

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

**CORESLAB STRUCTURES (TULSA) INC.**

**Cases 14-CA-248354  
14-CA-248812**

**and**

**INTERNATIONAL UNION OF OPERATING  
ENGINEERS LOCAL 627, AFL-CIO**

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF  
TO THE ADMINISTRATIVE LAW JUDGE**

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Counsel for the General Counsel William LeMaster respectfully files this brief with the Honorable Robert A. Ringler, Administrative Law Judge (ALJ). This case is before the ALJ based upon a Consolidated Complaint and Notice of Hearing alleging that Coreslab Structures (Tulsa) Inc. (Respondent) violated Sections 8(a)(1), (3), (5) and 8(d) of the National Labor Relations Act (Act). The issues in this matter were heard by the ALJ on November 9, 10, and 12, 2020, and are addressed below.

## **I. Background**

At all relevant times, Respondent has operated a facility located in Tulsa, Oklahoma where it has engaged in the business of producing bridge members and structural commercial products. T. 245-246, 590; GC 1-I, p.2; GC 1-k, p.2.<sup>1</sup> Respondent acquired the Tulsa operation from Rinker Materials around December 2004. T. 246. Prior to the purchase, Rinker Materials had a collective-bargaining relationship with International Union of Operating Engineers Local 627, AFL-CIO (Union) with respect to the production and maintenance employees at the facility. T. 247. Upon its acquisition of the business, Respondent voluntarily recognized the Union as the bargaining representative of the same unit of employees. T. 247. Respondent employs a total of 38-40 full-time employees, excluding temporary employees. T. 248. Of those employees, approximately 25-30 employees held bargaining unit positions represented by the Union.<sup>2</sup> T. 39, 248. A couple of months after Respondent acquired the business from Rinker, Respondent and the Union negotiated their first of many collective bargaining agreements with the most recent contract having effective dates of May 1, 2015 through April 30, 2019. T. 247-248; JX 1.

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<sup>1</sup> References will be denoted using the following abbreviations followed by page numbers: Trial Transcript (T.); General Counsel's exhibits (GC); Respondent's exhibits (R); and Joint exhibits (JX). Where necessary, Respondent's Bates numbers will be referenced (e.g., JX 5, CST0006; JX 17, CST 0206, etc.).

<sup>2</sup> General Manager and Vice President Neil Drews testified that the number of unit employees fluctuates due to natural attrition. T. 248. For example, on September 30, 2019, when Respondent withdrew recognition from the Union, 26 employees held bargaining unit positions at that time. T. 249; JX 9, page 2; JX 13, page 3; JX 20.

## II. Statement of Facts

On February 20, 2019,<sup>3</sup> Union President and Business Agent Justin Evans sent a reopener letter to Respondent advising of the Union's desire to open the contract for negotiations. T. 41-42; JX 2. The parties met for three bargaining sessions before Respondent withdrew recognition from the Union on September 30. The parties met on April 10, July 26, and September 6. T. 41-42; JX 20. On April 10, the parties met at the Union hall.<sup>4</sup> Attendees were Justin Evans, Union Business Manager Michael Stark, Respondent's General Manager and Vice President Neil Drews and Respondent's Controller Greg Kaufman. T. 44-45; JX. 20. The April 10 bargaining session lasted approximately one hour as the parties discussed their respective proposals. T. 45-47. No tentative agreements were reached on any aspects of the parties' proposals. T. 47. The parties concluded their first session by agreeing to reconvene for a second session on April 19. T. 47.

Although not raised by the Respondent at the April 10 session, on March 28, Respondent was put on notice by Calibre CPA Group PLLC (Calibre) that Calibre would conduct an audit of Respondent's records on behalf of the Central Pension Fund of the International Union of Operating Engineers (CPF). T. 51, 362-363; JX 17. As described by Fund Counsel Joseph Shelton, the CPF is "a multi-employer defined benefit pension plan located in Washington, D.C." covering employees who work under collective-bargaining agreements between IUOE locals and participating employers. T. 433. Under Article 16 of the parties' 2015-2019 CBA, Respondent was contractually obligated to make specific monetary contributions to the CPF on all hours worked. JX 1, pages 15-16. Calibre notified Respondent that its audit would cover Respondent's contributions to the CPF for the period of January 2016 through December 2018.

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<sup>3</sup> Unless indicated, all dates are 2019.

<sup>4</sup> All three sessions took place at the Union hall. T. 44.

JX 17, CST 0206. Calibre's audit took place on April 16 and 17 at Respondent's facility. T. 364. It was during the audit that Calibre informed Respondent that there was a discrepancy in the pension payments Respondent had made to the CPF during the audit period. Specifically, Calibre informed Respondent that it was to account for and make pension payments for *all employees* who fell within the job classifications identified in the parties' CBA. T. 365-366. As will be made clear later, Respondent's records showed that it had only made pension payments on behalf of Union members.

Although the parties had agreed to meet for a second bargaining session on April 19, that meeting did not take place. A few days prior to April 19, Neil Drews informed Justin Evans that Respondent was cancelling the session. T. 47-48. Drews informed Evans that the reason was because Respondent was under audit with the CPF. T. 48. The Union was not aware that Respondent was being audited until Drews notified Evans on this date. T. 50. Evans told Drews that the parties needed to return to negotiations to get an agreement ratified before the CBA expired at the end of the month. T. 50. Drews' response was that his hands were tied and that he was under orders not to negotiate until the audit was finalized. T. 50-51. Prior to the contract expiring, Evans returned to the facility and attempted to schedule additional bargaining dates. T. 52. When doing so, Drews would reiterate that his hands were tied and that his instruction from corporate was not to set up dates until the audit had been completed.<sup>5</sup> T. 52. As a result, Drews asked Evans about the Union agreeing to a three-month contract extension to July 31, 2019. T. 52-53. Evans advised that an extension would need to be ratified by the membership. T. 52. Evans took the extension proposal to the membership and explained the events that led to the

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<sup>5</sup> Drews testified that his references to "corporate" to Evans referred to Frank Franciosa at Respondent's corporate office located in Stoney Creek, Ontario, Canada. T. 245. Drews described Franciosa as his direct report and one of Respondent's owners. T. 253. GC 13 also identifies Franciosa as Respondent's Secretary Treasurer.

proposal. T. 53. His explanation included Respondent's refusal to negotiate until it received the results from the CPF audit. T. 53. The membership approved the extension and on April 24, the parties entered into a Memorandum of Understanding agreeing to a CBA extension to July 31. T. 54; JX 4.

Following the extension, Justin Evans spent the next several months visiting Respondent's facility on an almost weekly or bi-weekly basis. T. 56. Evans frequently communicated with Drews during this time period regarding renewing bargaining sessions. T. 56-57. Evans' response was always the same with him stating that his hands were tied and he could not schedule additional bargaining until corporate authorized him to do so. T. 57. Evans was "on hold" until corporate gave him the green light to proceed as corporate was waiting on the final results of the CPF audit. T. 57-58. Evans communicated with Drews concerning scheduling additional bargaining dates throughout the months of May and June 2020. Drews' responses regarding having to wait until corporate authorized him to meet again because of the audit remained the same throughout that time period. T. 58. On July 1, Evans called Drews to press him to schedule bargaining dates. T. 60; JX 5, CST#0006-0007. Drews reiterated that he was not able to do so until corporate told him to move forward. T. 60-61. On July 2, Evans followed up on that conversation with an email repeating his request for bargaining dates. T. 60-61; JX 5, CST0006-0007. Evans stressed that it was the parties' obligation to get a contract done and he provided his availability July 8-12. JX 5, CST0006-0007. On July 3, 2019, Drews replied and wrote that "[t]he corporate stance is that we do not negotiate until we see the way the audit turned out." JX 5, CST0006. On July 15, Evans emailed Drews after the Union had learned that the audit had been completed and Respondent had been notified. JX 5, CST0005. Evans again offered his availability for negotiations starting the very next day through July 21.

*Id.* Drews replied that as of his 11:29 a.m. email on July 15, the audit results had not come across his desk but he would let Evans know when it did. *Id.* On July 16, Evans replied emphasizing that it was important that the parties meet soon for negotiations. JX 5, CST0008. On July 18, Evans emailed Drews asking if he had heard anything yet. JX 5, CST0005. Later that day, Drews replied that he had received the audit results the day prior and Respondent was “trying to figure out how to proceed.” JX 5, page 8. On July 22, Drews emailed Evans, “According to Corporate, they said I can enter talks, but not sign anything until the audit is final.” JX 5, CST0005. On July 24, Evans emailed Drews proposing the parties meet two days later at 10:30 a.m. on July 26, and Drews agreed. JX 5, CST 0011.

The audit results had been communicated to Respondent by way of a letter from Calibre dated July 15. T. 373-374; GC 14. Calibre had determined that Respondent owed the CPF \$119,455.28 in pension payments for the 2016-2018 period. T. 374-375; GC 14, CST 0208-0212. On July 19, Neil Drews emailed a letter to Nancy Sargent of Calibre protesting the audit results. GC 14, CST 0214. Drews argued that the CBA “does not provide for pension contributions for all the employees listed in your audit.” *Id.* Drews testified that he was trying to convey Respondent’s position that the company’s past practice was to only make pension payments for those individuals identified on the remittance forms provided by the CPF to Respondent. T. 380. Drews also argued in his letter to Calibre, “Past practice and the interpretation of the parties to the CBA does not include the employees listed in your audit.” GC 14, CST 0214. Drews acknowledged in his testimony that with respect to “the interpretation of the parties” he was referring to his personal interpretation of the CBA. T. 382-383.

On July 24, Nancy Sargent emailed three questions to Neil Drews seeking clarification of his July 19 letter. GC 14, CST 0215. One of those questions was for Drews to expand on his

interpretation of the parties' CBA and to explain why it does not include the employees identified in Calibre's report. *Id.* On July 26, Drews provided his answers in writing. GC 14, CST 0217. In response to Sargent's request that he expand on his interpretation of the CBA, Drews wrote:

The audit appears to assert that pension contributions to the Central Pension Fund must be made for every employee in the bargaining unit. However, Article 16 does not require pension contributions for every employee in the bargaining unit. The CBA provides for pension contributions on "all hours worked" in Section 16.3. Pension contributions are applicable for participants in the Central Pension Fund. That is the common purpose of pension contributions. No contribution is required by the CBA for employees who are not participants in the Central Pension Fund. The company offers other retirement benefits to employees that are available to employees who are not participants in the Central Pension Fund.

