondent argues in its brief that deferral is permissible when a collective-bargaining agreement contains a clear an unmistakable waiver of a union's right to the requested information. In *The Chesapeake and Potomac Telephone Company v. NLRB,* 687 F.2d 633, 636-637 (2nd Cir. 1982), the court stated:

> However, national labor policy disfavors waivers of statutory rights by unions and thus a union's intention to waive a right must be clear before a claim of waiver can succeed. Waivers can occur in any of three ways: by express provision in the collective bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two. The language of a collective bargaining agreement will effectuate a waiver only if it is "clear and unmistakable" in waiving the statutory right. The same standard applies to conduct of the parties; whether alone or in combination with contractual language, conduct can effectuate a waiver only

> if the union's intent to waive is clear and unmistakable from the evidence presented. (Citations omitted.)
>
> Applying these principles here, the Board's finding that the Union did not waive its right to the requested information is supported by substantial evidence. C&P relies upon language in the collective bargaining agreement to the effect that arbitration hearings "shall (be) conduct(ed) ... in accordance with the Voluntary Arbitration Rules of the American Arbitration Association," and notes that those rules do not provide for prehearing discovery. However, the fact that the Union agreed that arbitration hearings would be governed by the AAA rules hardly proves that it has waived its statutory right to discovery before a hearing takes place, especially under the "clear and unmistakable" standard.
>
> * * *
>
> Finally, C&P attempts to prove that the parties' past practice has been that pre-arbitration discovery is not allowed. At best C&P has shown that on some occasions it has refused to furnish information. That CWA did not file unfair labor practice charges on these few occasions hardly establishes "clear and unmistakable" waiver, especially since on other occasions C&P produced requested information.

Along these lines, the Board has repeatedly found that although a contract provides for a specific type of information request, such a provision does not constitute a waiver of a union's more general right under the Act to receive relevant information. *Ormet Aluminum Mill Products,* supra at 804-805; *King Broadcasting Co.,* 324 NLRB 332, 337 (1997); and *Postal Service,* 308 NLRB 358, 359 (1992).

The parties' contract language here provides "Specific financial information will be shared with union personnel who are bound by secrecy agreements (and their CPA, if requested)." The contract language in no way limits what type of information the Union is entitled to save to say the Union's request must be specific, and the union personnel and their CPA must be bound by a confidentiality agreement. Here, as had been the parties practice, the Union offered to sign a confidentiality agreement simultaneously with its information request, and there can be no serious contention that this contract language constitutes a clear and unmistakable waiver beyond that of what information the Union can request.

Respondent also argues there has been waiver by past practice. Respondent states in its post-hearing brief that the profit sharing plan has been in existence since 1986, and has remained essentially unchanged since 1989. While Respondent's post-hearing assertion may be correct, there is nothing in the record establishing the origination date of the plan, or that there have been no changes since 1989. Moreover, Respondent did not acquire Butler Works from Armco until 1999. The union for Butler Works at Armco was an Armco independent union, which apparently continued to represent the employees until 2003, when Local 3303 took over representational status. The extent of the prior audits by either of the unions of the profit sharing plan is sketchy at best on the record. Green testified he looked through the prior audits to respond to Respondent's subpoena request. Green testified there was different information requested at different times, with the 1986 audit being a little more in depth than the 1999 audit. He testified the Union did not feel there was enough information requested in the past to do a fair audit. When asked to explain what more in depth meant, Green testified the 1986 audit looked a little more in depth in that it had more pages. When asked if the 1986 request was as extensive as the 2010 request, Green testified, "I don't know." Green is not an accountant and I do not find that Respondent has established a consistent past practice where the Union has clearly and unmistakably waived the right to request the information it has currently requested. Moreover, even if I were to conclude the Union or its predecessor had consistently requested less information in past audits that does not establish that the Union clearly and unmistakably

waived the right to request more detailed information in the future when it perceived the need to do so.[22]

Finally, Respondent contends it should not be required to produce the outstanding items of requested information because they involve confidential information. It is Respondent's burden to establish information is confidential. Respondent drew testimony from Vichich in an effort to meet this burden of proof. However, Vichich made no claims in his testimony as to confidentiality requirements pertaining to items 17 and 24. Accordingly, I find that Respondent has failed to meet its burden of proof concerning those items and having rejected Respondent's other defenses, I find it violated the 8(a)(1) and (5) of the Act by its failure and refusal to produce items 17 and 24. *See Ormet Aluminum Mill Products,* 335 NLRB 788, 803 (2001); *Public Service Co. of Colorado,* 301 NLRB 238, 247 (1991); and *Richard Mellow Electrical Contractors Corp.,* 327 NLRB 1112 (1999).

