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

CORESLAB STRUCTURES (TULSA) INC.

AND CASES 14-CA-248354
14-CA-248812

INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 627, AFL-CIO

RESPONDENT'S POST HEARING BRIEF

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RESPONDENT'S POST HEARING BRIEF

The Respondent, Coreslab Structures (Tulsa) Inc. ("Coreslab" or "Respondent"), submits its Post Hearing Brief herein on the unfair labor practice charges filed by the International Union of Operating Engineers Local 627, AFL-CIO ("Union" or "Local").

I. STATEMENT OF THE CASE

This is perhaps the unusual case in which there is no animosity between the union and the employer. The Union's President, Justin Evans, testified he and Neil Drews, General Manager and Vice President of Coreslab, had a good working relationship. Evans and Drews frequently referred to each other by their first names in their testimony. The long-time Steward testified there were never any issues between the Union and Coreslab that he could not work out with management. No grievances were filed while Drews was General Manager from 2011 to September 2019. Drews made proposals in contract negotiations intended to improve wage growth for several job classifications. Even in the 2019 contract negotiations, the primary issue was not one that arose between the parties, but the result of an audit by the Central Pension Fund ("CPF") of pension contributions that occurred during negotiations.

The uncertainties the audit created for Coreslab led to two contract extensions and a slower pace of negotiations. Coreslab did not receive the audit results until late July, and was able to confirm that it likely would have no withdrawal liability from the CPF only in early September. The CPF asserted under reported contributions of more than $100,000, and the audit brought to light issues with the interpretation and practice concerning pension contributions.

In negotiations, Coreslab proposed in the second bargaining session deleting the pension provisions from the CBA. The Union objected to this proposal. Coreslab then proposed in the third bargaining session replacing the pension language with the company's profit-sharing

program. The Union resisted this proposal too. The Union's wage and pension proposal far exceeded the typical wage and pension proposal by the Union, and the Union never modified its position on wage increases or pension contributions.

The parties made progress in their third session, finding common ground on several subjects although the Union's proposals on increases in wages and pension contributions as well as the company's proposal to delete the pension language were sticking points. Five days later, an employee delivered to Drews a disaffection petition ("Petition") signed by 18 of the 26 employees in the bargaining unit. The Petition changed the complexion of negotiations again. Coreslab determined that it should honor the employees' desire not to be represented by the Local any longer, as stated in the Petition, and informed the Local on September 24, 2019, that it would withdraw recognition of the Local at the end of the CBA on September 30, 2019.

II. PROCEDURAL POSTURE OF CASE

On September 17, 2019, the Union filed a charge with four allegations. On September 25, 2019, the Union filed another charge with one allegation. On October 16, 2019, Coreslab submitted a position statement on both charges. A consolidated complaint in this matter was issued on December 26, 2019, with a hearing originally set for March 17, 2019. The hearing was postponed due to the pandemic, and reset for November 9, 2019. A three-day video hearing was held on November 9, 10, and 12, 2019 before Administrative Law Judge Thomas Ringler.

The allegations of the consolidated complaint are: (1) Coreslab allegedly not being privileged to withdraw recognition of the Union; (2) Coreslab allegedly not bargaining in good faith in the 2019 contract negotiations; (3) interference with § 7 rights and discrimination by Coreslab not paying pension contributions for non-union members; (4) interference with § 7 rights and discrimination by Coreslab offering profit-sharing to union members; (5) interference

with employees' employees' § 7 rights when Plant Manager Danny Johnson allegedly prohibited Evans from speaking with a temporary employee who was not a member of the bargaining unit; and (6) Coreslab allegedly not furnishing information requested by the Union.

III. STATEMENT OF THE FACTS

1. Labor-Management Relationship

a. History

Coreslab and the Union had a productive labor-management relationship for 14 years – beginning with Coreslab's purchase of a concrete bridge beam manufacturing plant in Tulsa on December 30, 2004. The Union represented a unit of production employees at the plant when Coreslab purchased it. TR 590-591.[1] Coreslab produces bridge beams for highways in Oklahoma, Arkansas, and Kansas. TR 245, 519, 590. Coreslab's corporate office is in Stoney Creek, Ontario, Canada, and Drews reports to Frank Franciosa, one of the owners, at the corporate office. TR 245, 253.

After acquisition of the Tulsa plant, Coreslab voluntarily recognized the Local and negotiated an initial CBA with the Local in February 2005, followed by successor agreements in 2007, 2011, and 2015. TR 247-248. The Tulsa plant typically has 38-40 employees, with 25-30 being in the bargaining unit represented by the Local. TR 248.

Drews participated in contract negotiations in 2007 and 2011 as a member of Coreslab's bargaining team. TR 591. In 2015 and 2019, Drews was the lead negotiator. TR 591. During the time Drews has been General Manager from 2011 to the present, no grievances were filed by the Local until one in September 2019. TR 591. Coreslab participated in arbitration of that grievance, even though it was held after the CBA expired. TR 592. During Drews' time as

[1] The hearing transcript is cited as "TR" with the page number. Volume numbers are not included in the record citations as the pages are consecutively numbered. Exhibits are cited as "J" for joint, "GC" for General Counsel, and "R" for Respondents.

General Manager, there have not been any issues brought to his attention from the bargaining unit. TR 592. Evans testified he and Drews had a good working relationship. TR 165.

b. <u>Steward's Role</u>

Under the CBA, the Union has the right to appoint two Stewards. J-1, Art. XIX, § 19.1, (5). A Steward represents employees in grievance and is permitted to be present when an aggrieved employee discusses a grievance with his supervisor. J-1, Art. XIX, § 19.1. The CBA requires that a Steward "be given a reasonable amount of time to handle grievances of the employees." J-1, Art. XIX, §19.1, (6); TR 155 (Evans). The Steward can submit a grievance under the CBA, and meet with Coreslab to discuss a grievance. TR 155 (Evans).

Evans testified the Steward is a representative of the Local. TR 155. Evans testified the Steward is to be a point of contact between employees and the Union office. TR 154. Evans explained the Steward "gives me a point of contact to be able to hand out the receipts that I could get the guys that I caught on break, and then I would go that – that Steward, 'Here are the rest of the receipts, dues receipts, and if you don't mind, give them out, and give me a call if you ever need anything.'" TR 126. Evans testified the Steward at Coreslab never came to him about any issue with management. TR 157.

Floyd Prince was the only Steward for 12-14 years, until he applied for and was promoted by Coreslab to a supervisory position in May 2019. TR 520-521. Prince was asked to serve as Steward by the members of the Union. TR 561.

After Prince was promoted, Evans tried to find another steward but it took him "probably a good year or year and a half." TR 124. Evans could not recall the new Steward's name: "Larry, and I am not real sure of his last name. That also a nickname. I believe his first name

was Delbert something…." TR 125. Delbert was terminated after about a year, and then no one else was willing to be Steward when Evans asked around.[2] TR 125, 157.

Prince, the long-time Steward, testified to his role, stating he "represented the guys out there in the yard in contract negotiations. I went to – just kept everything smooth and running between the Company and the Union and the – the employees, the members." TR 521. Prince testified "nothing major really came up," and the union "never had any type of grievance." TR 522. Prince added: "I mean, just – something happened between the Company and the members, and we talked about it and would get it taken care of" -

> [U]sually a member would come to me and tell me what was going on, and I would usually go to – at – at that time I went to Jerry Morris who was our Plant Manager at the time, and I would tell Jerry what – what was said, and we would get both parties together, and we would talk it out.

Id. Prince added: "If it needed to be dealt with more, then we would pursue it towards the – Union Hall. But it never did, so." *Id*. Prince testified he could file a grievance. TR 531.

Prince testified he attended contract negotiations when he was Steward. TR 536. In negotiations, Prince was "there to represent the members – in our plant." TR 555. By "represent members," Prince testified he meant, "just to make sure that, you know, we were getting things done the right way, you know. We – we had a meeting before on negotiations on what the members wanted, and we worked towards that." TR 561-562. Prince testified that during negotiations, he would speak to the Union's representatives about the subjects being discussed. TR 562. Prince testified he had a role in negotiations and "took it serious." TR 563. When the parties got to the tentative agreement stage in negotiations, Prince testified he would call a meeting with the Union members and tell them what was going on. TR 563-564.