*Id.*

As agreed upon, the parties met for their second bargaining session on July 26. Justin Evans and Michael Stark were present again for the Union. For Respondent, Neil Drews and Coda Odell attended. T. 67; JX 20. Odell had replaced Greg Kaufman as Respondent's controller in May 2019. T. 261. This bargaining session was shorter than the one on April 10, lasting approximately 40 to 45 minutes. T. 67. The parties again discussed various proposals with Respondent giving the Union its first written proposed changes. T. 70; JX 15. After limited discussion, no tentative agreements were reached on this date regarding either party's proposals. T. 71. The CPF audit was raised briefly only in that Respondent told the Union that it intended to appeal the audit results, but the parties did not engage in a discussion as to what the audit found. T. 72, 73-74. At the end of the session, Drews proposed a twenty-cent increase to coincide with a one-month extension. T. 73. Drews made this proposal because Respondent was contesting the CPF audit findings and with the contract extension expiring in five days, he did not believe the parties could finalize a successor contract in that time period. T. 73. After a

caucus, the Union returned with a counter proposal of a thirty-cent increase and a two-month extension. T. 74. Evans testified that the Union's counter proposal was intended to give the company time to get answers from the CPF regarding the audit and to "get more money in the employees' pockets." T. 74. Drews advised that he would have to get corporate's approval and Evans noted that he would need to get the extension terms approved by the membership. T. 74-75. The meeting ended with that understanding. T. 76.

On the following Monday, July 28, Evans visited Respondent's facility to present the extension terms to the membership. T. 76. When he arrived, Evans visited Drews in his office. At that time, Drews told Evans that the extension proposal was off the table. T. 77. Evans then asked about Respondent's initial proposal of twenty-cents and a more limited extension. Drews responded that everything was off the table. T. 77. Drews did not provide an explanation other than corporate told him to take the raise off the table. Drews stated if there was going to be an extension, it would be a stand-alone agreement. T. 77. With that information, Evans presented the proposed two-month extension to the membership along with the explanations provided by Respondent. T. 77-78. The membership agreed to extend and on July 31, the parties entered into an agreement memorializing a second extension of the expired CBA to September 30. T. 78-79; JX 6.

Sometime around late July, Evans visited Respondent's facility to meet with unit employees to update them on the status of negotiations. T. 134-135. Evans was in the employee break room talking to an individual he understood to be a new hire. T. 135. The employee advised that he did not want to join the Union but he was interested in signing an Authorization for Representation card. T. 135. At that time, Plant Manager Danny Johnson entered the room and interrupted the conversation by asking Evans "what the hell" they were doing. T. 135.

Evans explained and in the presence of bargaining unit employees in the room on break, Johnson responded that the employee was not allowed to talk to Evans. T. 135. Johnson told Evans that the individual Evans was talking to was still temporary and he had no right talking to the Union. T. 136. Evans disagreed with Johnson's statement and explained to him under the law, the individual had the right to talk to Evans and to fill out an Authorization for Representation card. T. 135. Evans tried to explain that the individual was not joining the Union, but Johnson did not want to listen to Evans' explanation. T. 136. The temporary employee left with Johnson and Evans engaged in their dispute. T. 137.

Similar to his actions during the months of May and June, Justin Evans communicated with Neil Drews in person, by telephone, text message, and e-mail throughout the months of August and September regarding resuming negotiations. T. 79. Again, Drews responded with the same company line that "corporate said wait." T. 79. On August 27, Evans sent a text message to Drews asking, "Any idea when you would want to start working on negotiations." T. 80-82; JX 18. Drews responded, "I don't know. Corporate told me to wait." *Id.* That same week, Evans emailed Drews with dates the Union was available to continue negotiations. JX 7. When he did not hear back from Drews, Evans sent another email on September 4. *Id.* On the same day, Drews replied that he would like to meet on September 6 if that date was still available. *Id.*

The parties met on September 6, with the same attendees as the July 26 session. T. 84; JX 20. The third and final bargaining session lasted approximately two hours. T. 84. The parties spent time discussing Respondent's proposals set forth in Joint Exhibit 19. T. 85-88; JX 19. Tentative agreements were reached on shift differential, adjustments to articles to replace gender specific language with the word "employee," and the removal of certain classifications

with the understanding that if that work was reinstated that Respondent would meet with the Union to establish a pay grade for each classification. T. 85-88; JX 19.

During the course of the parties meeting on September 6, the subject of the Central Pension Fund (CPF) came up again as Respondent was proposing to replace the pension with an existing profit sharing plan. T. 88; JX 19. During the course of the parties' discussion on the subject, Respondent communicated new information to the Union. The first was that Respondent was making pension payments as required by Article 16 of the CBA only to dues paying members of the Union. T. 89. The second was that Respondent was allowing bargaining unit employees who were not Union dues paying members to participate in Respondent's profit sharing plan. T. 89. Although Respondent's obligation to make contributions to the CPF is identified in the parties' CBA, the CBA does not reference a profit sharing plan and that has never been negotiated between the parties. T. 91; JX 1. Prior to the parties' September 6 bargaining session, the Union was not aware that Respondent was (1) limiting its pension payment to Union members or (2) allowing non-Union members to participate in Respondent's profit sharing plan. T. 90, 97-98. Respondent confirmed that those employees who were Union members could not participate in the profit sharing. T. 90-91. The Union protested by reminding Respondent that it could not provide benefits to some unit employees and not others. T. 93. After a brief caucus and further discussion on unrelated topics, the session came to a close when Neil Drews declared that the parties were too far apart and would need to return on a later date. T. 96.

On September 9, Evans emailed Drews requesting information concerning Respondent's profit sharing plan and its 401(k).<sup>6</sup> T. 98-99; JX 8. In the same email, Evans also requested

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<sup>6</sup> Respondent's 401(k) plan is a negotiated benefit found in the parties' CBA under Article 17. JX 1, page 16.

additional dates to schedule further negotiations. JX 8, CST0024. On September 10, Evans followed up with another email providing dates the Union was available for bargaining throughout the month of September. JX 8, CST0023. Evans also asked that the information he requested on September 9 be provided as soon as possible, noting “the employees have went above and beyond in allowing the company two extensions or 5 months to negotiate with them.” *Id.* Later on September 10, Drews replied to Evans advising that he was out of the office but should return on September 12. JX 8, page 3.

On September 11, bargaining unit employee Theron Chalakee hand delivered to Neil Drews a disaffection petition signed by 18 of the 26 bargaining unit employees. T. 402-405, 702-703, 707; JX 16.<sup>7</sup> The petition was dated September 9, 2019, and read:

To whom it may concern. We, the employees at Coreslab Structures have signed this petition to state that we no longer need or want the Union (Local 627) in our plant.

We feel that Local 627 have nothing to do with us and they do not represent us in any manner.

JX 16.

On September 12, Evans met with Drews in Drews’ office. T. 100-101. Drews provided Evans with documents responsive to Evans’ September 9 information request. T. 102-104, T. 707-708; JX 9. Evans informed Drews that the Union planned to file a grievance over Respondent only allowing non-Union members to participate in the profit sharing plan. T. 101. Drews denied the grievance because the profit sharing benefit was not set forth in the CBA. T. 101. During the same conversation, Drews informed Evans that “everything was off the table again, everything that we tentatively agreed on.” T. 101-102.<sup>8</sup> Evans thumbed through the

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<sup>7</sup> Although the petition contains 21 signatures, three non-bargaining unit employees signed - Wendell Colquitt, Wes Virden and Claude Ward. T. 405, 707.

<sup>8</sup> Evans testified that Drews did not provide any reason why while Drews testified that Respondent was withdrawing

documents provided while notifying Drews that the Union would move the profit sharing grievance to the next step of the grievance procedure. T. 102-103. Following their meeting, Evans sent Drews a letter dated September 12 confirming the Union was proceeding to Step 2 of the parties' grievance procedure. T. 108; GC 2. Within that letter, Evans communicated the Union's objection to Respondent's practice as it concerned profit sharing eligibility, noting that "every employee, whether a member or not, must be treated equally and fairly....(the Union) demands every employee within the Bargaining unit be made whole with both Pension and Profit Sharing, according to applicable laws." *Id.* Evans also reviewed the documents provided by Drews on September 12. As of his review, Evans believed there was some information missing and there were additional documents that he wanted. T. 103. As a result, on September 16, Evans emailed Drews advising of the missing information or additional items he was requesting. T. 104-105; JX 10, CST0032. Evans requested (1) the start date of the profit sharing plan at Respondent's Tulsa facility, (2) contact information along with the 401(k) prospectus, (3) data on the last ten years profit/loss margins, (4) Respondent's five year profit/loss forecast, and (5) the percentage or monetary number of company profit the profit sharing is based on. *Id.* Drews replied later that day denying Evans' request for information. *Id.* Drews wrote that the information Evans was requesting pertained to profit sharing versus pension during negotiations and Respondent had withdrawn its offer on September 12. *Id.* Drews emphasized that there were no contractual offers on the table at that time. *Id.* Drews made no reference to the disaffection petition received the day before. *Id.*

On September 19, Drews emailed Evans a letter denying the Union's grievance. T. 110; GC 3. Within his letter, Drews wrote that Respondent had made pension contributions in

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all tentative agreements because it had received a disaffection petition from employees. T. 102, 106-107, 709-710.

accordance with Article 16 and that the Union's grievance was "preempted by federal law to the extent the Local is attempting to assert that pension contributions should have been made to the Central Pension Fund." *Id.* As it related to the profit sharing plan, Drews advised that the CBA does not address or cover profit sharing and a grievance cannot be asserted over a bargaining proposal that is not part of the contract.<sup>9</sup> *Id.* In the following week, around September 23-25, Evans met with Drews at Drews' office as the next step in the grievance process. T. 111-112. The parties reiterated their respective positions with respect to Respondent allowing non-Union members to participate in its profit sharing plan while not allowing the same benefit for Union members. T. 112-113. The parties' positions remained the same as communicated verbally on September 12 and in the parties' subsequent correspondence. T. 112-113. Next, Drews became visually upset when he communicated his frustration with the fact that the Union had filed an unfair labor practice charge over the profit sharing issue and he asked Evans why the Union would not "just let the grievance play out." T. 113. Evans responded that it was the Union's belief that a Board charge was the direction it needed to go to represent the bargaining unit. T. 113. At that point, Drews handed Evans a letter dated September 24 informing Evans that Respondent had received a petition from employees on September 11 stating that 18 out of 26 bargaining unit employees "no longer need or want Local 627 of the IUOE to represent them." T. 113-114; JX 11. The letter further advised that Respondent would no longer recognize the Union as the employees' collective bargaining representative when the CBA expires on September 30. JX 11. Drews also told Evans that Respondent had retained legal counsel. T. 113. Evans asked to see the petition but Drews denied that request. T. 115. The meeting concluded at that point. T. 115.

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<sup>9</sup> The Union's grievance concerning Respondent's profit sharing practice ultimately progressed to arbitration. T. 204-205.

On September 26, Evans emailed Drews advising that the Union maintained majority status of Respondent's employees and he renewed his availability for additional negotiation dates in late September and early October. JX 12, CST0037. Later that day, Drews replied confirming that he had received a disaffection petition on September 11 showing that a majority of unit employees no longer wish to be represented by the Union. JX 12, CST0036-0037. Based on that petition, effective the expiration of the parties' CBA on September 30, Respondent would no longer recognize the Union as the unit's bargaining representative and Respondent declined to schedule any further bargaining sessions. *Id.* When the CBA expired on September 30, Respondent withdrew recognition from the Union. T. 117, 402.