As to the other items the Union requested, first it must be said that the Union's initial request for the information in dispute was made on May 3, 2010, and yet Respondent did not raise any confidentiality concerns to the information request until Bennett's letter of November 18, 2010, over six months following the Union's request. Even in that letter, Bennett offered no explanation of why the Respondent considered the information to be confidential, nor did he make any suggestion to negotiate to reach an accommodation concerning those items Respondent was declaring to be confidential. Rather, Respondent offered some of the other items of the requested information, only upon the Union's withdrawal of the charge and relinquishing its other claims. Respondent's claim of confidentiality here is clearly belated, a factor which the Board takes into account in considering the legitimacy of those concerns. See, *A-1 Door & Building Solutions,* 356 NLRB No. 76 (2011); and *Pulaski Construction Co.*, 345 NLRB 931, 938 (2005). Respondent's bare claim of confidentiality without explanation for the items it was not willing to provide also evidences an intent not to negotiate concerning those items, which would have allowed the Union to possibly compromise and reach an accommodation. Moreover, as provided for in the collective-bargaining agreement, the Union offered to sign a confidentiality agreement with its May 3 request. Yet, Respondent did not tender a proposed confidentiality agreement until November 18. The parties were eventually able to agree to the terms of a confidentiality agreement and on February 28, 2011, the Respondent was forwarded a signed confidentiality agreement which it had negotiated with the Union. Murtagh testified the union at Butler had signed confidentiality agreements in the past and received requested information. Vichich testified that in prior audits conducted by the Union there have been confidentiality agreements, and he was not aware of any problems concerning a breach of confidentiality.[23] Thus, I find Respondent's claims of confidentiality further diminished. See, *Stella D'oro Biscuit Co.,* 355 NLRB No. 158 slip op. 5-6 (2010); *Island Creek Coal Co.*, 289 NLRB 851, 851 fn. 1 (1988), affirmed 879 F.2d 939 (D.C. Cir. 1989); and *Facet Enterprises,* 290 NLRB 152, 165 (1988), enfd. in relevant part 907 F.2d 963 (10th Cir. 1990).

[22] Green testified the Union did an extensive study on Respondent's corporate finances in 2004 because Respondent was on the verge of bankruptcy. Thus, there is vague testimony that the Union has had access to detailed financial information from Respondent in the past when the need arose. Moreover, the predecessor union's 2002 audit of the profit sharing plan states at page 2 that the accounting firm had access to the Respondent's "internal financial statements." The latter document appears to come under item 1 of the Union's current outstanding information request which Respondent is refusing to provide.

[23] While Local 3303 did not replace the Armco independent union at the Butler facility until 2003, Respondent has apparently viewed some continuity between the two labor organizations as it argued past practice concerning the union going back to 1986 in its post hearing brief.

Moreover, Vichich testified that Respondent turns over the very records the Union is requesting here to an outside accounting firm DT for its annual audit. When asked why Respondent could not turn those records over to the accounting firm hired by the Union, Vichich explained that DT is hired by Respondent and has a confidentiality agreement to make Respondent whole for losses due to DT's breach of confidentiality. When shown that Respondent's confidentiality agreement with AR provided for legal and equitable relief to Respondent for its breach, Vichich could only state he was not aware that the agreement contained such a provision.

Vichich testified concerning his concerns of confidentiality with respect to items 1, 6, 7, 10, and 18 were that Respondent works in a highly competitive environment with a small number of competitors, and that if the information contained in those items was leaked to those competitors it could cause Respondent to go out of business. Vichich testified Respondent had a particular concern as to item 7, which he viewed as very sensitive to Respondent's operations. On the other hand, Vichich admitted there was a disincentive for the Union to disclose the information to a competitor because under the scenario Vichich attempted to paint the employees would be out of a job.

Barger, the CPA hired by the Union, specializes in manufacturing and distribution companies and in employee benefit plans testified in detail as to why he needed the disputed information as to each open item. He credibly testified that his failure to receive the requested information would reduce his review to checking Respondent's mathematical accuracy as opposed to verifying the profit sharing calculation which was the task he was hired to do by the Union. Along these lines, it has been long held that a union is not required to accept an employer's mere summaries or characterizations of requested information but is entitled to review the base line information to formulate its own arguments rather just accepting positions posited by a respondent employer. See, *Ormet Aluminum Mill Products,* 335 NLRB 788, 802 (2001)(holding a union is entitled to see invoices rather than mere summaries thereof); *Merchant Fast Motor Line*, 324 NLRB 562, 563 (1997) (holding that a union was not required to accept a respondent's declaration as to profitability or summary financial information provided by the respondent); *McQuire Steel Erection, Inc.*, 324 NLRB 221 (1997) (summaries of payroll records deemed not sufficient to meet a respondent's statutory obligation); *New Jersey Bell Telephone Co.*, 289 NLRB 318, 330 fn. 9 (1988), enfd. 872 F.2d 413 (3d Cir. 1989) (summary of an employee's absence records found not to be acceptable, with the administrative law judge stating that a grievance under a collective-bargaining agreement is analogous to a trial, wherein summaries may be offered by a party but it must make available to the other side the records on which the summary is based); *Pertec Computer*, 284 NLRB 810, 822 (1987)(the provision of a cost study insufficient absent access to the financial records from which the study was derived); and *E. I. du Pont de Nemours & Co.*, 346 NLRB 553, 557 (2006), enfd. 489 F.3d 1310 (D.C. Cir. 2007), (where it was noted that, "In order to assess the accuracy of the Respondent's claims, it was necessary for the Union to examine the data that formed the basis for the Respondent's conclusions.")