[2] Evans was aware of the reason for Delbert's termination and did not grieve it. TR 156.

As Steward, Prince provided a Union packet, with pension information and a dues checkoff card, to new employees in the bargaining unit. TR 537. Prince testified he "would give them the spiel of the Company or the Union, 'Which one would you rather want to be in?' I was a Union Steward so I would pull them towards the Union." TR 549. The pension information was the CPF booklet that explained what the pension was. TR 538. Prince "would get the packet from the Union, because they would give – they would give me all of the new names, and then I would pass them out and I would talk to them." TR 551. Once a new employee filled out the dues checkoff form, Prince called the Local office to come to Coreslab to pick up the form or sometimes took the forms to the Union hall himself. TR 539. Prince testified this is what occurred when Evans was the President and Business Manager. TR 539.

In 2005, the Union had two Stewards – Prince and Tim Merrill. TR 529. In 2019, the Union did not have any Steward. TR 556.

c. <u>Union Membership</u>

Prince testified that in 2005, a majority of the employees in the bargaining unit were members of the Union. TR 564. Prince testified that over time, Union membership had declined. TR 565. Prince testified Oklahoma's Right-to-Work law had "drastic" effect on the Union's membership, adding it was "decreasing fast." TR 565. Prince testified that employees left the Union during the time he was Steward. TR 566.

Figures on Union membership from 2011-2016 were not offered by the General Counsel or the Union. Based on information the General Counsel subpoenaed, Union membership declined from 12 in 2017, to 9 in 2018, and to 8 in 2019. GC-11. Evans testified that during the 2019 contract negotiations, the Local had only 7-8 "actual members." TR 157. Evans thought

one member retired when negotiations began. *Id*. From January 2017 through September 2019, only one employee, Shawn Queen, joined the Local. TR 306-307.

2. 2019 Contract Negotiations

On February 20, 2019, Evans sent a letter requesting contract negotiation to Coreslab's Oklahoma City office. JX-2. After that letter was forwarded to Drews at the Tulsa plant, Drews called Evans to acknowledge the Union's letter. TR 595; J-2. The parties had three bargaining sessions in 2019: April 10; July 26; and September 6. TR 40; J-20. All the bargaining sessions were held at the Local's union hall in Tulsa, and the Local was represented at each session by Evans and Michael Stark. TR 44, 153-154. The Union did not have any employees from the bargaining unit attend any of the bargaining sessions. J-20; TR 146, 536.

a. April 10, 2019 – First Bargaining Session

In the first session, Evans "had a sheet that I was reading off my proposals, and I believe the Company had the same, a typed sheet." TR 47. Evans did not think he provided the Union's written proposal to Coreslab at the first session. *Id*. ("no, I don't believe, I made no copies"). The second page of R-7 is the copy of the Union's proposal that Evans read in the first session, with Drews' handwritten notes in the left-hand margin. TR 600, 602. Evans admitted that R-7 is in substance the proposal the Union made to Coreslab at the first session. TR 149.

Evans testified the Local presented "a full proposal" in the first bargaining session, and Coreslab made a couple of language proposals dealing with "maintenance of the agreement" but did not make any financial proposals. TR 46, 151. Evans testified the Local had a financial proposal and asked for holidays. TR 46. Drews and the Union's representatives discussed the Union's proposal on holidays; bargaining unit members also get a personal day, while other Coreslab employees do not. TR 611. Evan testified Coreslab proposed taking "Maintenance out

of the bargaining unit, wanted to move some names, take some job titles out that – the commercial work, different things, and then I believe – that was about it."[3] *Id*. Evans testified that no tentative agreements were reached in the first session. TR 47.

The Union's proposal on wages was a $1.50 increase for each year of a four-year proposed contract, totaling a $6.00 increase in wages over the term of the contract. TR 602; R-7. The Union's initial proposal on pension contributions was for a $0.50 increase in Coreslab's pension contributions each year of the proposed four-year contract. TR 603; R-7. The Union never reduced its wage or pension proposals in negotiations. TR 603.

In March, before the first session, Coreslab had received a letter from the CPF requesting an audit of Coreslab's contributions. J-17. In the first session, Drews told the Union Coreslab was "getting ready to be audited." TR 610. Drews brought up the audit "(b)ecause I thought it could affect how we were going to have to negotiate moving forward." *Id*.

Drews prepared the summary of the Union's proposal from the first negotiations in R-1 on the afternoon of April 10 after getting back to his office. TR 603, 605-606. On the copy of that summary in R-2, Drews made notes the following day on April 11 for a call with Franciosa about contract negotiations. TR 605-606. Drews wrote one note: "We come to the table just being notified about CPF Audit from 2016-2018. We had to await findings." TR 606; R-1 (second page). Drews wrote this note because he "wanted to let him (Franciosa) know, before I can really negotiate with them, I kind of wanted – we kind of wanted to find out what the audit does entail – what the audit is going to entail." TR 606-607.

[3] Evans testified at the hearing that Coreslab did not make a written proposal at the first session. TR 151. However, in his Jenck's Affidavit dated September 19, 2019, Evans testified Coreslab presented the written proposal in J-15, minus the handwritten date and the word "Proposal" at the top of the page, at the first session. TR 170-171. Evans testified JX-15 is consistent with his testimony that Coreslab made proposals but no financial proposals at that session. TR 171-172. Evans recalled discussing all the subjects in JX-15 with Coreslab at the first session. TR 172.

Drews also made this note: "Terms. – 4 years with those rates I don't think so." TR 607; R-2 (second page). Drews testified he was not going to agree to a four-year term for the contract with the rates proposed by the Union: "Yeah, I mean, historically, I mean, the rates – normally they would come to the table with approximately a five or six percent increase. This was an astronomical amount compared to normal." TR 607-608. The Union's representatives did not provide any rationale for its wage and pension proposals. TR 618.

The Union's wage and pension demands in the 2019 contract negotiations were much greater than in the 2015 contract negotiations. TR 612. In 2015, the Union requested a total increase of $0.84, with $0.50 to go to wages and $0.34 to go to the pension. TR 612; R-20 (Drews' Summary of 2015 negotiations). The parties ultimately agreed on wage increases of $0.20, $0.25, $0.25, and $0.30 for the four years of the 2015 CBA, and a $0.05 increase per year for pension contributions by Coreslab. TR 612-613; R-20 (page two).

Drews told the Union's representatives that what he discussed would have to be approved by his corporate office: "I always state that." TR 619. This was no different than contract negotiations in 2007, 2011, and 2015. TR 370, 619. Evans admitted Drews told him in the first session that Drews had to have corporate approve whatever he did in negotiations. TR 175. Evans testified he similarly expressed to Drews that Evans and Stark had to have whatever was discussed in negotiations approved by a vote of the Union membership. TR 175.

b. April 16, 2019 – CPF Audit

The CPF conducted an in-person audit at Coreslab's plant on April 16 and 17, 2020.[4] TR 364, 620. Drews testified that initially, the auditor reported to him that "everything is looking good," but when she came back from lunch, the auditor said she had to continue and it would probably take another day. TR 365. The auditor talked to her supervisor at lunch on the first

[4] On March 28, 2019, Coreslab was informed of the CPF audit. TR 362-363; J-17.

day. TR 366. The auditor told Drews that she needed "to make sure that you (Coreslab) account for all of the maintenance as well as all the people that fall into those classifications." *Id.* Drews testified this was when he knew Coreslab would owe something due to the audit. *Id.*

After the auditor left Coreslab, Drews called Evans and "mentioned to him that the results weren't favorable with the audit, and that I probably couldn't – probably couldn't go through – we wouldn't have a final number, and I would just as soon wait until the end, until the final results of the audit, before we proceed." TR 634-635. Drews continued: "That is when he (Evans) mentioned that we needed – that if that was the case, we needed to do an extension, and I said if that was what we needed to do, then let's do it." TR 635.

c. <u>April 22, 2019 Meeting</u>

On April 22, 2019, Drews and Evans discussed contract negotiations in Drews' office. TR 176. Drews asked Evans if the parties could get the pension language out of the CBA. TR 176 (Evans). Evans told Drews that removing the pension language was something the bargaining unit would have to agree to, but that issue should not stop the parties from meeting. TR 177. Evans knew at this point that Drews was concerned about the CPF audit. TR 178.