### **III. Legal Argument**

#### **A. Respondent prohibited employees from speaking/meeting with the Union in violation of Section 8(a)(1) of the Act.**

##### **1. Legal Support**

The basic test for a violation of Section 8(a)(1) of the Act is whether under all of the circumstances the employer's conduct reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed by the Act. *Mediplex of Danbury*, 314 NLRB 470, 472, (1994). See, e.g., *Sunnyside Home Care Project, Inc.*, 308 NLRB 346 fn. 1 (1992), citing *American Freightways Co.*, 124 NLRB 146, 147(1959). The Board has consistently found that a prohibition against speaking with union representatives violates Section 8(a)(1). See *Jerry Ryce Builders, Inc.*, 352 NLRB 1262, 1269 (2008) (instructing employees to eat lunch on the jobsite so as to avoid speaking with union representatives); *West Dixie Enterprises*, 325 NLRB 194, 2000 (1997) (prohibiting employees from speaking with union agents).

## 2. Argument

When Plant Manager Danny Johnson interrupted Union President and Business Representative Justin Evans while he was talking to a temporary employee in late July 2019, Johnson unlawfully prohibited employees from engaging in Section 7 activity in talking to a representative of the Union. Johnson testified that on the day in question, he walked into the breakroom and observed Evans handing pieces of paper to employees, including a temporary employee. T. 572, 575-576. At the time that Johnson engaged Evans, he did not know what the pieces of paper were. T. 572. Johnson took the position that because the documents must have been Union related, and the temporary employee was on his first day, whatever pertained to the Union did not concern the employee because he worked for an employment service. T. 575. Evans explained his presence and Johnson responded that the employee was not allowed to talk to Evans. T. 135. Johnson told Evans, in the presence of other unit employees present, that the individual Evans was talking to was still temporary and he had no right talking to the Union. T. 136. Evans disagreed with Johnson's statement and explained to him under the law, the individual had the right to talk to Evans and to fill out an Authorization for Representation card. T. 135. Although temporary at the time, Johnson confirmed in his testimony that temporary employees have the possibility of being hired into a bargaining unit position if they pass a sixty-day window period. T. 584-585. Johnson also confirmed in his testimony that Evans, as a Union representative, had the contractual right to be in the employee break room and speak to employees just as he was on the day Johnson observed him talking to a temporary employee. T. 585. The combined testimony of Evans and Johnson confirmed that Johnson sought to unlawfully interfere with an employee's right to engage in discussion with a Union representative. Not only did Johnson interfere with the temporary employee's ability to do so,

but Johnson's restriction was also observed by full-time bargaining unit employees who reasonably would be restrained from future encounters with Union representatives based on Johnson's unlawful conduct on that day. As a result, through Danny Johnson's actions in the breakroom in late July 2019, Respondent violated Section 8(a)(1) of the Act.

**B. Respondent's pension and profit sharing practices violated Section 8(a)(3) and (5) and 8(d) of the Act.**

**1. Violation of Section 8(a)(3) of the Act.**

**a. Legal support**

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. §158(a)(3). Respondent's facially discriminatory practice as it related to pension payments and profit sharing eligibility was unlawful under more than one legal theory. Under *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the General Counsel must persuasively establish that the evidence leads to a conclusion that protected conduct was a motivating factor in the employer's adverse action. There must be evidence that the employee in question was engaged in protected activity, the employer was aware of that activity, and the activity was a substantial or motivating factor for the employer's action. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004). The burden then shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB at 1089. Additionally, in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1976), the Supreme Court found that if an employer's discriminatory conduct is inherently destructive of important employee rights, no proof of anti-union motivation is needed. As set forth below, the record

supports a finding that Respondent discriminated against bargaining unit employees under both the *Wright Line* and *Great Dane* standards, in violation of Section 8(a)(3) of the Act.

**b. Argument**

The facts are largely undisputed regarding Respondent's practice as it concerns (1) its pension payments to the Central Pension Fund (CPF) and (2) its policy regarding those individuals who are eligible to participate in Respondent's profit sharing plan. The testimony and evidence set forth at hearing established that at all relevant times, Respondent (1) only made pension payments to the CPF on behalf of Union dues paying members and (2) prohibited Union dues paying members from participating in its profit sharing plan.

Article 16 of the parties' 2015-2019 collective-bargaining agreement sets forth Respondent's pension obligations. Article 16.3 reads,

*The company agrees to contribute to the Central Pension Fund as follows:*

*April 30, 2016, one dollar and twenty five cents (\$1.25) per hour on all hours worked.*

*April 30, 2017, one dollar and thirty cents (\$1.30) per hour on all hours worked.*

*April 30, 2018, one dollar and thirty five cents (\$1.35) per hour on all hours worked.*

*April 30, 2019, one dollar and forty cents (\$1.40) per hour on all hours worked.*

JX 1, page 15-16.

Respondent's General Manager and Vice President Neil Drews has served in that role for the company since 2011. T. 244. Drews confirmed the process Respondent had followed in making monthly pension payments to the CPF since he took over that role. T. 259. Upon receipt of the remittance forms from the CPF, an individual in Respondent's payroll department would calculate the number of hours for those employees Respondent deemed to be eligible for pension payments. This role was filled by various payroll clerks including Ana Hernandez and her

predecessor Valerie Boggs. T. 254-255, 259, 281-282. Ms. Hernandez or Ms. Boggs would transfer the hours worked and payments owed for each employee deemed eligible by Respondent to a spreadsheet and that document would be reviewed by Respondent's controller<sup>10</sup> and Drews. Drews would then sign off on the payments, authorizing Respondent's accounting office to make payment to the CPF. T. 259-261, 273-274. Drews testified that GC Exhibit 6 constitutes spreadsheets showing all of the employees for whom Respondent made CPF pension payments between January 1, 2016 and September 30, 2019. T. 268-270; GC 6. Each spreadsheet is submitted to the CPF along with Respondent's monthly payment. T. 286. Each spreadsheet shows the number of hours worked by each named employee per work week and month, the total hours worked by all named employees for the month, and the total monthly pension payment made to the CPF for those named employees. T. 268-270; GC 6. Drews further confirmed that throughout the time period covered by GC Exhibit 6, there were more bargaining unit employees employed by Respondent than just those identified within the exhibit. T. 276-277. When asked by the ALJ why that was, Drews admitted that Respondent's practice was to only make pension payments for Union members:

Because my understanding from when I took over in 2011, the only thing – the only people we paid a pension to was the current members of the collective bargaining agreement – or members of the union, sorry. And that's who was always on the remittance forms and it's been that way since 2011 since I took over, and I just kept proceeding and I have never received a document from the pension fund or anybody – or even the union stating that it needed to be done otherwise.

T. 277.

The exhibits offered into evidence corroborate Drews' testimony. For example, Respondent started calendar year 2019 making pension payments for only eight bargaining unit

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<sup>10</sup> Greg Kaufman and Coda Odell held Respondent's controller position during the relevant time period with O'Dell replacing Kaufman in that role in May 2019. T. 261.

employees. GC 6, CST 0113. Drews confirmed in his testimony that GC Exhibit 5 constitutes records created by Respondent showing all employees who worked a bargaining unit position for any period of time during calendar years 2017-2020. T. 262-263. In 2019, eight employees were members of the Union at some point throughout the year: Millie Adrean, Johnnie Brown, Dolores Escalera, Sergio Garcia, Tommy Hand, Delbert Montgomery, Shawn Queen, and Thomas Vann. GC 5, CST 0035. Those are the same eight employees, and only employees, that Respondent made pension payments for in 2019. GC 6, CST 113. A review of GC Exhibits 5 and 6 confirm the same practice in 2017 and 2018. Drews also confirmed that the only reason an employee's name would have been removed from Respondent's spreadsheets provided to the CPF, as set forth in GC Exhibit 6, is if an employee left Respondent's employment or they resigned from the Union. T. 278-279. Additionally, the only employee who joined the Union between January 1, 2016 and September 30, 2019 was Shawn Queen. T. 306-307; GC 5, CST 0034. A review of GC Exhibit 6 confirms that only one name was added to Respondent's pension payment spreadsheets provided to the CPF during the same time period. That one name was Shawn Queen as his name first appears on Respondent's pension spreadsheets effective November 2018, the same month he joined the Union. GC 5, CST 0034; GC 6, CST 0189. Drews further confirmed that while Respondent hired other individuals into bargaining unit positions between 2017 and 2019, they did not join the Union. T. 306-307. As a result, Respondent did not make pension payments to the CPF on their behalf. GC 6. For the period of January 1, 2017 through Respondent's withdrawal of recognition on September 30, 2019, the following table identifies the employees removed from or added to Respondent's list of employees for whom it paid pension payments to the CPF, the reason for Respondent's removal

or addition of the employee, and the date the employee was removed from or added to

Respondent’s payments to the CPF:

<b>Employee</b>	<b>Event</b>	<b>Removed from CPF Payments</b>	<b>Added to CPF Payments</b>
<b>Jimmy Miksell</b>	Employment Terminated 3-30-17 GC 5, CST 0033	Pay date 4-14-17 GC 6, CST 0169	
<b>Floyd Prince</b>	Resigned from Union 5-1-17 GC 5, CST 033	Pay date 4-14-17 GC 6, CST 0169	
<b>Sergio Loera</b>	Retired 7-24-17 GC 5, CST 033	Pay date 8-4-17 GC 6, CST 0174	
<b>Richard Grona</b>	Employment Terminated 8-10-17 GC 5, CST 033	Pay date 8-25-17 GC 6, CST 0174	
<b>Theron Chalakee</b>	Resigned from Union 5-1-18 GC 5, CST 034	Pay date 5-4-18 GC 6, CST 0183	
<b>Shawn Queen</b>	Joined the Union 11-12-18 GC 5, CST 034		Pay date 11-2-18 GC 6, CST 0189
<b>Thomas Vann</b>	Retired 4-29-19 GC 5, CST 035	Pay date 5-3-19 GC 6, CST 0132	
<b>Delbert Montgomery</b>	Employment Terminated 6-10-19 GC 5, CST 035	Pay date 6-28-19 GC 6, CST 0136	

In defense of its actions, Neil Drews testified that Respondent did not make pension contributions for non-Union members because they were not identified on remittance forms Respondent received from the CPF on a monthly basis, “and we didn’t believe we needed to.” T. 632. Drews made the same arguments to Calibre when he contested the audit findings in July, along with the argument that the parties’ CBA did not require payments to all bargaining unit employees. GC 14, CST 0214, 0217. With respect to Respondent’s argument that it simply relied upon the remittance forms provided by the CPF on a monthly basis, this argument is contrary to the reality of the CPF contribution process. CPF attorney Joseph Shelton provided a detailed explanation of that process beginning with the moment an employer becomes a

signatory contractor with a contractual obligation to make pension payments to the CPF. First, a copy of the collective bargaining agreement is sent to the CPF and the CPF's employer records department will assign an account number to that employer. T. 436. Consistent with the CBA, the CPF's employer records department will enter the appropriate contribution rate and any other specific classifications covered by the CBA. T. 436. The CPF then provides the employer with instructions for reporting employer contributions to the CPF. T. 437-438; GC 16. The instructions contain template forms that can be used by the employer or the employer can generate its own version. T. 436-437; GC 16, page 12. The employer report of contributions is set forth on page 12 of GC Exhibit 16. Employers can use this form, or one of their own, to identify the employees for whom contributions are being remitted. T. 438; GC 16, page 12.<sup>11</sup> On the employer's initial report, social security numbers are provided by the employer because at that point, the CPF would not have assigned a participant ID number to individual participants (employees). T. 438-439. The form requires the hours worked, wages, contribution rate, and the appropriate work period. T. 439; GC 16, page 12. The next step in the process would require the employer to submit to the CPF the employer report of contributions, or a similar form, even if self-generated by the employer, listing the employees, their identifying information, hours worked, and contribution rate. T. 440. The CPF has **NO WAY** of knowing whether the employer's initial report is accurate with respect to whether the employer has listed all eligible employees. As Shelton noted in his testimony, "The fund relies on self-reporting by the employer, so it's a self-reporting process. So the fund's relying on that information that the employer's providing." T. 440. The CPF sends out blank employer report of contribution forms for the first two months. By the third month, using the participant (employee) information