While Respondent contends the Union did not offer to compromise concerning the requested information, Barger testified concerning item 6, that Respondent had been informed that the Union was not interested in customer names and thus they can be redacted from the information supplied. Concerning item 10, Barger testified the Union did not have any interest in the names of suppliers, or customers. Barger also testified that the Union conveyed to Respondent during the February 25, 2011 settlement conference that the Union could do without item 7.

I find with respect items 1, 6, 10, and 18 that the General Counsel has established the relevancy and a strong need for the requested information by the Union. Respondent's

confidentiality claims are belated and tenuous at best since the Union and its accountant have signed a confidentiality agreement which was approved by Respondent, and Respondent has provided no basis to suspect that either the Union or accountant would breach that agreement. Thus, I find that by its failure and refusal to provide the Union with items 1, 6, 10 and 18 Respondent has violated Section 8(a)(1) and (5) of the Act. I have previously found that Respondent is required to provide the Union with items 17 and 24.[24] As to item 7, Barger testified he could accomplish his review without that item, and Vichich testified that this item was particularly sensitive to Respondent. Accordingly, I do not find Respondent is required to provide the Union with item 7, and the consolidated complaint is dismissed with respect to that item.

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times the Union has been the exclusive collective bargaining representative of Respondent's employees in the bargaining unit described in the parties' collective-bargaining agreement that is appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. The Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide relevant requested information to the Union since May 3, 2010 as described in items 1, 6, 10, 17, 18, and 24 in the attachment to the Union's May 3, 2010 letter to Respondent pertaining to the contractual profit sharing plan. Respondent may redact customer and supplier names from the information it is being ordered to provide.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

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[24] I do not find Respondent bargained in good faith to reach a compromise with the Union concerning the requested information concerning its alleged claims of confidentiality. First, its claims of confidentiality were untimely and non specific. Second, I have weighed the Union's need for the requested information versus Respondent's claims of confidentiality and have concluded the Union is entitled to the information as requested and that Respondent is adequately protected. Particularly, since the Union has signed a confidentiality agreement which Respondent participated in crafting. Finally, it is already over a year since the Union's initial information request, and the time lag was in large part due to Respondent's belated response. In the circumstances here, I do not find ordering the parties to engage in further negotiations about the requested information as Respondent suggests in its post-hearing brief is warranted or would be useful. Rather, I have concluded the Union is entitled to the information as set forth above, and that it should be promptly provided.

[25] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, AK Steel Corporation, which maintains an office and place of business in Butler, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Refusing to provide United Auto Workers Local 3303 a/w United Automobile, Aerospace, Agricultural and Implement Workers of America, requested information necessary for the performance of their function as collective bargaining representative of AK Steel Corporation's employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the excise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish United Auto Workers Local 3303 a/w United Automobile, Aerospace, Agricultural and Implement Workers of America copies of the requested information as described in items 1, 6, 10, 17, 18, and 24 in the attachment to the Union's May 3, 2010 letter to Respondent pertaining to the contractual profit sharing plan, redacting only customer and supplier names from the information to be provided.

(b) Within 14 days after service by Region 6, post at its Butler, Pennsylvania facility copies of the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 3, 2010.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 27, 2011

_____
Eric M. Fine
Administrative Law Judge

[26] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National labor Relations Board" shall read "Posted Pursuant to a Judgment of the United Stated Court of Appeals Enforcing and Order of the National Labor Relations Board."

APPENDIX
NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to provide United Auto Workers Local 3303 a/w United Automobile, Aerospace, Agricultural and Implement Workers of America requested information necessary for the performance of its function as collective bargaining representative of AK Steel Corporation employees in the bargaining unit described in our collective-bargaining agreement with that Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL promptly furnish United Auto Workers Local 3303 a/w United Automobile, Aerospace, Agricultural and Implement Workers of America copies of the requested information as described in items 1, 6, 10, 17, 18, and 24 in the attachment to the Union's May 3, 2010 letter to AK Steel Corporation pertaining to the contractual profit sharing plan, redacting only customer and supplier names from the information to be provided.

AK STEEL CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

112 Washington Place, Suite 510
Pittsburgh, Pennsylvania 15219-3458
Hours: 8:30 a.m. to 5 p.m.
412-395-4400.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 412-395-6899.