Evans testified the pension audit was the reason Drews wanted to reschedule the April 19 bargaining session that Evans said the parties had set. TR 178. Evan testified Drews informed him of the need to cancel the April 19 session "the first time he had told me was over the phone, and then I believe we had a little bit of an e-mail exchange." TR 49. No email confirming cancellation of a bargaining session set for April 19 was introduced into evidence. Drews did not recall any bargaining session with the Union being set for April 19, 2019. TR 620.

Evans testified Drews "told me that the CPF was auditing them, and that their company or Corporate told them to halt the negotiations until they thought it was finalized." TR 49.

Evans testified that he told Drews that the expiration date of the CBA was coming up, and they needed to get the contract ratified by the end of the month (April 2019). TR 50. Evans testified that Drews responded that "(h)is hands were tied. That he was under orders that he could not negotiate until the audit was finalized." TR 51.

d. <u>April 24, 2019 – First Extension Agreement</u>

On April 24, 2019, the parties entered into an extension of the CBA until July 31, 2019. JX-4. Evans typed the extension agreement on the Union's letterhead. TR 178-179; J-4. Evans testified he spoke to the union membership about two options in April: (1) extending the CBA; or (2) calling a strike. TR 180. Evans testified the membership chose the extension option, although the extension agreement does not reference approval of the membership for the extension. TR 179-180. The July 31, 2019 extension date was the product of the auditor telling Drews that the audit results would be sent to Coreslab in about 60 days after the audit. TR 635.

e. <u>July 17, 2019 – CPF Audit Letter</u>

On July 17, 2019. Coreslab received a letter from the CPF, which asserted Coreslab owed over $100,000 for under contributions. J-1. Drews responded to the CPF's letter, stating:

> I still felt that we were paying the remittance forms, and to me, those were the ones that – those were the only ones that we should've been paying in the Central Pension Fund. And I go past practice – this is what we've been doing for – since – just wanted to let her know that's the way we've always done it.

TR 380. Drews testified the CPF was requesting "a substantial amount for the size of plant that we are, and we wanted to make sure we knew where our stance were because with going back and forth with Calibre, we were hoping to get this resolve right away. And once we got that past us, then we could go forward. We could move forward with the negotiations." TR 386.

f. <u>July 26, 2019 – Second Bargaining Session</u>

In April when the parties entered into the extension agreement, they did not schedule a second bargaining session. In June 2019, Evans did not send any emails to Drews regarding another bargaining session. TR 182. This was because the parties had discussed that it would take 60 days for the audit results. On July 17, 2019, Drews received the results of the audit TR 373. Drews then told Evans that he could return to the bargaining table. *Id*.

On July 26, 2019, the parties' held their second bargaining session, which Drews testified lasted an hour to an hour and a half. TR 387. Coreslab made a written proposal to the Union, addressing six subjects in the CBA. J-15; TR 637.

Item 5 of Coreslab's July 26, 2020 proposal was to delete § 16.3 on pension contributions. J-15; TR 637. This was a significant item to Coreslab, and one that was discussed in detail, but which generated little interest from the Union. Drews testified Coreslab had an option for employees in the retirement plan, and while the company did not have a matching percentage in its 401(k) plan, it did have a profit-sharing plan in which employees to put some or all of their money in the 401(k) plan. TR 637-638. In discussing § 16.3, Drews "basically told them (the Union representatives) what all is involved" in the profit-sharing plan. TR 638. Drews did this "(b)ecause if I was going to get rid of the pension, I wanted the employee to have something that they could go towards retirement, and this was the option that Coreslab offers." TR 638. The written proposal in J-15 points out that profit-sharing had exceeded the CPF contributions historically, and has a short vesting period. The profit-sharing plan requires one year of service. TR 323. It takes employees five years to vest in the CPF. TR 472. Drews testified that Evans and Stark listened to what he said about the profit-sharing plan and had a few questions, but "when I answered their questions, Mr. Stark's response was, 'Well, we kind of like the Central Pension Fund, and that is probably going to stay.'" TR 639.

Evans testified it did not surprise him that Drews made a proposal on eliminating the pension contribution language. TR 187. Evans testified Coreslab wanted to "trade it out in July and they was wanting – the pension come up and – to replace it with the profit-sharing." TR 197. Evans testified that the Union's position was that it would not agree to delete the pension contribution provision: "Well, that is going to be the Union's stance, always." *Id*.

Evans testified at 186 it is common for employers to propose deleting CPF provisions:

> I know through experience, I sat in anywhere from ten to twenty of these negotiations a year on different contracts, and personally a part of ten or eleven different contracts, and of those, five or six, we spend the majority of our time, I can honestly say, that the Central Pension is a big concern for every company. How far is that, because I have seen it go right up to the be the last thing taken off the table, that the Company takes off the table. That's – that's the last thing they want to take off the table. That is first thing we want to leave on the tables.
>
> So, knowing their exact strategy, I don't have not – no real clue on that. I know he was, but I can give you twenty other examples of where companies, I thought – they were going to push that to the very, very end, and then – and you think, all of a sudden they change, and they leave – they drop the contract out of it.

Coreslab's proposal on deleting pension contributions did not present an impediment to getting a contract to Evans, who testified at 187:

> A proposal is a proposal is a proposal. It – I look at it no different than us proposing an extra day of holiday. They have the right to pull that, talk about it. I can stand on wanting more holiday pay, but it may not be a real big issue to the guys.

Evan testified that Drews said "if we wasn't going to get out of the pension – wasn't able to get out of the pension, then that limits what he can do." TR 72. Evans added at 72:

> I don't think he (Drews) had a clear understanding of it was not – the Union can't agree just right then and there at the table. We have to take that back to the membership to let them to agree for any changes, and whenever we didn't jump on-board with his idea of the pension versus the 401(k) and – then he didn't want to negotiate any longer.

The other five items in Coreslab's proposal at the second bargaining session addressed the contract's duration, revising the time for notifying the Union of new hires, job classifications in Art. III and App. A, and duplicative language on supplemental dues in § 6.1.

Coreslab's proposal on duration was that the contract duration would depend on what the parties negotiated for the rest of the CBA. J-15 (Item 1); TR 639. Coreslab was looking to delete § 16.3 if it was going to negotiate more than a one-year agreement. TR 639. Drews testified that "with what they (the Union) had proposed (in the first session), and looking at that, and I think that would be a huge financial obligation that a plant as small as what we are, I don't think we could have handled it." TR 639-640.

On item 2 in the July 26, 2019 proposal, Drews proposed taking maintenance employees out of Art. III (TR 640):

> [B]ecause it is a job we typically don't post for. It's – it's a position that – it is hard to fill, and – I mean, I – originally I didn't think it was going to be that big of a deal, but, I mean, it was just something I was wanting to see taken out because we don't post for that position.

Drews testified the Union's representatives responded to this proposal by stating the position had been in the CBA "the whole time, and they would like to keep it in there." *Id*.

On item 3, Coreslab wanted to extend the time to notify the Union of new hires from 15 to 30 days because, as Drews testified, "with the amount of people that we get that come in and out, if they stick thirty days, they usually are going to stick for a little while." TR 641. Drews testified that "it would probably save time – time for Justin where he wouldn't have to keep coming out here, if I shot him a message every two weeks." *Id*. Drews testified the Union representatives did not act like this proposal was a concern to them. *Id*. Evans testified "our biggest part of the time we discussed about the new hires – the new hires, and they wanted to send me guys maybe once a month, if they made it a month, and me coming out and getting them

signed up." TR 68. Evans testified there is a lot of turnover at Coreslab's plant and often employees quit before the time for the company to notify the Union of a new hire. TR 214.

On item 4, Drews testified Coreslab proposed deleting § 6.1 because it was duplicative of § 6.7; both involved Coreslab adding $0.55 to employees' hourly wages and then deducting $0.55 from wages and sending that deduction to the Union. TR 641-642. Drews testified the Union representatives said they would look into that, but they were not in favor of it. TR 642.