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<sup>11</sup> GC Exhibit 16, page 11 is a cover page attached to the employer report of contributions. Both are sent to participating employers on a monthly basis. T. 438-439,

provided by the employer, the CPF begins sending prepopulated remittance forms to the employer. T. 441-442. Examples of these prepopulated forms are identified in GC 7, GC 8, GC 19, and R 11. The CPF relies upon the employer to provide the names of employees who should receive benefits. The only way the CPF would know whether the employer has gained or lost employees within the covered collective-bargaining unit would be if that information was provided by the employer. T. 442-443. As Shelton stated in his testimony, “I believe the instructions note that when a – when an employer terminates (an) employee or if an employee retires, the expectation is that the employer would be marking off – the employee’s name. Similarly, if the employer is adding a new employee, that the employee’s name would be handwritten into the prepopulated report – or typed in.” T. 443. Page 5 of the instructions reads, “Cross out any employees for whom you are no longer reporting contributions. They will be removed permanently from your report.” GC 15, page 5. If an employer stops making payments for an employee identified on the CPF generated employer remittance form, it takes one to three months for the CPF’s prepopulated forms to reflect the change made by the employer. T. 443-444. However, even if the CPF accidentally removed a name from the prepopulated remittance form in error, or failed to send out a remittance form to the employer altogether, the burden lies with the employer to either submit a form using its own spreadsheet or to download a copy of a blank remittance form from the CPF’s website. T. 445. The only way that the CPF will know if an employer is properly self-reporting and making pension contributions for all employees covered by the collective-bargaining agreement in question is through its random audit program. T. 446. That is how the CPF learned that Respondent had failed to make pension payments for all employees covered by the parties’ CBA. The CPF learned through its random audit on April 16 and 17, 2019, that Respondent had failed to make pension payments for all bargaining unit

employees between January 1, 2016 and December 31, 2018. T. 447-455. Although Respondent argued to Calibre and the CPF that it should not be required to make payments for employees who were not members of the Union, the parties' CBA did not support Respondent's argument. T. 450-45. After the audit was completed, CPF attorney Joseph Shelton's initial responsibility was to make sure the billing letter was sent to Respondent. T. 447. Shelton did so by letter dated October 2, 2019. GC 14, CST 0218-0219. Shelton's letter accompanied the final audit that notified Respondent of its under-payments, specifically \$119,455.28 in contributions due, \$17,918.29 in liquidated damages, \$19,313.19 in interest, and \$2,310 for audit expenses incurred for a total of \$158,996.76. Id. Based on Respondent's arguments that payments should not be required for non-Union members, the CPF, including Shelton, reviewed the parties' CBA and found nothing to support Respondent's arguments. T. 450-451. In addition to reviewing the entire CBA, Shelton specifically identified and reviewed the CBA's recognition provision, Article 16 (Pension), and Appendix A, which sets forth all of the job classifications covered by the CBA. T. 451. Nothing within the parties' CBA authorizes Respondent to limit pension payments to the CPF only for Union members. Drews admitted as much on the stand while acknowledging the CBA's language and its applicability to employees. Drews confirmed that Article 3.1 (Recognition) identifies the Union as the sole collective bargaining representative for all production and maintenance employees located at Respondent's Tulsa facility. T. 257. He also confirmed that the terms of the parties' CBA apply to all bargaining unit employees within the classifications identified in Appendix A of the contract, including but not limited to wages, seniority, vacation, etc. T. 257-258. Lastly, Drews confirmed that while Article 16 requires pension payments for all hours worked, it does not limit payment to those hours worked by

Union members. T. 258. Simply put, Respondent has used its own interpretation of benefit eligibility for the CPF and that included a limitation of only Union members.

Respondent's discriminatory practice as it concerned pension payments was similarly followed in how it handled its profit sharing benefit. Respondent's profit sharing benefit has been available to employees since January 2006. T. 323, 668. If the company profits one dollar, employees are eligible for a payout. T. 324-325. Respondent has paid out a profit sharing payment to employees every year since the benefit was implemented. T. 324. Payment is made annually to eligible employees during a safety meeting no later than March 15 of each year for tax purposes. T. 325, 351-353, 357-. The qualifications for eligibility are as follows:

- One full year of employment (excluding the first 12 months of employment).
- Be enrolled in a 401(k) plan and contributing in the current year.
- Not be covered by a collective bargaining agreement.
- Be currently employed at the time of distribution, or be eligible for re-hire.

JX 9, CST0027

Drews confirmed that during his time in his current position, Respondent has allowed bargaining unit employees to participate in the profit sharing plan only if they were not members of the Union:

Q Okay. And so with respect to those individuals that you have allowed to participate in the profit-sharing program, you've allowed those unit employees to participate who you did not make pension payments to the Central Pension Fund for, correct?

A You are correct, yes.

Q Okay. And those that you did make central payment – those you made pension payments for to the Central Pension Fund, you did not allow to participate in the profit-sharing program?

A Correct. If you – if you belong to the union, which we contributed to their Central Pension Fund, they're not eligible. And those who were not in the union and we did not contribute, they were offered profit-sharing as long as they were with us for one year and 401 – the other – B and C and D.

Q Understood. So as long as you met the other – no, strike that. You allowed the non-union members to be eligible for profit-sharing program while not allowing the members, correct?

A Correct.

T. 330.

Drews confirmed that this practice had been in effect since he began as General Manager and Vice President in 2011. T. 330-331. New hires are informed by Respondent of their retirement benefit options. T. 331-332. Respondent notifies new hires that they have two options – pension if they choose to join the Union or profit sharing through Respondent if they do not join the Union. T. 332. New hires are told they are eligible for one or the other. T. 332. GC Exhibit 11 is a Respondent generated document, based on its underlying records, that identifies all employees who received a profit sharing payment between 2017 and 2020. T. 335-336; GC 11. GC Exhibit 11 identifies all bargaining unit employees per year, whether the employee received a profit sharing payment, the amount of payment if so, and whether the employee in question was a Union member at the time of payment. GC 11. The exhibit confirms Drews' testimony in that it shows that every employee who received a profit sharing payment between 2017 and 2019 was not a member of the Union. Those eligible for profit sharing payments changed when payments were made in March 2020 because Respondent withdrew recognition from the Union effective September 30, 2019. GC Exhibit 11 indicates

that five employees received profit sharing payments in March 2020 even though they were Union members prior to September 30, 2019. GC 11, CST 0109. Drews testified that he used that information as a key to note that Respondent had paid those individuals pension payments from January through September 2019. As a result, their profit sharing payments were adjusted accordingly to account for those payments as Respondent took the position that employees could not receive both benefits. T. 340-341. For example, Millie Adrean received \$1,128.02 on March 11, 2020. GC 11, CST 0109. Had Respondent not unilaterally adjusted her profit sharing payment, she would have received around \$4,400-\$4,500. T. 342.

The evidence set forth at hearing confirmed that during the 10(b) period,<sup>12</sup> Respondent admittedly engaged in a discriminatory practice of making pension contributions and allowing unit employees to be eligible for profit sharing based on their Union membership. Under the *Wright Line* test, supra, all bargaining unit employees either chose to be dues paying members of the Union or declined. It is without question that Respondent was aware of which employees were Union members and which employees were not. See GC 5. As it concerns animus, Respondent blatantly treated bargaining unit employees differently based solely on Union membership as it concerned their eligibility for pension and profit sharing benefits. Union members were provided a pension and non-Union members were allowed to participate in Respondent's profit sharing plan. Drews confirmed this fact was specifically told to new hires when they came on board with the company. The Board has historically found disparate treatment to be evidence of animus and animus may be inferred from circumstantial evidence based on the record as a whole. *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991), enfd. 976 F.2d 744 (11<sup>th</sup> Cir. 1992). In its Answer to the Consolidated Complaint and Notice of Hearing,

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<sup>12</sup> As the charge in Case 14-CA-248354 was filed on September 17, 2019, the 10(b) period began on March 17, 2019.

Respondent argues that it “did not act with unlawful intent and there has been no adverse or discriminatory action towards employees. Alternatively, the adverse action (if any) would have been made in any event for lawful reasons, even in the absence of protected conduct.” GC 1K, page 7. Respondent’s defense simply is not plausible under the facts set forth at hearing. Respondent took the position that it was only obligated to make pension payments for Union members and it made the unilateral decision to only allow non-Union members to participate in its profit sharing program. The *only* distinction between the two groups of employees is their Union membership. The disparate treatment was based *solely* on the employees’ choice concerning joining the Union. Therefore, under *Wright Line*, Respondent’s practice as it concerned pension contributions and profit sharing eligibility was violative of Section 8(a)(1) and (3) of the Act.

Additionally, in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1976), the employer denied vacation benefits to employees on strike after negotiations for a new contract fell through. In that case, the employer denied striking employees their vacation benefits asserting that its contract obligations had been terminated by the strike and no employees had a right to vacation pay. Subsequently, the employer provided all non-striking employees with vacation benefits. In *Great Dane*, the Supreme Court set forth the principle that if an employer’s discriminatory conduct is inherently destructive of important employee rights, no proof of anti-union motivation is required. *Id.* The Court further observed: “The act of paying accrued benefits to one group of employees while announcing the extinction of the same benefits for another group of employees who are distinguishable only by their participation in protected concerted activity surely may have a discouraging effect on either present or future concerted activity.” *Id.* at 32. In the instant case, the General Counsel has established that Respondent engaged in discriminatory

conduct that is inherently destructive of important employee rights, specifically with respect to employees' eligibility to participate in retirement plans – whether a pension plan through the CPF or profit sharing through the Respondent. See, e.g., *Mainline Contracting Corp.*, 334 NLRB 922 (2001) (Although no evidence of anti-union motivation existed, the employer's policy of excluding from consideration for hire all applicants who revealed their union affiliation was inherently destructive of Section 7 rights). The burden then shifts to the Respondent to establish it was motivated by legitimate objectives. *Great Dane*, 388 U.S. at 34. There is no lawful argument to defend Respondent's disparate treatment of its bargaining unit employees. Regardless of how Respondent tries to describe its reasons for doing so, it treated employees differently based on their Union membership. Such discriminatory conduct is plainly violative of Section 8(a)(1) and (3) of the Act.