On item 6, Drews testified Coreslab proposed making the job classifications in App. A fit the jobs employees were performing. TR 642. Drews explained that some of the classifications were for commercial positions like parking garages, and Coreslab focuses on bridge beams:

> We pretty much just focus on bridge beams. And to stay focused on bridge beams, there are not a lot of job titles, and I just wanted to simplify it, but yet give them – give the employee a range. Once they had been here a while, and putting more confidence into their position, where they had a chance to go into another level, to increase their wage.

TR 643. Evans testified Coreslab "wanted to talk about the … moving some job titles up and moving some people up in there." TR 68. Evans admitted that Drews' proposals on App. A would increase the pay rates for some employees by adding new job titles. TR 173. Evans testified the App. A proposal by Coreslab was an economic proposal. *Id*. Evans testified the parties discussed App. A at each of the three bargaining sessions. TR 183.

Evans testified the parties discussed the CPF audit at the second bargaining session, and Drews "mentioned that they were appealing it, but we didn't get into big detail, any big detail of it." TR 72. Drews and Evans testified the parties did not reach any verbal tentative agreements in the second session. TR 71, 388. Evans did not give Drews a copy of the Union's proposal at the second session, even though Coreslab gave him a copy of the company's proposal (J-15) at the second session. TR 69-70.

g. <u>July 31, 2019 – Second Extension Agreement</u>

A second extension of the CBA was discussed at the July 26, 2019 bargaining session. TR 657. Evans and Stark took a caucus during the second bargaining session, and when they returned, Drews testified at 658 they said that if Coreslab:

> didn't have anything clear on 16.3, we were probably going to have to extend the deadline. But to do that, they needed – they needed to go back to the Union member(s), the collective bargaining unit, and ask them if they could go for an extension, but to do that, they wanted to go back and – with a $0.30 raise to show everybody it was in good faith, and trying to make a resolution that hopefully there would be an outcome soon.

Drews testified that a contract extension and a raise of $0.30 was Evan and Stark's idea. TR 658. At the end of the session, Drews testified Evans said the Union needed more information on the proposal to delete pension contributions because Evans said the Union "typically don't ever get rid of the pension." TR 388. Drews responded, "if we can't at least look at getting rid of this, I said then we probably aren't going to – we're probably not going to get anywhere." TR 389. Drews testified Evans then said, "if that's the case, … he said we're going to have to do an extension." *Id*. Drews testified that Evans said Drews had "to give something." *Id*. Drews said "we have the option to give something if you're willing to look at article – at article 16.3" *Id*. Drews testified that Evan "just said no, it's not an option." *Id*. Drews testified Evans then said, "can't you at least give me .30 cents an hour?" *Id*. Drews testified that he said "you might get .20, but I said it's something I have to talk to my corporate office about." *Id*. Drews testified Evans said they could extend the CBA "all the away to September – or he said let's look at September 31st (sic)…. Let's do it for two months." *Id*.

Evans' claimed that Drews' brought up an extension a $0.20 increase first, and the Local responded with a $0.30 increase for a two-month extension. TR 73-74. Evans even claimed that Drews tentatively agreed to a $0.30 increase for a two-month extension. TR 75. But Evans

added that Drews said he "would have to get that okayed with Corporate, that – and that I would have to get I ratified – I would need to get it ratified from the guys. They have to vote on it, of course, and then proceed from there." *Id*. Evans testified that removing the pension language from the CBA was a big deal to Drews. TR 186. When asked how it would make sense for Drews to propose a temporary wage increase at the end of the second bargaining session without having agreement from the Union to delete the pension contribution, Evans responded: "I don't have a good answer for his – his plan is." *Id*.

Evans testified Drews did not provide the Union with anything in writing on a temporary wage increase of $0.20, and Evans did not have any emails from Drews on a temporary wage increase proposal. TR 188-189. Drews did not tentatively agree to this proposal from the Union for a raise in exchange for an extension of the CBA. TR 658. The Union presented Drews with the typed proposed tentative agreement in R-5 on a $0.30 per hour raise at the second bargaining session. TR 659. Drews told Evan and Stark that he could not sign the tentative agreement, as he "still had to talk to Corporate." TR 659. Drews added that Coreslab and the Union had never agreed to a temporary extension of the contract in exchange for a temporary raise. *Id*. Drews never signed the Union's proposed tentative agreement in R-5.

Drews did talk to his corporate office about a $0.20 per hour raise, as he told Evans and Stark he would. TR 661. The corporate office did not agree with a $0.20 raise at that time because the Union was not willing to sign any of Coreslab's proposals for the increase. *Id*. Drews communicated this to the Union the Monday following the second bargaining session, which led to the extension agreement in J-6. TR 391, 661-662. Drews told Evans they would have to do an extension without a wage increase. TR 391. On July 31, 2019, Drews and Evans

signed the extension agreement in J-6 that extended the CBA to September 30, 2020. TR 660. Evans testified the membership voted to extend the CBA a second time. TR 189-190.

h. <u>August 1, 2019 – Drews Meeting with Employees</u>

On August 1, 2019, Drews met with about 30 employees for 20 minutes.[5] TR 494, 684; GC-25. Union, non-union, and temporary employees attended the voluntary meeting. TR 412, 495. Drews testified that a comment from an employee caused him to have this meeting with employees. TR 684. Evans had met with employees the day before when he was at the plant to sign a second extension. TR 493. An employee came to Drews and stated that Evans told the employees that Coreslab was in the middle of an audit and was going to "'owe a lot of money.'" TR 684; *see also* TR 493. Drews testified the last thing he wanted was "instability in my employees, thinking they are not going to have a job here," and "everybody has different ideas of a lot of money." TR 684; *see also* TR 493. Drews testified that the way the employee described what Evans said, "I felt that I better speak to the employees and say something." TR 684.

Drews explained to employees that the company would be making contributions for them to the CPF, but if they were not members of the CPF, they would not benefit from those contributions. TR 416. Drews also explained that due to the pension contributions the company would be making as a result of the CPF audit, the company would not be paying profit-sharing to anyone in the bargaining unit. *Id*. At the time Drews met with employees, Drews did not know whether the company was going to be able to continue profit-sharing for unit employees: "It all depended on how the negotiations went." TR 685.

Drews testified the majority of the employees in the meeting did not know that they were eligible for a pension. TR 495. Drews testified the reaction from employees was "mixed" –

[5] Drews typed talking points for himself for the voluntary employee meeting, but did not distribute the talking points to employees. TR 414; GC-15.

"there was a lot of questions about why do we have to – why do we have to go by what the bargaining – or what the CBA says and – and I just basically said, hey, we're finding out that's the law and that's the way it's got to be." TR 417. Drews testified there were four employees who were not happy with what he said in the meeting. *Id*.

Two employees, Terry Workman and Joe England, asked Drews after the meeting if they were eligible for profit-sharing or the pension. TR 500. Drews told them that with the way negotiations are going and after what he learned in the CPF audit, they would be eligible for the pension. *Id*. Workman and England commented they did not sign up for the Union because of the profit-sharing. *Id*.

Drews testified employees also had questions about contract negotiations also, and he responded to those question by telling employees what was going on in the negotiations, adding "if they had an issue with what I was doing or Justin was doing, they needed to – there was an option, if they wanted to find out what the could or could not do, either call me, call Justin, or go on to NLRB.gov." TR 411; *see also* GC-15. Drews testified, "I wanted to let them know that Justin's available for contact and so am I." TR 418

Drews did not talk to any employees about them not being represented by the Union. TR 427. Drews did not have any discussions with any employees about a disaffection petition. *Id*.

i. <u>September 6, 2019 – Third Bargaining Session</u>

Evans sent Drews a text message on August 27, asking when he "would want to start working on negotiations." TR 82; J-18. Drews texted back, "I don't know. Corporate told me to wait." J-18. In late August, Drews had been instructed by his corporate office to wait on having another bargaining session. TR 686; J-18

Evans sent Drews an email on September 4 asking whether Drews had received Evans' email with dates for negotiations. TR 83; J-7. Drews responded that he would like to meet on Friday if that day was still available for Evans. J-7. Drews testified that Coreslab had been looking at withdrawing from the CPF, but was concerned about potential withdrawal liability which had been an issue at another Coreslab plant. TR 393. Drews had gone to the CPF website, and learned that since 2014, no employer had any withdrawal liability because of the CPF's strong financial status. TR 393, 687. Drews testified he called his corporate office as soon as he read the information on the CPF website because "I wanted to try to get a resolution on this Collective Bargaining Agreement." TR 687, *see also* TR 393 ("And I brought that to Frank (Franciosa at corporate) and said, hey, I want to get this stuff negotiated. We need to move forward.") Drews got the go ahead to proceed with bargaining and he called Evans.[6] TR 687.

In the third session, Coreslab made what Evans' characterized as a "full proposal" in all issues.[7] TR 190-191, 192, 688. Evans testified that Drews made the written proposal in J-19 as package proposal to the Union. TR 192. Evans testified at 192 that Coreslab's proposal was:

> taking some of our proposals and agreeing to it, denying others. This is – is kind of an overview of what our last two meetings were, I think. That is kind of what I would call that, and kind of a good place to start on the September 6 meeting.

Evans testified the Union did not make a written proposal in the September 6 session.[8] TR 193.

Coreslab's proposal in the third session addressed 19 subjects, including a wage increase and many articles on which Coreslab proposed no change. J-19. Coreslab also modified its proposal on the pension article. The Union did not modify its position on wages or pension.

[6] Coreslab also sent a letter to the CPF to verify the lack of withdrawal liability. TR 394, 701.
[7] Evans testified the third session was the longest of the three bargaining sessions. TR 84.
[8] Based on Evans' testimony, the Union never made a written proposal to Coreslab.

On Art. 16 regarding pension contributions, Coreslab revised its position from the second session by affirmatively stating the company was willing to replace pension contributions with profit-sharing, as Drews testified at 192:

> On this article, I went through and explained how the profit-sharing works, and we had – we had an extensive talk on that. We were very clear, I believe, other than they wanted to know the amounts that everybody made, and that – I felt that I gave them a good enough – a decent enough proposal for them to consider this, and in Article 16, this – where I eliminate the pension and ask them to consider profit-sharing, I did make this so if you were part of the Collective Bargaining Agreement, you would be eligible for – you would be eligible for profit-sharing, while we were eliminating pension.

Drew testified this proposal did not discriminate on Union membership. TR 692-693. Drews testified Evans and Stark "insisted on keeping it (pension contributions) in there." TR 735.

Evans testified the parties had a lengthy discussion about Coreslab's proposal to delete pension contributions and add a profit-sharing provision. TR 89, 194. Evans did not think he and Stark ever told Drews that they would not agree to delete the pension language. TR 197. Evans testified Drews answered questions they asked about the profit-sharing program. TR 196.

Regarding duration (title page and Art. XXVII), Coreslab proposed a one-year contract. Drews testified that depending on Coreslab's financial obligation from the audit and what the parties agreed to on Art. 16, Coreslab might have agreed to a longer term. TR 689. Drews testified: "If Article 16 would have come to resolution, we could have gone for four years." *Id*.

On Art. III, Coreslab maintained the same proposal from the second session to delete "maintenance employees." TR 690; J-19. Evans testified Drews explained the company's rationale was that it could not fill the position with the wage rate paid for this position. TR 93. Evans testified the Union's response was that the wages could be increased. TR 94.

On Art. VI regarding supplemental dues, Coreslab preferred to delete the supplemental dues, but proposed a compromise to change the language to the company pay supplemental dues

only hours employees worked, rather than payroll hours. TR 690. Drews testified this proposal was so that "someone is not receiving a benefit on a benefit." TR 690.

On Art. X regarding wages, Coreslab modified its earlier position and proposed a wage increase of $0.30 per year for the duration of the contract. TR 691; JX-19. Drews testified the Union did not agree to this wage proposal, but indicated the Union representatives would listen to it. TR 691. Evans testified, "[M]y wage package stayed the same from our very first meeting, from our very first proposal." TR 96; *see also* TR 149.

On Art. XIX, Coreslab proposed gender neutral terms. TR 693. On Art. XXII, § 23.4, Coreslab also proposed gender neutral terms. TR 694. In § 23.6, Coreslab noted that if the maintenance employees were deleted from the CBA, then the provision for the company to provide overalls to maintenance employees would need to be deleted also. *Id*.

On App. A, Drews testified that Coreslab proposed revised language to delete job classifications that did not apply to a bridge plant like the Tulsa plant, and to create wage growth for several of the remaining classifications. TR 396-397. Drews testified at 397-398:

> According to this agreement, they didn't have – there was never a place for them to go to move up. And I wanted to give them the options like, hey, if you're willing to take – if you're willing to take responsibility on marking a bed out and everything, I'd love to pay you more and make an improvement in them.

Drews added that his goal in the proposal on App. A was "to make improvements on this to make it where we could move a few guys up to give them – to give the more wage." TR 397. Drews testified App. A needed an update because many of the classifications had not been applicable since Coreslab purchased the Tulsa plant. TR 395.

Drews testified that "after an extensive break," Evans came back with a paragraph he wanted to add to the end of App. A to permit certain job classifications to be added back into App. A if circumstances warranted in the future. TR 395; J-19 (third page). Drews testified,

"And I told him as long as we're a bridge plant and you're in agreement – or I said I have no problem if we need to add- if we need to add back some of them, but I said I don't have a problem, you know with what he was saying." TR 395. Drews testified he told Evans "we can't use this exact language, but I said we can come up with something." TR 396.

On Articles I, III, IV, V, VII, IX, XI, XII, XIII, XVII, XVIII, XXIV, XXV, XXVI, Coreslab proposed that the language remain the same, i.e. no change in the language of these articles from the 2015-2019 CBA. TR 689; J-19.

Drews testified that at the end of the third session, there were certain issues on which Coreslab and the Union were on the same page, but the parties were not ready to sign an agreement. TR 397. On shift differential, Drews testified Coreslab was willing to agree to the Union's proposal to increase shift differential from $.050 to $1.00. TR 395, 695. Drews and Evans testified the parties agreed to update CBA's gender references also. TR 86-87. Evans testified the Union was willing to take commercial work out of App. A. *Id.* No written, signed tentative agreement was introduced into evidence. TR 198-199.

Drews testified that he thought Coreslab's proposal at the third session was a "complete proposal" that the Union had requested: "To me it was a proposal that we could go forward, where they could take it to the bargaining members, and – or the Union members, that make – that vote on this, that they could take it right to them and maybe they could get an agreement."[9] TR 695. Instead, the Union's representatives wanted more information on the pension. TR 696. Drews testified Stark said, "'Well, we can work at it, but I believe it is – I believe that we like our pension better.'" TR 697. Drews replied, "We're not too far apart, and please send me your

[9] Drews did not tell the Union's representatives that they could agree to some of the company's proposals but not others: "I don't believe I did. I typically refer to it as 'all or nothing.' I mean, we got – we have got to make agreements like we did in 2015 with that spreadsheet. I was kind of a checkoff list of what we could agree on. It never got that stage." TR 696.

questions and we will talk in the future." TR 697. Evans testified that at the end of the third session, it was left that "[w]e would just get together and set new dates." TR 97. Evans testified Drews said the parties would have to come back and keep working on the contract. TR 194.

j. <u>September 11, 2019 – Disaffection Petition</u>

On September 11, 2019 – five days after the third session, Drews received the Petition from employees in the bargaining unit which stated they no longer wished to be represented by the Union. TR 702-703; J-16. The Petition stated:

> 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 do not feel that Local 627 have anything to do with us and they do not represent us in any manner.

J-16. The petition was signed by 18 of the 26 employees in the bargaining unit.[10] TR 249.

On September 11, at about 3:30 p.m., as employees were leaving the facility, Theron Chalakee brought the petition to Drews. TR 704. Drews testified Chalakee "just said that they didn't want to be represented, that the people in the collective bargaining unit, didn't want to be represented." TR 704; *see also* TR 404. Drews did not make any comment to Chalakee or ask him any question. TR 704. Drews was "was surprised" by the petition because "(a)fter hearing Justin say that they had the majority, I was – I was thinking I was believing him. I mean, he said that, and he would have no reason to lie, and then we got this." TR 706.

k. <u>September 12, 2019 – Drews/Evans Meeting</u>

On September 12, 2019, Drews and Evans met at Drews' office when Evans came to pick up information that Drews had compiled in response to a request from Evans. TR 707. In the meeting, Drews told Evans that he had received the disaffection petition in J-16, and it had 22

[10] There are 21 signatures on the Petition; but employees numbered five, seven, and 14 were not in the bargaining unit. TR 405.

names on it.[11] TR 708-709. Evans asked for a copy of the petition, and Drews responded, "'Not at this point.'" TR 709. Drews also told Evans that due to the petition, Coreslab was going to withdraw anything that it "had agreed to previously" and all of its proposals. TR 710.