**2. Violation of Section 8(a)(5) and 8(d) of the Act.**

**a. Legal support**

An employer has a statutory duty to bargain in good faith as to wages, hours, and other terms and conditions of employment, i.e. mandatory subjects of bargaining. *Detroit Newspapers*, 327 NLRB 799, 800 (1999), reversed, 216 F.3d 109 (D.C. Cir. 2000), citing *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). In *NLRB v. Borg-Warner Corp.*, the Supreme Court concluded that “[t]he duty [to bargain] is limited to those subjects, and within that area neither party is legally obligated to yield . . . . As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree.” *Id.* Generally speaking, mandatory subjects of bargaining are those that “settle an aspect of the relationship between the employer and employees.” *Allied Chem. & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971). Pension plans and their corresponding employee pension benefits have clearly

been defined by the Board as mandatory subjects of bargaining. *T.T.P. Corp.*, 190 NLRB 240 (1971); *Inland Steel Co.*, 77 NLRB 1 (1948), *enfd.* 170 F.2d 247 (7<sup>th</sup> Cir. 1948). Respondent's 401(k) retirement plan also constitutes a mandatory subject of bargaining. See *Lexus of Concord, Inc.*, 330 NLRB 1409 (2000). Further, Section 8(d) of the Act imposes an additional requirement when a collective bargaining agreement is in effect and an employer seeks to "modify" terms and conditions of employment "contained in" the agreement. The employer must obtain the union's consent before implementing the change. *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063 (1973), *enfd.* 505 F.2d 1302 (5<sup>th</sup> Cir. 1974), *cert. denied* 423 U.S. 826 (1975). Absent this consent or waiver by the union, the duty to bargain in good faith continues during the term of an existing collective bargaining agreement. *NLRB v. Jacobs Manufacturing Co.*, 196 F.2d 680 (1952).

#### **b. Argument**

As it concerns Respondent's practice of not making pension payments for non-Union members and only allowing non-Union members to participate in its profit sharing plan, Neil Drews admitted that Respondent did not negotiate with the Union over these decisions. T. 360-361, 381-382. Although Drews, Justin Evans, and Union Business Manager Michael Stark were active participants in contract negotiations in 2015, Respondent never raised the company's practice as it concerned pension payments and profit sharing eligibility at the table. T. 361-362. Justin Evans testified that as Local President and Business Agent, it was his job to communicate with Respondent's management on behalf of the bargaining unit. T. 40-41. Both Neil Drews and Justin Evans started in their roles as Vice President and General Manager and Local President and Business Agent in the same year, 2011. Evans testified that he had one contact with the company as it concerned discussing issues involving the bargaining unit and that was

Drews. T. 41. In the eight years that Drews and Evans worked with each other in this capacity, Drews never notified Evans that Respondent (1) only made pension payments for Union members or (2) allowed non-Union members to participate in Respondent's profit sharing plan.

T. 90. The profit sharing plan is not a benefit set forth in the parties' CBA and it is not a benefit that was ever negotiated with the Union. T. 91; JX 1. As it concerns Respondent's practice of only making pension payments on behalf of Union members, Drews testified that had been Respondent's practice dating back to at least when he took over his current role of Vice President and General Manager in 2011. T. 277. Profit sharing has been a benefit offered to Respondent's employees since 2006. T. 323, 668. Drews testified that when he became VP and GM in 2011, he followed suit in the company's practice of not allowing employees to participate in Respondent's profit sharing benefit if they were receiving pension payments. T. 668-669.

Drews further confirmed that he continued making profit-sharing payments on that basis "to current." T. 669. Through Drews' testimony and the exhibits admitted into evidence, it is undisputed that the record shows that since at least 2011, Respondent has failed to bargain with the Union over mandatory subjects of bargaining through its pension payment and profit sharing practices, in violation of Section 8(a)(1) and (5) of the Act. Furthermore, between March 17, 2019 and September 30, 2019,<sup>13</sup> Respondent failed to continue in effect all the terms and conditions of the parties' CBA by failing to pay contractual pension benefits as set forth in Article 16 (Pension) of the agreement in violation of Section 8(d) of the Act.

**3. Respondent did not establish waiver by the Union or untimeliness under Section 10(b) of the Act.**

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<sup>13</sup> As the charge in Case 14-CA-248354 was filed on September 17, 2019, the 10(b) period began on March 17, 2019. September 30, 2019 is the date that Respondent withdrew recognition from the Union.

In its Answer to the General Counsel's Consolidated Complaint and Notice of Hearing, Respondent argues that "the Union's conduct and inaction with respect to the profit-sharing plan and pension benefits constituted a waiver of any right to bargain over these subjects." GC 1-K, pages 3-4, 7. While the record established that Respondent's discriminatory practice of paying pension benefits for Union members and profit sharing payments to non-Union members dates back to at least 2011, there is no evidence that the Union was or should have been aware of Respondent's discriminatory practice prior to the parties' September 6, 2019 bargaining session.

Although not argued in its Answer, the record is clear that Respondent was not permitted to unilaterally pay pension benefits for only Union members or only allow non-Union members to participate in its profit sharing plan under the contract coverage standard set forth in *MV Transportation, Inc.*, 368 NLRB No. 66 (2019). Under the contract coverage test, the Board will examine the plain language of the parties' CBA to determine if the employer's unilateral action was granted within the compass or scope of the contract. First, it is without question that the profit sharing benefit is not covered by the parties' CBA. With respect to employees' pension, Article 16 (Pension) identifies the amounts to be paid to the CPF based "on all hours worked." JX 1, page 15-16. As confirmed by the CPF upon its review of the contract, the limitation practiced by Respondent is not authorized in any way by the CBA. Therefore, Respondent's unilateral action of limiting pension and profit sharing benefits based on Union membership is not within the compass or scope of the parties' CBA. Under *MV Transportation*, Respondent must then show that the Union clearly and unmistakably waived its right to bargain over the changes in question or that the changes were privileged for some other reason. *MV Transportation*, slip op. at 2. It is well established that waivers of statutory rights are not to be lightly inferred, but must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460

U.S. 693, 708 (1983). The Board will not force a waiver “upon an unwitting party.” *United Hosp. Medical Center*, 317 NLRB 1279, 1282 (1995), citing *NLRB v. New York Telephone*, 930 F.2d 1009, 1011 (2<sup>nd</sup> Cir. 1991). In fact, “national labor policy disfavors waivers of statutory rights by unions and a union's intention to waive a right must be clear before a claim of waiver can succeed.” *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982). The Board has long held that the burden of proof is on the party asserting the existence of a waiver. *Litton Systems, Inc.*, 283 NLRB 973, 973-974, n.6 (1987). As will be explained, Respondent has not met its burden of proof to establish a “clear and unmistakable” waiver on the part of the Union.

As for timeliness of the allegations, the Board has held that the 10(b) statute of limitations does not begin to run until the charging party has received actual or constructive notice of the conduct that constitutes the alleged unfair labor practice. *Vanguard Fire & Security Systems*, 345 NLRB 1016, 1016 (2005), citing *Concourse Nursing Home*, 328 NLRB 692, 694 (1999).

As set forth previously, the record is devoid of any evidence that the Union had actual knowledge of Respondent’s discriminatory practices related to pension and profit sharing eligibility. At no point was the practice raised with the Local President and Business Agent or Business Manager prior to September 6, 2019. The General Counsel anticipates Respondent will argue that the Union should be charged with knowledge of Respondent’s pension and profit sharing practices based on the testimony of former steward Floyd Prince. Prince testified that he has worked at Respondent’s Tulsa facility for 22 years, which would date back to the time when Rinker Materials owned the business. T. 518. At the time of his testimony, Prince was a production supervisor. T. 518. He left the bargaining unit for a promotion to that position

effective May 1, 2019. T. 519. While Prince was still in the bargaining unit, he was a Union steward for around 12 to 14 years until he resigned his steward position on May 1, 2017.<sup>14</sup> T. 521, 541, 542. When Respondent started operations in early 2005, Prince was one of two Union stewards along with Tim Merrill. T. 542. Prince testified that after Respondent acquired Rinker Materials, the plant manager at the time, Jerry Morris, told him that Respondent intended to make pension contributions for Union employees. T. 524-525. That as a new benefit that was not available to employees under Rinker Materials and Prince thought it was a good thing. T. 525 He did not know that all unit employees were eligible for pension payments. T. 560. Even during his testimony, Prince confirmed that at the present, he was not certain if all unit employees should be eligible for the benefit. T. 560. Again, Prince thought the concept was “pretty nice of (Respondent)” because in his eyes they were “just trying to make it equal.” T. 528. This testimony confirms the testimony of Evans in that Evans testified that the Union’s stewards at Respondent’s facility are not “trained on the intricacies to know whether or not there has been a violation of federal labor law.” T. 127. Also in 2005, Jerry Morris told Prince and Merrill that Respondent intended to allow non-Union members to participate in its profit sharing program. T. 527-528. At that time, Prince notified the Union’s members of Respondent’s intent. T. 530. Prince never notified his superiors with the Union such as Justin Evans or Evans’ predecessors Mike Bishop and Mike Ellis. T. 535, 552. No employees complained to the Union and no employees asked to file a grievance. T. 531. While he was steward, Prince was also present during the March safety meetings where Neil Drews would distribute profit sharing payments to non-Union members on an annual basis. T. 532-535. Although Prince knew that

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<sup>14</sup> Although Prince recalled that he resigned from the Union in 2018, he confirmed that whatever date Respondent’s records showed that he resigned would be the accurate date. T. 542. Respondent’s records show that Prince resigned from the Union on May 1, 2017. GC 5, CST 0033.

profit sharing payments were distributed to non-members, he never raised it with his Union superiors because he thought it was a good thing and he did not know that the Union would have issues with the practice. T. 547.

The Union did not have actual notice of Respondent's pension and profit sharing practices prior to September 6, 2019, when Respondent disclosed it during negotiations. Justin Evans testified that no management official or employee had previously notified the Union of Respondent's practices. T. 97-98. CPF attorney Joseph Shelton also confirmed that the CPF does not notify the Union regarding what employees the fund has received payments for. T. 446. The only time such a communication would take place would be if there was a delinquency as found with Respondent due to the random audit that took place on April 16 and 17, 2019. T. 446-447. The audit that took place at that time was the first and only audit the CPF had conducted of Respondent. T. 455. Therefore, the Union would have no way of knowing whether Respondent was making pension payments for all eligible employees.