In the September 12 meeting, Evans told Drews that the Union was filing a grievance over profit-sharing. TR 708, 101. Drews asked Evans for a few details about the grievance, and then said, "If that is what you got to do, you got to do (it)." TR 709.

l. <u>September 24, 2019 – Drews/Evans Meeting</u>

On September 24, 2019, Drews provided Evans with a letter stating that Coreslab was withdrawing recognition of the Union effective September 30, 2019. TR 711; J-11. Drews testified that the basis of Coreslab's decision to withdraw recognition was "the disaffection petition that I received on the 11th." TR 402. Drews explained further at 710:

> When the employees asked me, that they don't want to be represented anymore, I kind of felt that we were going to have to, not only deal – that my only option was to take their word and if they didn't want – if they didn't want representation, I had to – I had to do that. I mean, when you are the boss of somebody and they come and ask you for something, and it is something of this seriousness, I – I have got to take that and I have got – I have got to move forward with it. If I don't, I am not credible to them.

By September 24, Coreslab had received a response from the CPF that it would not have any withdrawal liability "so, we were moving forward with the employees' wishes." TR 711 (Drews). The effective date of the withdrawal of recognition was the CBA's last day.[12] *Id.*

After delivering the letter on September 24, Coreslab did not meet with the Union again for negotiations. Evans testified the Union did not file a Petition for Election with the Board after the letter from Drews on Coreslab withdrawing recognition of the Union. TR 167.

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[11] There were 22 numbers on the Petition, but only 21 signatures.

[12] While Evans asserted in his testimony that Drews was upset in the September 24 meeting, in his Jencks affidavit, Evans stated that Drews was "a little flustered." TR 212. Evans then claimed that being visibly upset is the same as being flustered. *Id.* Drews was not angry when he delivered the letter to Evans on September 24, contrary to Evans' testimony. TR 711.

3. Pension Contributions

a. Central Pension Fund

In 2005, Coreslab decided to add the CPF as a benefit to unit employees who were members of the Union. Prince testified the pension plan first came up at the Tulsa plant when Coreslab purchased the plant. TR 523. Prince testified Morris informed him of the pension plan:

> Well he just mentioned that the – that Coreslab had decided to put the pension fund in for the Union employees, and you know, this was something that we hadn't had before, they believed they wouldn't allow it. They had their own pension fund. So it was quite interesting, and I was quite surprised it happened.

TR 524, 525. The other Steward, Merrill, participated in contract negotiations in 2005 when pension contributions were added, and also told Prince about the CPF. TR 530, 549. When he learned about the pension, Prince notified union members because those were the employees who would be receiving the pension. TR 546. Prince testified he did not go to the Union business office over pension payments being made for Union members and profit-sharing being for non-members because he thought it was a good thing. TR 552. Prince believed the CBA applied to all employees, but he understood the pension was only for union members. TR 560.

Prince testified that he would tell new employees about the pension also and profit sharing: "I would give them the spiel, and then I would tell them that, 'When you are a Union member, you have got a pension plan, and the other one, you have a profit-sharing.' I would tell them that right off the bat." TR 549-550.

b. CPF Remittance Forms

Each month the CPF sent Remittance Forms to Coreslab for pension contributions. The second page of the Remittance Form in R-11 has employee names printed by the CPF on the form, which is titled "Employer Report of Contributions." TR 622-623. Drews testified Coreslab made pension contributions based on the documents from the CPF: "If you look at

January the 31st, 2016, Page 2, and Page 2 and 3, all have names typed in on the left side, and those are the employees – those are the current Union members, and we knew we had to pay pension for those employees." TR 626. Drews testified the remittance forms from the CPF that Coreslab received had only the names of union members on the forms. TR 320.

Coreslab made pension contributions the same way from the time Drews became General Manager in 2011. TR 627. Drews testified at 277 to his understanding of the calculation of pension contributions when he became General Manager:

> 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 its been that way since 2011 since I took over, and I just keep proceeding and I had never received a document from the pension fund or anybody – or even the union stating that it needed to be done otherwise.

Drews testified the company did not make contributions for other employees in the bargaining unit because "(t)hey were not listed on the Remittance Forms, and we didn't believe we needed to." TR 632. Drews testified that until the audit by the CPF, no one, including representatives of the Union, brought it to his attention that there might be an issue with how Coreslab was calculating pension contributions. *Id*. Coreslab regularly sent emails to the Union notifying the Union of new hires. TR 662-663; R-16. Neither Evans nor Stark ever told him that new hires should be included in pension contributions. TR 665-666.

c. <u>Audit – April, 2019</u>

During the CPF audit on April 16 and 17, 2019, Drews "was feeling pretty good until the lady went to lunch, Molly. She decided to – well when she come back from lunch, she mentioned to me that she had talked to her boss, and he kind of threw up a red flag. But before that, she had said that everything was in order." TR 633. After the second day, Drews "realized

that we had not been making the correct contributions." TR 634. Drews made a spreadsheet and got a rough idea that the difference would be around $100,000 at that point. *Id*.

d. <u>Audit Letter – July 2019</u>

On July 17, 2019, Coreslab received the audit results, with a total for underpayments that "was a little higher" than what Drews expected. TR 635; J-5. Coreslab timely responded to the CPF's letter, and has been in continuous communication with the CPF since. TR 667-668. At the time of the hearing in November 2020, Coreslab was negotiating with the CPF on the audit findings. TR 736. Coreslab withdrew from the CPF effective September 30, 2019. TR 666-667.

4. <u>Profit-Sharing Plan</u>

a. <u>Coreslab Profit-Sharing</u>

Coreslab purchased the Tulsa facility on December 30, 2004, and one year after that, employees with one year of service were eligible for profit-sharing. TR 323-324. There has been a profit-sharing payment to employees every year since 2006. TR 324. Drews described the Coreslab profit-sharing program at 323:

> [I]t's an amount we give to the employees. If the company profits, the employee's profit. Coreslab is a family-owned company. They try to treat every employee like a – like a family member, that if somebody – somebody has a part of our – is a part of our workforce, they feel that they deserve something toward – to help them towards retirement.

To participate in profit-sharing, an employee has to have one year of service. TR 323. When asked how the company decides if a profit-sharing will be paid in any given year, Drews testified: "If the company profits a dollar, somebody gets the profit." TR 324-325. Profit-sharing is a one-time payment that is always made before March 15 for tax reasons. TR 325.

Prince testified that Morris talked to him and Merrill about profit sharing in 2005: "He just – he told me that the Union members got a pension fund, and to make it fair, the Coreslab

was giving a profit-sharing so they could put their money into 401(k) or whatever." TR 527. Prince testified: "We didn't have a problem with it." TR 528. Prince testified Coreslab was "just trying to make it equal" because "if you are a Union member, you are getting a pension." TR 528, 529-530. After Morris talked to him about profit-sharing, Prince talked "to each and every one" of the Union members: "I told them what Jerry told me, that this is what the Union is providing and this is what the Company is going to provide." TR 530. Prince did not file a grievance over Coreslab providing profit-sharing to non-union members. TR 531. Prince was not aware of any union member going to the Union business office to file a grievance over Coreslab providing profit-sharing to non-union members. TR 528, 531.

Coreslab determined the employees who were eligible for profit-sharing payments based on whether an employee was receiving a pension. TR 330, 668. If the employee received pension contributions, then the employee did not receive profit-sharing. TR 668. Drews testified this was the practice at Coreslab since 2011 when he became General Manager: "It's been standard practice. There's been no complaints or …." TR 331; *see also* 668-669.

Joint Exhibit 9 is a summary of the profit-sharing program that Coreslab gives to all employees when they ask about profit-sharing, and outlines the requirements for an employee to participate in profit-sharing: an employee has to have been employed for one year; an employee must be enrolled in the 401(k) plan and contributing to the 401(k) plan in the current year; an employee must not be covered by a collective bargaining agreement; and an employee must be currently employee or eligible for rehire at the time the profit-sharing payment is made. TR 328-329. On the requirement of an employee not being covered by CBA, Drews testified: "Ever since I have been there, it has been, if you were receiving a pension fund payment, you were part of the Collective Bargaining Agreement." TR 683. Drews testified this was how this

requirement was applied in terms of which employees were eligible for profit-sharing. TR 683. The longer an employee has been with Coreslab since the Tulsa facility was acquired, the more an employee receives in profit-sharing. TR 341.

b. <u>Communications with Employees and Stewards</u>

Drews communicated with employees in the unit, including Stewards, several times each year as to the profit-sharing program. Around Thanksgiving, Drews reminded employees they had to contribute to the 401(k) plan to be eligible for profit-sharing.[13] TR 739.

Drews testified that in late February each year, after a safety meeting, he distributed profit-sharing forms to employees who were going to receive profit-sharing to permit the employees to designate how much profit-sharing they wanted to put in their 401(k). TR 359, 669-670; GC-12. Drews testified he discussed the profit-sharing plan in that same meeting with employees: "I would basically start it out, 'It is time to sign the profit-sharing distribution forms, that way we know how – how and what amounts you would like deposited into what accounts.'" TR 670. Drews testified he did not conceal that the form he distributed was something about profit-sharing: "I let everybody know that this was in regards to profit-sharing." *Id.*; *see also* TR 359 ("I do it in front of everyone."). Drews testified that both Union members and non-union members were present at the meeting when he handed out the profit-sharing forms and discussed profit-sharing, including Prince, the Steward. TR 351, 671. Drews testified every year, employees asked him to explain the three options on the profit-sharing form for employees to receive a profit-sharing check or put profit-sharing funds into their 401(k). TR 671-672. Drews received the signed profit-sharing forms back from employees. TR 673.

[13] Art. XVII provides that employees are part of the 401(k) plan and "will participate under the eligibility rules, terms and conditions of the plan as Company may determine and from time to time re-determine." J-1, p. 16; TR 745.

At a subsequent meeting in March, again following a safety meeting attended by all production employees, Drews handed out profit-sharing checks and earnings statements on the profit-sharing payment to employees who received profit-sharing. TR 345, 674-675; GC-11(a). Drews testified that when he handed out the profit-sharing checks, there were employees who did not receive profit-sharing checks present. TR 675-676. Drews testified his usual statement when he handed out the profit-sharing checks was: "What I – what I basically say every years, is, 'Guys, those of you who signed the sheet and turned it in, that are receiving profit-sharing checks, you – it is that time where you get those checks.'" TR 676. Drews said that some of the employees who were not receiving profit-sharing checks would stay around while Drews handed out the checks. *Id*. Prince was present when he started handing out the profit-sharing checks. *Id*. Prince did not ask any questions about the checks. TR 677. Drews testified he has handed out profit-sharing checks every year since he became General Manager in 2011. *Id*.

Prince confirmed that after a safety meeting in March each year, Drews would discuss profit-sharing with the employees present and hand out profit-sharing checks to non-union members. TR 532-533. Prince was aware that Drews was distributing profit-sharing checks, and that the employees who received the profit-sharing checks were not members of the Union. TR 533. Prince did not receive a profit-sharing check during these meetings. *Id*. Prince testified that none of the employees at those meetings asked him questions about the profit-sharing: "Like I said, I explained it all to them already. They knew it was coming." TR 534. Prince added: "I remember talking to them and telling them what was going on, and everybody was in agreement." *Id*. Prince testified he did not file a grievance over any of the profit-sharing check distributions, or even talk to the Union's business office about the profit-sharing checks distributed by Coreslab. TR 535.

c. **Profit-Sharing Plan Records**

Based on GC-11, Drews testified four employees who received profit-sharing in 2017 and nine in 2018, and this was due to how long the employees had worked for Coreslab: "They were not receiving pension payments, and they had been – this is where they had actually been there for more than one year. I think a lot of them on the first page, they were the second year then." TR 678-679. In 2019, 14 employees participated in profit-sharing, and this was for the same reason, i.e., more employees had worked for at least one year.[14] TR 679.

5. **Evans Meeting With Employee**

In late July 2019, Danny Johnson, Plant Manager, walked into the breakroom during the morning break and saw Evans handing out papers. TR 572. All employees took breaks at the same time, and it was Johnson's typical practice to go to the break room when it was break time, as that is where the vending machines and microwave are. TR 586. Johnson testified Evans was handing a paper to a temporary employee, and Johnson "tried to tell Mr. Evans that he was a temporary employee, that you know, we didn't – he didn't concern – he wasn't concerned in what was going on – on with the Union, and that this one day was his first day." TR 572. Johnson testified Evans responded, "that he had the right to talk to anybody in the plant that he wanted to." *Id*. Johnson replied: "I said, 'Okay, fine.'" *Id*. Johnson got his snack and drink, and left the break room with Evans and the temporary still in the break room. TR 572, 576-577. Johnson did not stop Evans from talking with the temporary employee. TR 573.

Johnson testified this individual was working through a temporary employment agency, and did not become a regular Coreslab employee. TR 574. Coreslab hires temporary employees

[14] In 2020, after Coreslab withdrew recognition, two union members received profit-sharing: Millie Andean and Queen, as both had more than one year of service. GC-11. Johnnie Brown, Dolores Escalara, and Sergio Garcia did not participate in the 401(k), a requirement for participation in the profit-sharing plan, so they did not receive profit-sharing. TR 681-682.

for 60 days, and if the temporary employees work that long and will make a good hand, then Coreslab offers the person a full-time position. *Id*. Johnson testified the individual's status as a temporary employee was the reason he spoke to Evans: "I just figured that being his first day through an employment service, that whatever pertained to the Union and the company didn't really involve him because he actually didn't work for us. He worked for an employment service." TR 575. This individual worked at Coreslab for less than two weeks. TR 731-732.

Evans testified this person signed an Authorization Card when Evans met with him. TR 162. Evans testified Drews did not have any problem with Evans talking to employees. TR 165.

6. <u>Union Requests for Information and Coreslab Responses</u>

a. <u>September 9, 2019 Request</u>

On September 9, 2019, Evans emailed Drews to request six items. RX-17 (0268). On September 12, 2019, Drews provided the information Evans requested. TR 708.

Item 1 requested by Evans was a seniority list of bargaining unit members with the terms and equations to figure such calculation. Item 2 was the approximate start date of profit sharing at the Tulsa facility. Item 3 was a list of employees who receive and how are excluded from profit-sharing. In response to items 1-3, Drews provided a seniority list for all 38 employees at Coreslab with the percentage of the total seniority each employee had, and which employees were in the Union and which were not. R-17 (0270). Drews had already told Evans at the third session that Coreslab had paid profit-sharing to employees who were not in the union and not receiving pension contributions. This responded to items 1-3 of Evans' request. R-17 (0269).

In item 4, Evans requested the rules for profit-sharing, which Drews provided on September 12. R-17 (0271-0272).

In item 5, Evans requested "all" information on the 401(k) plan, in response to which Drews provided printouts from Coreslab's payroll vendor on "Plan Highlights" as of September 10, 2019 for "CORESLAB STRUCTURES, INC. 401(K) PLAN – 420103." R-17 (0273-0275).

In item 6, Evans requested a list of employees who were eligible and ineligible for the 401(k) plan, to which Drews stated in his response: "All employees are eligible for 401K after they have been employed with Coreslab for 90 days." R-17 (0269).

On the copy of Evans' September 9 email in R-17 (0268), Drews made notes of his responses to Evans next to each item. TR 713. Regarding item 1, Drews wrote "verbally" and that "was in reference to I gave him the terms of the profit-sharing, the equations to figure it" at the bargaining session on September 6. TR 713-714. In regard to items 2, 3, and 4, Drews put a checkmark to indicate that he included the information on item 2 in what he provided to Evans on September 12. TR 714. Regarding item 5, Drews wrote "gave later," meaning that he did not have the information at the time and he met with Evans later to give the other information to him. TR 714-715. Regarding item 6, Drews wrote "all employees eligible" and that was "a note that I told him that in the September 6th meeting, in the bargaining session." TR 715.