One would assume by calling Prince to the stand that Respondent intends to hang its hat on his knowledge as a steward. Although Prince held the position of steward, the record established that the Union steward role at Respondent's facility was nominal at best. As it concerns Prince's knowledge of Respondent's actions, an employee's knowledge of the occurrence of an unfair labor practice is not automatically imputed to the employee's union. See *Stone Board Yard v. NLRB*, 715 F.2d 441, 445 (9<sup>th</sup> Cir. 1983) (knowledge by union members not attributed to the union because they were not agents of the union). Whether knowledge of bargaining unit employees is imputed to the collective bargaining representative depends on the facts. *Michael Konig*, 318 NLRB 337, 339 (1995). First, the record established that Respondent never communicated its pension and profit sharing practices to the Union's Local President,

Business Agent or Business Manager. That was abundantly clear from Neil Drews' and Justin Evans' testimony. The record also established that while Prince was aware of Respondent's practices, he never disclosed that information to his superiors. T. 531, 535. 552. In the 12-14 years he served as steward, Prince did not file one grievance and to his knowledge, neither did Tim Merrill. T. 543, 547. When describing his role as a steward, Prince testified that he only handled "little things that would always come up...just bickering, nothing major; nothing major really came up....just, just little stuff." T. 521-522, 543. Larger issues, which never came up, would have been deferred to his superiors at the Union hall. T. 522. Any discussions Prince had with Jerry Morris never required escalation or the involvement of Neil Drews. T. 522. Evans testified that stewards such as Prince were primarily used as a "point of contact" for the purpose of distributing dues receipts to members when Evans was pressed for time or unable to meet with members when visiting the facility. T. 125-126.

Prince confirmed that he did not realize there could be an issue with Respondent's pension and profit sharing practices and that such issues would have been handled by Justin Evans, Mike Ellis, or Mike Bishop at the Union hall because such subjects would not fall under "minor things like bickering." T. 547-548. While the Union's stewards, including Prince, are present at collective-bargaining negotiations, they are passive participants at best. Prince testified that he's there as the face of the bargaining unit, though he is not an active participant at the table. T. 555. The active participants on behalf of the Union are its Local President, Business Agent and Business Manager. T. 555. For the purpose of determining actual knowledge through a union steward, the Board has looked to a number of factors in prior cases. In *Catalina Pacific Concrete, Co.*, 330 NLRB 144 (1999), the question of whether the union received notice outside the 10(b) period of certain unilateral changes concerned the union's steward. The Board

affirmed the ALJ's finding that the employer failed to prove its 10(b) defense. The Board and ALJ found that the employer had no reasonable basis for believing that the steward had the authority to act as the Union's agent as it concerned receipt of notice of proposed unilateral changes. *Id.* It was also determined that there was no contractual basis for attributing such authority to the steward, nor did the union hold the steward out as someone who possessed such authority. *Id.* The same arguments apply here. Respondent has provided no evidence or argument in support of a position to establish that it viewed the Union's steward as its point of contact for something as important as eligibility for benefits (or lack thereof). Prince himself testified that he only handled minor bickering between employees, never filed a grievance, and in 12-14 years, never once became aware of an issue that he deemed important enough to communicate to his superiors with the Union. Similarly, the question of notice through a union steward was addressed in *Brimar Corp.*, 334 NLRB 1035 (2001). In that case, the employer implemented new workstation forms without giving the union timely notice. The employer argued that the complaint allegations were untimely because the union steward had knowledge of the alleged unilateral change outside of the 10(b) period. In affirming the ALJ's rejection of the argument, the Board wrote:

We agree with the judge that Sec. 10(b) of the Act does not bar the complaint's allegations. We adopt the judge's finding that Union Steward Robbie McCaskill's November 1996 knowledge of the Respondent's newly implemented "Workstation Form" is not imputed to the Union for the purpose of triggering the 6-month period prescribed in Sec. 10(b) of the Act for the timely filing of unfair labor practice charges. In doing so, we agree with the judge's finding that McCaskill, although a steward, had no role in matters relating to bargaining, and the Respondent had no reason to believe otherwise.

*Id.* at 1037 fn. 1.

The only "role" that Prince or any other steward had in "bargaining" was a seat at the bargaining table every four years where he served as the "face" of the bargaining unit. The

evidence set forth in the record are distinguishable from those cases that attributed knowledge through stewards because the stewards were much more involved in those cases. See, e.g., *Baytown Sun*, 255 NLRB 154, 160 (1981) (union steward's knowledge imputed to the union because the steward was closely tied to the union, worked closely with the union, and attended 25 or 30 negotiation sessions). Prince, on the other hand, only communicated with Union leadership as it concerned presenting new employees with a packet of materials upon their initial hire. This is not surprising, per Evans' testimony, because in the eight to nine years Evans and Neil Drews held their respective leadership duties, it was Evans whom Drews reached out to in order to address issues with the bargaining unit. No one else. T. 128. Those discussions were not had at the steward level. T. 128. The record does not contain evidence of significant Union activity by Prince as steward that extends beyond handling minor bickering issues between employees, the distribution of Union literature, and his literal physical presence at negotiations.

Additionally, the evidence failed to establish that the Union should be charged with constructive notice of Respondent's pension and profit sharing practices. Justin Evans testified that during the life of a contract, he would try to visit the facility at least once a month to talk to the unit and see if there were any problems. T. 126-127. Although there might be a month or two missed here and there, for the most part he would visit the facility monthly to talk to employees and distribute dues receipts. T. 127. The Union also designated stewards when employees were willing to take the position. When Evans started his position as Local President and Business Agent in 2011, Floyd Prince was the Union's sole steward. T. 123. Stewards are appointed in that it requires "[f]inding somebody with the willingness to want to hand out receipts and what not." T. 123-124. Floyd continued in that role until he resigned from the

Union in May 2017.<sup>15</sup> After Floyd resigned from the Union, Evans then took steps to replace him by asking for volunteers. That took “a good year or year and a half” until a replacement, Delbert, volunteered to step into the role. T. 124-125. Delbert served as steward for approximately one year until he was terminated. T. 125. After Delbert’s departure from that role, Evans attempted to fill the vacancy but no one was willing to do so. T. 125. The record confirms that the Union maintained a consistent presence at Respondent’s facility, appointed stewards when Evans could find volunteers, and attempted to fill steward vacancies when they occurred. See *Broadway Volkswagen*, 342 NLRB 1244 (2004) (where the employer unilaterally granted wage increases more than six months before the charge, constructive knowledge not found because employees did not inform the union of the changes, there was no evidence that the changes were apparent, the union maintained contact with employees and actively represented them). Cf. *Moeller Bros. Body Shop, Inc.*, 306 NLRB 191 (1992) (union charged with constructive knowledge where the union failed to exercise due diligence in failing to monitor the employer’s facility where the unilateral changes would have been facially apparent).

For the reasons set forth above, as it concerns Respondent’s pension and profit sharing practices, the evidence does not support a finding that the Union had actual or constructive knowledge prior to September 6, 2019 as it concerns the question of waiver or timeliness under Section 10(b) of the Act.

**C. Respondent’s failure and/or delay in providing information violated Section 8(a)(5) of the Act.**

**1. Legal Support**

A collective-bargaining representative is entitled to information that is relevant and

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<sup>15</sup> Although Evans’ recollection was that Prince served until he left for management, Respondent’s records confirm that Prince resigned from the Union in May 2017, two years prior to his promotion to Production Supervisor in May 2019.

necessary to fulfill its statutory duties and responsibilities. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-436 (1967). The Board applies a liberal, discovery-type standard to evaluate whether information is relevant. *Id.* at 437. The Board will require the disclosure of information even if it is merely of “probable or potential relevance” to a union for, among other things, negotiating mandatory subjects of bargaining or policing a collective-bargaining agreement. See, e.g. *Associated General Contractors of California*, 242 NLRB 891, 891 (1979), *enfd.* as modified 633 F.2d 766 (9<sup>th</sup> Cir. 1980). “[A]ny information which is relevant and, therefore, reasonably necessary to the union’s discharge of its statutory obligations falls within the sphere of the union’s entitlement.” *Boyers Const. Co.*, 267 NLRB 227, 229 (1983).

The Board deems most information related to employees’ terms and conditions of employment to be presumptively relevant and necessary to the union’s performance of its duties. See, e.g., *W.B. Skinner, Inc.*, 283 NLRB 989, 990 (1987), citing *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61 (3d Cir. 1965) (explaining that such data “concerns the core of the employer-employee relationship”); *North Star Steel Co.*, 347 NLRB 1364 (2006). Presumptively relevant information not only includes employees’ wages but also information related to benefit plans and other information impacting employees’ general working conditions. See, e.g. *Washington Beef, Inc.*, 328 NLRB 612, 618 (2000)(requiring employer to furnish information related to 401(k) plan and health and welfare benefits); *Retlaw Broadcasting*, 324 NLRB 138, 141 (1997)(personal service contracts); *Maple View Manor*, 320 NLRB 1149, 1150-51 (1996), *enfd.* mem. 107 F.3d 923 (D.C. Cir. 1997)(wages and benefit plans).

Where a union requests presumptively relevant information, the employer must provide it. *Disneyland Park*, 350 NLRB 1256, 1257 (2007). A union need not establish that presumptively relevant information is immediately relevant to a current issue in negotiations or

contract administration. See, e.g., *Jano Graphics*, 339 NLRB 251, 260 (2003). Rather, “wage and related information pertaining to employees in the bargaining unit should, upon request, be made available to the bargaining agent without regard to its immediate relationship to the negotiation or administration of the collective-bargaining agreement.” *Whitin Machine Works*, 108 NLRB 1537, 1541 (1954), *enfd.* 217 F.2d 593 (4<sup>th</sup> Cir. 1954). See also, *U.S. Abatement, Inc.*, 303 NLRB 451, 459 (1991)(explaining that a union “need not demonstrate that the collective-bargaining agreement has been violated before it is entitled to the information it requested”).

## **2. Argument**

On September 9, 2019, Justin Evans emailed Neil Drews and requested the following information: (1) Seniority list of bargaining unit members with the terms of so called “Profit Sharing” and equations to figure such calculation; (2) Approximate start date of “Profit Sharing” at the Tulsa facility; (3) List of employees who receive and who is excluded from “Profit Sharing; (4) Rules of “Profit Sharing”; (5) All information on the company 401k; and (6) List of employees eligible and ineligible for 401K. JX 8, CST0023. When Evans met with Drews in Drews’ office on September 12, Drews provided several documents responsive to Evans’ requests. T. 102-104, T. 707-708; JX 9. After Evans reviewed the provided documents, he followed up with Drews in another email on September 16 clarifying his prior requests that he deemed had not been answered and he requested additional information concerning Respondent’s profit sharing and 401(k) plans. JX 10, CST0032. Evans clarified he was asking for the date that Respondent starting its profit sharing plan at its Tulsa facility.<sup>16</sup> *Id.* Evans also asked for contact information along with Respondent’s 401(k) prospectus, the last 10 years profit/loss margin, Respondent’s five year profit/loss forecast, and the percentage or monetary

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<sup>16</sup> In its September 12 response, Respondent answered the same question from September 9 by answering that “Eligibility starts at employees one year anniversary.” JX 9, CST0025.

number of company profit Respondent's profit sharing was based on.<sup>17</sup> *Id.* As set forth above, information related to employees' benefit plans is presumptively relevant and must be provided to the employees' bargaining representative. See, e.g. *Washington Beef, Inc.*, supra; *Retlaw Broadcasting*, supra; *Maple View Manor*, supra. The record established that the parties' CBA (Article 17 – 401(K) Plan) identifies Respondent's 401(k) plan as a benefit for bargaining unit employees. JX 1, page 16. The record further established that Respondent had allowed non-Union member bargaining unit employees to participate in its profit sharing plan. Therefore, the information sought by the Union was presumptively relevant under Board law. However, Respondent refused to provide that information to the Union. Drews replied to Evans and told him that his requests concerned “profit sharing vs. pension during negotiations” and that offer had been withdrawn by Respondent on September 12, 2019. JX 10, CST0032. It is true that after an employer lawfully withdraws recognition from the Union, it is no longer obligated to furnish a union with requested information. See *Champion Enterprises, Inc.*, 350 NLRB 788, 793 (2007) (“Following a lawful withdrawal of recognition, an employer no longer has a duty to provide a union with requested information.”). However, as argued below, Respondent's withdrawal of recognition from the Union on September 30 was unlawful because the employees' disaffection petition was tainted by Respondent's unfair labor practices. Therefore, the Union's bargaining status remained (and remains) in effect. Furthermore, even if Respondent's withdrawal of recognition is found to be lawful, at the time Evans requested the information in question, Respondent had not withdrawn recognition from the Union. Evans made his request for information related to Respondent's 401(k) and profit sharing plans on September 16. Drews denied his request on the same date. Respondent did not withdraw

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<sup>17</sup> Evans testified to the latter as the “trigger mechanism” where profit sharing “kicks in.” T. 105-106.

recognition until the CBA expired two weeks later on September 30. The facts here differ from those in *Champion Enterprises*, supra, where the union requested information, the employer responded that it would take six weeks to provide the information, and the employer withdrew recognition two days prior to the earliest date it could provide the information in question. In this case, Respondent never took the position that it could not provide the 401(k) and profit sharing information for a certain period of time. Instead, while the Union unquestionably remained the bargaining representative, Respondent denied the Union's September 16 request for presumptive relevant information and its failure to provide it to the Union violated Section 8(a)(1) and (5) of the Act.

On December 10, 2019, Evans emailed Drews renewing previous requests and seeking additional information specific to Respondent's profit sharing plan. T. 118-120; GC 23, CST 0280. Evans requested (1) the overall bonus payout figure; (2) where the overall bonus payout figure is derived from; (3) the number of years Respondent's profit sharing program had been in existence; and (4) the "trigger point" at which profit bonus is activated.<sup>18</sup> *Id.* On December 12, Drews replied to Evans with partial answers. GC 23, CST 0279. As for Evans' first two requests, Drews declined to answer taking the position that the relevancy was contingent on the Union winning the profit sharing arbitration and "that cannot be assumed." *Id.* He further noted that he did not believe the information was relevant to the grievance. *Id.* For the first time, Drews provided Evans with an answer he had been seeking for several months by confirming Respondent had been using a profit sharing program at its Tulsa facility since January 1, 2006. *Id.* Lastly, regarding Evans' question concerning "the trigger point" at which the profit bonus is

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<sup>18</sup> The third request was a renewal of the same question raised by Evans to Drews in Evans' September 16 email to Drews. The fourth request regarding the "trigger point" was a renewal of the same question in Evans' September 16 email to Drews, though phrased differently.

activated, Drews wrote that he did not understand the question. *Id.* As it concerns Respondent providing the Union with the start date of the profit sharing program, the record does not contain evidence to justify Respondent's three month delay. Board law requires a reasonable good-faith effort to respond to a request as promptly as circumstances allow. *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9. (1993). Absent evidence justifying delay, even a delay of several weeks may constitute a violation. See *United States Postal Service*, 359 NLRB 56 (2012) (1-month delay unreasonable); *United States Postal Service*, 308 NLRB 547, 551 (1992) (4-week delay unreasonable); *Monmouth Care Center*, 354 NLRB 11, 52 (2009), *enfd.* 672 F. 3d 1085 (D.C. Cir. 2012) (6-week delay unreasonable). As a result, even though Respondent finally provided the profit sharing start date, it did so three months later without any explanation for the delay when it could have been provided immediately. While Evans used different language to explain his request for the "trigger point" that activated profit sharing payments, Respondent failed to provide that same information when originally requested by Evans on September 16 and it did not seek clarification at that time. When presumptively relevant information is requested, the burden shifts to the employer to comply with the request or to request clarification. *Keauhou Beach Hotel*, 298 NLRB 702, 702 (1990). "An employer may not simply refuse to comply with an ambiguous and/or overbroad information request, but must request clarification and/or comply with the request to the extent it encompasses necessary and relevant information." *National Electrical Contractors Assn.*, 313 NLRB 770, 771 (1994). The Union requested information related to the "trigger point" or "trigger mechanism" in varying language as early as September 16, and Respondent's failure to provide it along with the remaining 401(k) and profit sharing plan information requested by Evans on September 16. Respondent's failure to provide that information, and its delay in providing the start date of the profit sharing plan until

December 12, violated Sections 8(a)(1) and (5) of the Act.

**D. Respondent's failure to bargain in good faith for a successor agreement violated Section 8(a)(5) of the Act.**

**1. Legal Support**

The Section 8(a)(5) duty to bargain in good faith, as defined in Section 8(d) of the Act, includes the duty to “meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment...” *Caribe Staple Co, Inc.*, 313 NLRB 877, 893 (1994). The Board has held that a schedule of meetings is “material to the question of whether there has been a breach of the obligation to bargain collectively, but its significance is dependent on the entire context.” *Exchange Parts Co.*, 139 NLRB 710, 712 (1962). The Board considers the totality of the circumstances when determining whether a party has satisfied its duty to meet at reasonable times. *Calex Corp.*, 322 NLRB 977, 978 (1997), *enfd.* 144 F. 3d 904 (6th Cir. 1998); *Garden Ridge Management*, 347 NLRB 131, 131-132 (2006). In reviewing the “entire context” of the record, the evidence established that Respondent’s refusal and/or delays in bargaining for a successor agreement were violative of the Act.

**2. Argument**

The record established that Respondent consistently refused to schedule additional bargaining sessions and return to the table to negotiate a successor agreement. Starting in mid-April 2019 through late August 2019, Respondent, by its lead negotiator Neil Drews, adamantly took the position that it would not return to the table and bargain over any aspect of the expired CBA due to the pending CPF audit. Even though Respondent continually refused to entertain the idea of returning to the table for weeks and months at a time, the Union continued in its efforts to represent its bargaining unit by pressing Respondent to return to the table throughout the period in question:

- Mid-April 2019 – Drews reneged on the parties’ agreement to meet on April 19. T. 47-48. This was the first time Respondent refused to meet with the Union to negotiate a successor agreement due to the pending CPF audit. Due to Respondent’s refusal to bargain, the Union had limited choices as it concerned representing the bargaining unit. Faced with the options of a strike vote and an extension of the expired contract, Drews presented Respondent’s proposed extension to July 31, 2019 because “nobody wins in a strike.” T. 55.
- May and June 2019 – During the next two months, Evans sought to get Respondent back to the table as quickly as possible during his frequent communications with Drews. T. 56-57. Each time, Evans was rejected with the response that negotiations were “on hold” until corporate gave Drews authorization to meet again pending the audit results. T. 57-58.
- July 2019 - With the parties’ CBA extension expiring at the end of the month, Evans continued his efforts in getting Respondent back to the table through conversations, phone calls, and emails with Drews. T. 60; JX 5. Again, Drews maintained the company line that “[t]he corporate stance is that we do not negotiate until we see the way the audit turned out.” JX, CST0006. Not until July 22, just nine days prior to the expiration of the parties’ contract extension did Drews inform Evans that he could return to the table, but without the authority to sign off on an agreement. “According to Corporate, they said I can enter talks, but not sign anything until the audit is final.” JX, CST0005. During the parties’ July 26 bargaining session, the topic of an extension tied to a pay raise was addressed between the parties as negotiations had yet to reach an agreement or impasse and Respondent was still addressing the results of the audit. T.

73-75. Two days later, Drews informed Evans that corporate would only agree to another contract extension if there was no corresponding pay raise for employees. T. 77. Again, due to Respondent's delay and refusal to engage in full contract negotiations, just days before the CBA was set to expire again, Respondent forced the Union into the option of a strike or an extension. Both options were presented to the membership and the membership again voted to extend the contract again to September 30, 2019. T. 77-79; JX 6.

- August 2019 – Evans continued to press Drews throughout this month to return to the table. T. 79. Again, the Union was told to wait because corporate would not allow local management to bargain while the audit was pending. T. 79. On August 27, Drews confirmed this continued stance in a text message exchange with Evans – “Corporate told me to wait.” T. 80-82; JX 18.
- September 2019 – During the last week of August and early September, Evans continued to provide the Union's availability for bargaining sessions. JX 7. It was not until September 4 that Drews agreed to return to the table - over four months after the initial contract expired and a full month after the first extension had expired.

The record is undisputed that despite the Union's best efforts, Respondent continually refused to return to the table claiming the pending CPF audit prevented it from doing so. The company's position on Article 16 and the potential for replacing it with a profit sharing plan is just one of many subjects the parties were discussing at the table. Although such a change is certainly an important topic for discussion, there is no claim or assertion by Respondent that the parties were at impasse with respect to the issue such that a complete breakdown in the entire negotiations had taken place. See *Taylor-Winfield Corp.*, 225 NLRB 457, 459 fn. 18 (1976)

(general bargaining impasse produced by stalemate over pensions). Due to Respondent's utter disregard of its obligation to meet and confer at reasonable times, the parties only met three times between April 10 and September 6, 2019. The parties met for less than an hour, an hour, and two hours. The pension topic was still under discussion by the parties on September 6 with significant questions being raised as a result of the disclosure by Respondent concerning its pension and profit sharing eligibility practice. This case simply involves a company who refused and delayed to bargain over a successor collective-bargaining agreement by citing to a pending audit. As evidenced by the limited discussions had by the parties during their three negotiation sessions, the audit did not prevent the parties from discussing matters covered by the CBA and that included discussing the possibility of replacing the pension benefit with profit sharing.

While the Union agreed to present two contract extensions to its membership in late April and late July 2019, it did so out of a lack of options best suited for its membership. The Union should not be penalized for Respondent's disregard of its obligations under the Act. Furthermore, although the extensions were entered into, the Union consistently attempted to bring Respondent back to the table during time periods in which the parties could have been negotiating. The Memorandum of Understanding executed by the parties on April 24, 2019 specifically read that the parties would resume negotiations in June or July of 2019 for the purpose of ratifying a successor agreement that will begin August 1, 2019. JX 4. The Union requested that Respondent return to the table throughout the month of June. Respondent refused to do so. The Union requested that Respondent return to the table throughout the month of July. Respondent refused to do so until five days before the parties' CBA was set to expire again.

The totality of the evidence supports the General Counsel's Consolidated Complaint in that Respondent failed to bargain in good faith for a successor collective-bargaining agreement and its failure to do so violated Section 8(a)(1) and (5) of the Act.

**E. Respondent's withdrawal of recognition from the Union violated Section 8(a)(5) of the Act.**

**1. Legal Support**

An employer may not withdraw recognition based on employee disaffection if there is a causal nexus between the disaffection and unremedied unfair labor practices. *Olson Bodies, Inc.*, 206 NLRB 779, 780 (1973). Not every unremedied unfair labor practice will taint evidence of a loss of majority support. There must be specific proof of a causal relationship between the unfair labor practices and the ensuing events establishing a loss of support. *Lee Lumber*, 322 NLRB 175, 177 (1996). The unfair labor practices in question "must be of a character as to either affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself." *AT Systems West, Inc.*, 341 NLRB 57, 60 (2004). To determine whether there is a causal connection between an employer's unfair labor practices and employees' disaffection, the Board considers the following factors: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on the employees' morale, their organizational activities, and membership in the union. *Master Slack Corp.*, 271 NLRB 78, 84 (1984). The General Counsel bears the burden of establishing that the employee disaffection is attributable to the unfair labor practices. However, the General Counsel does not have to call employees to in effect testify, "Yes, I changed my mind about the union because of..." Instead, the Board applies an objective standard to determine what effect the specific unfair labor

practices reasonably would have on employees. *Vanguard Fire & Security Systems*, 345 NLRB 1016, 1044 (2005); *Bunting Bearings Corp.*, 349 NLRB 1070, 1072 (2007) (objective evidence examined in *Master Slack* inquiry); *Veritas Health Services, Inc. v NLRB*, 895 F.3d 69, 82 (DC Cir. 2018), quoting *AT Systems West, Inc.*, 341 NLRB 57, 60 (2004) (“it is the objective evidence of the commission of unfair labor practices that has the tendency to undermine the Union, and not the subjective state of mind of the employees, that is the relevant inquiry in this regard.”). In a *Master Slack* analysis, it is immaterial whether employees may have other reasons, unrelated to the employer’s unfair labor practices, for their loss of support for the Union. The withdrawal of recognition is unlawful where the unfair labor practice was a substantial and aggravating cause of the Union’s loss of majority support, even if it was not the *only* cause. As the Board held in *Hillhaven Rehabilitation Center*, 325 NLRB 202, 205 (1997), vacated in part on other grounds sub nom,

Evidence that [an employee] initiated the petition effort for reasons other than the Respondent’s unfair labor practices, or that these reasons may also have influenced other employees who signed the petition does not negate the factors supporting the finding of a causal relationship between the Respondent’s unlawful conduct and the employees’ expression of disaffection.

As set forth below, Respondent relied upon a ULP tainted disaffection petition in order to withdraw recognition from the Union. In doing so, it violated Section 8(a)(1) and (5) of the Act.

## **2. Argument**

A balancing of the *Master Slack* factors requires a finding that Respondent’s dilatory approach to negotiating a successor collective-bargaining agreement unlawfully tainted the disaffection petition that was submitted to Respondent on September 11, 2019. Regarding the first factor of the length of time between the unfair labor practice and the withdrawal of

recognition, Respondent's bad faith bargaining was an ongoing violation starting with its unwillingness to return to the table in mid-April 2019 and extending through its receipt of the disaffection petition on September 11. Respondent's insistence that it would not schedule timely bargaining sessions resulted in just two relatively brief bargaining sessions between mid-April and September 2019. At the time that it received the disaffection petition dated September 9, Respondent was in the midst of its continuing unlawful refusal to meet and bargain with the Union at reasonable times and intervals. See *Fruehauf Trailer Services*, 335 NLRB 393 (2001). (withdrawal of recognition tainted where it occurred in the midst of a continued failure to meet and bargain with the union). Furthermore, the timing of the petition and subsequent withdrawal of recognition immediately followed Respondent's announcement to bargaining unit employees concerning its longstanding unfair labor practices related to its discriminatory pension and profit sharing eligibility. On August 1, 2019, Neil Drews held a special meeting with bargaining unit employees where he provided an update on negotiations. T. 411-419, 486-501; GC 15; GC 25. While doing so, Drews informed the employees of the CPF audit and advised if the employees were bargaining unit employees, they may benefit by the company making additional payments owed to the CPF. T. 415-416; GC 15; GC 25. However, Drews additionally informed those present that all of the money the employees would have earned towards profit sharing would now have to be paid into the pension fund for the hours they had worked. T. 416-417; GC 25, page 2. Drews confirmed that employees would be "forfeiting" their profit-sharing when the distribution was made in March 2020. T. 417. This was not well received by the group. A majority of the employees in the meeting, which predominantly consisted of bargaining unit employees, did not know they were eligible for a pension. T. 495. Employees questioned why the terms of the collective-bargaining agreement had to be followed. T. 417. A majority of

those present made it known that they would rather have profit sharing. T. 504; GC 25, page 2.

Several employees expressed the fact that they were not happy with this revelation. T. 417.

Bargaining unit employees Terry Workman and Joe England remained to talk to Drews once the meeting concluded. T. 499. Neither Workman or England were Union members at the time. T.

500. Both employees asked the same question regarding whether they were eligible for profit sharing or pension benefits. T. 500. Both Workman and England made it known that they did not sign up for the Union specifically because of the profit sharing. T. 506; GC 25, page 2.

Although Respondent's unlawful conduct in making pension payments for only Union members and allowing profit sharing eligibility for only non-Union members had been in effect for years, the ramifications of that unlawful conduct came to fruition once Respondent was put on notice through the CPF audit that it had acted improperly and it notified the affected employees of the ramifications just over one month before the September 9 petition was submitted to Respondent on September 11. In reality, the chickens came home to roost. Again, without any bargaining or even a discussion with the Union, Respondent then took it upon itself to strip employees of their profit sharing benefits because it unilaterally took the position that employees could not receive both the pension and profit sharing. Respondent made one discriminatory and unilateral step after another as it concerned pension and profit sharing and it did so right up until the disaffection petition was distributed and submitted by employees. As of September 9 (the date of the petition), September 11 (the date the petition was submitted to Respondent) and September 30 (the date Respondent withdrew recognition), Respondent had failed to remedy its unilateral changes, mid-term modifications, and bad faith bargaining. Therefore, the first *Master Slack* factor weighs in favor of a causal connection.

As for the second and third *Master Slack* factors, they are often analyzed together. *Tenneco Auto., Inc. v. NLRB*, 716 F.3d 640 (DC Cir. 2013). The two factors also weigh against Respondent. The Board has long recognized that bad faith bargaining, especially when combined with unlawful conduct away from the bargaining table, tends to cause employee disaffection from a union. See *Radisson Plaza Minneapolis*, 307 NLRB 94, 95-96 (1992), citing *Premier Cablevision*, 293 NLRB 931, 933 n. 5 (1989) (employer's overall bad faith bargaining, combined with its unilateral wage increase and refusal to provide the union information, had a tendency to cause employee disaffection); *Compare Quazite Corp.*, 323 NLRB 511, 512 (1997) (disaffection petition not tainted by employer's earlier unfair labor practices where employer continued to bargain in good faith thereafter). Furthermore, it is well established that dilatory bargaining tactics have a tendency to invite and prolong employee unrest and disaffection from a union. *Fruehauf Trailer Services*, 335 NLRB 393, 394 (2001). Failing to meet and bargain at reasonable times and intervals "reasonably convey[s] the message that union activity is futile." *Id.* at 394-395. See *The Westgate Corp.*, 196 NLRB 306, 313 (1972) (when an employer delays bargaining, "unrest and suspicion are generated, the conclusion of an agreement is delayed, and the status of the bargaining representative is disparaged"); *The Little Rock Downtowner, Inc.*, 145 NLRB 1286, 1305 (1964), *enfd.* 341 F.2d 1020 (8th Cir. 1965) (delayed bargaining may invite or prolong employee discontent); "*M*" *System, Inc.*, 129 NLRB 527, 548-549 (1960) (dilatory bargaining tactics cause employee frustration at Union's failure to report progress); *B.F. Diamond Constr. Co., Inc.*, 163 NLRB 161, 174-75 (1967). For these reasons, the second and third factors weigh in favor of a causal connection.

As for the fourth *Master Slack* factor, the effect of Respondent's unlawful conduct, the Board has looked at whether there was evidence of employee knowledge of the ULP's in

question and whether there was any evidence of employee disaffection that predated the ULP. *Goya Foods of Florida*, 347 NLRB 1118, 1122 (2006); *Bunting Bearings Corp.*, 349 NLRB 1070, 1072 (2007) (causal connection in part by lack of disaffection evidence prior to unlawful lockout); cf. *Lexus of Concord, Inc.*, 343 NLRB 851, 852 (2004) (no causal connection because there was evidence of disaffection before the employer's unlawful conduct). The record did not establish evidence of employee disaffection in advance of Respondent's dilatory tactics in delaying and refusing to engage the Union in bargaining for a successor agreement or Respondent's communication to employees on August 1, 2019 that it was required to make pension payments to unit employees and because of that, Respondent would no longer pay employees profit sharing payments they otherwise would have been eligible for under Respondent's pre-existing practices. An objective analysis of the *Master Slack* factors requires a finding that the disaffection petition dated September 9, 2019 was tainted by Respondent's unremedied unfair labor practices because they were of a character as to either affect the Union's status, cause employee disaffection, or improperly affect the bargaining relationship itself. *AT Systems West, Inc.*, 341 NLRB 57, 60 (2004).

Lastly, in its Answer to the General Counsel's Consolidated Complaint and Notice of Hearing, Respondent argues that pursuant to *Johnson Controls, Inc.*, 368 NLRB No. 20 (2019), the Union failed to timely file an election petition and therefore did not avail itself of the relief set out in that case. Respondent is correct that in *Johnson Controls*, the Board modified the anticipatory withdrawal of recognition doctrine. If an employer receives evidence that the union has lost majority status within 90 days of the expiration of the parties' CBA, the employer may inform the union that it will withdraw recognition when the contract expires. *Id.* at slip op. 9. The incumbent union then has 45 days to file an election petition. *Id.* The Board in *Johnson*

*Controls* made it very clear that a union has a “variety of options” in such a scenario, including the filing of an unfair labor practice charge alleging...”that the petition is tainted by serious unremedied unfair labor practices.” *Id.*, citing, e.g., *Mesker Door, Inc.*, 357 NLRB 591, 596-598 (2011). As the Board noted in its summary, if the union in question does not file an election petition and the evidence in the employer’s possession establishes actual loss of majority status, it will be dispositive of the union’s lack of majority status and the employer’s withdrawal of recognition will be lawful “*assuming no other grounds exist to find it unlawful.*” *Id.* at slip op. 1 (emphasis added). *Johnson Controls* does not do away with the Board’s approach of analyzing whether a disaffection petition has been tainted by an employer’s unfair labor practices. *Johnson Controls* does not give Respondent cart blanche to benefit from its own wrong doing. The record established that Respondent’s unfair labor practices tainted the evidence it relied upon for withdrawal of recognition, thus making its withdrawal violative of the Act.

For these reasons, Respondent’s reliance upon the September 9 employee disaffection petition as its basis for withdrawal of recognition was violative of Section 8(a)(1) and (5) of the Act.

#### **IV. Conclusion**

The General Counsel respectfully submits that for the reasons set forth above, Respondent violated Sections 8(a)(1), (3), (5) and 8(d) of the Act as detailed in the General Counsel’s Consolidated Complaint.

Dated: December 31, 2020

Respectfully Submitted,

*W.F. LeMaster*

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