Evans did not look over the documents Drews provided him in the September 12 meeting in response to Evans' September 9 email, but after he was back at his office, Evans reviewed the information and wanted additional information. TR 209.

b. <u>September 16, 2019 Request</u>

Evans sent Drews another email on September 16, 2019, asserting that Drews' response in J-9 did not provide the prospectus for the 410(k) plan, the start date of the profit-sharing plan in Tulsa, or the rules of the profit-sharing plan. R-17 (0276); TR 200-201.

Regarding the request on the 401(k) plan in his September 9 email, Evans testified the email asked for "all information on the 401(k)" and did not request a prospectus on the 401(k) plan. TR 201. Evans testified Drews responded by producing information from ADP on Coreslab's 401(k) plan which provided "(a) broad overview" of the 401(k) plan. TR 202-203.

Regarding the request in Evans' September 9 email for the approximate start date of the profit-sharing at the Tulsa plant, Evans testified that Drews' response was that an employee's eligibility for profit-sharing starts after one year of service with the company, but Drews did not state specifically when profit-sharing started at the Tulsa facility. TR 202-203. Evans testified that in GC-23 (0280), in response to question 3 about the number of years that Coreslab's profit-sharing program has been in existence, Drews responded with the date of January 1, 2006. TR 203. Drews email with this information was in December 2019 in response to the Union's requests for information on the grievance concerning profit-sharing. TR 204.

Evans testified that Drews did provide what Drews called the rules for profit-sharing in his response in J-9 (0027-0028). TR 206.

Evans testified at the hearing that he also sought the "trigger" for profit-sharing payments in this email, although the email does not use that term. TR 105, 207; R-17 (0276). Evans testified, "that is what I am asking, is – is – when do they consider the profit? What is the trigger mechanism that says, 'Okay, boom. Everyone gets the profit-sharing.'" TR 106; *see also* TR 211. Drews responded to this request by reiterating that the proposal by the company on profit-sharing was withdrawn on September 12 when Drews told Evans that all proposals were off the table. R-17 (0276). At the hearing, Drews was asked how the company decides if a profit-sharing payment will be made in a given year, and responded: "If the company profits a dollar, somebody get the profit." TR 325.

c. October Request

On October 7, 2019, Drews also provided Evans with more information about bargaining unit employees, including hire dates, wage rates, gross salary, overtime, vacation accrual amounts, and termination dates. R-17 (0282-0284, 0286-0295); TR 716-717. This response by Drews demonstrates that Drews provided wage information for the bargaining unit to Evans.

d. December 10, 2019 Request

On December 10, 2019, in response to another email from Evans, Drews provided more information. TR 718-719; R-17 (0279-0281). In this email, Evans requested: (1) figures to start calculating each unit members' profit-sharing figure; (2) "where that number is derived from;" (3) the number of years the Coreslab profit-sharing program has been in existence; and (4) the "trigger point" at which profit-sharing is activated. R-17 (0279).

Drews responded on December 12, 2019, that the profit-sharing program is not a bonus. RX-17 (0279). Drews also stated that the information requested in items 1 and 2 addressed the remedy the Union was asserting in the pending grievance, and as such, the relevance of this information was contingent on the outcome of the arbitration. R-17 (0280). On item 3, Drews responded January 1, 2006. R-17 (0280). On item 4, Drews responded that he did not understand the question. R-17 (0280). Evans did not follow up with Drews about his response.

IV. ARGUMENTS AND AUTHORITIES

1. Coreslab Properly Withdrew Recognition Based on Employees' Disaffection Petition

a. Disaffection Petition Clearly Expressed Employees' Free Choice

Employee free choice is a core tenant of the National Labor Relations Act (the "Act"). "It is the Board which is charged with the responsibility for ensuring that the Act's underlying goal of industrial peace through employee free choice is achieved." *Peoples Gas System v.*

NLRB, 629 F.2d 35, 42 (D.C. Cir. 1980). "One of the fundamental rights under the Act which the Board is charged with protecting is employees' right to choose their bargaining representative, as well as the 'right to refrain' from collective bargaining." *Peoples Gas System*, at 45. In resolving whether majority status exists, the Board is required to "balance the statutory goal of promoting labor relations stability against its statutory responsibility to give effect to employees' wishes concerning representation." *Johnson Controls, Inc.*, 368 NLRB No. 20, 2019 WL 2893706, *6 (2019).

The Petition signed by 18 of the 26 unit members and delivered to Drews on September 11, 2019, clearly expressed employees' desire to no longer be represented by the Local. J-16. The Petition unequivocally states this, and is signed by a majority of the unit members.

b. <u>Withdrawal of recognition met standards set out in Johnson Controls</u>

In *Johnson Controls*, the Board stated:

> [W]e hold that proof of an incumbent union's actual loss of majority support, if received by an employer within 90 days prior to contract expiration, conclusively rebuts the union's presumptive continuing majority status when the contract expires. However, the union may attempt to reestablish that status by filing a petition for a Board election within 45 days from the date the employer gives notice of an anticipatory withdrawal of recognition.

<u>Johnson Controls</u>, 368 NLRB No. 20, at 2 (petition signed by 83 of 160 unit employees).

Here, the Petition was signed by 18 or the 26 unit employees, a clear majority of the bargaining unit. J-16. The Petition was received by Coreslab within 21 days of the CBA's expiration. These facts demonstrate conclusively that the Local lost majority support.

The Board, in *Johnson Controls*, 368 NLRB No. 20, at 7, stated the employer's options:

> We reaffirm the settled doctrine that if, within a reasonable time before an existing collective-bargaining agreement expires, an employer receives evidence that the union has lost majority status, the employer may inform the union that it will withdraw recognition when the contract expires, and it may refuse to bargain or suspend bargaining for a successor contract.

In reliance on *Johnson Controls*, Coreslab informed the Local that it was withdrawing recognition of the Local when the CBA expired. *See* III.2.l, *supra*. Coreslab also informed the Local that it was withdrawing all proposals and would not meet for bargaining any longer. *See* III.2.k, *supra*. This is exactly within the bounds outlined in *Johnson Controls*.

The Board also outlined a union's options in response to an employee disaffection petition and an employer's withdrawal of recognition:

> A union that receives such notice of anticipatory withdrawal has a variety of options. Assuming it has grounds to do so, it may file an unfair labor practice charge alleging that the employer initiated the union-disaffection petition or unlawfully assisted it, that the petition fails to make the employees' representational wishes sufficiently clear, that the petition is tainted by serious unremedied unfair labor practices, or that the number of valid signatures on the disaffection petition fails to establish loss of majority status.

Johnson Controls, 368 NLRB No. 20, at 7.[15]

If a union believes it actually has majority status, the union must file an election petition:

> "[T]he Board will no longer consider, in an unfair labor practice case, whether a union has reacquired majority status as of the time recognition was actually withdrawn. Instead, if the union wishes to reestablish its majority status, it must file an election petition. The Board will process the petition without regard to whether the parties' contract is still in force at the time the petition is filed.

Johnson Controls, 368 NLRB No. 20, at 8. The Local did not file an election petition. The Local's lack of a petition for certification is an admission that it does have majority status in the bargaining unit. Instead of filing an election petition to permit employees to again express their desires with respect to not being represented, the Local filed unfair labor practices, and alleged that the employees' Petition was tainted.

[15] The Local's charge and the Consolidated Complaint herein make no allegations that Coreslab initiated the disaffection petition or unlawfully assisted in the disaffection petition. The charge and complaint also do not allege that the petition fails to make the employees' wishes as to representation clear or that there are insufficient signatures to establish the Local's loss of majority status. The only allegation, in this case, is that other alleged unfair labor practices should invalidate the choice the majority of the employees made in signing the Petition.

c. **No Causal Relationship between alleged ULPs and the Loss of Support for the Union**

To succeed in invalidating the employees' free choice, as shown in the Petition, the unfair labor practices alleged by the Local "must have caused the employee disaffection here or at least had a 'meaningful impact' in bringing about that disaffection. In short, there must have been a causal relationship between the unlawful conduct and the petition…." *Master Slack*, 271 NLRB No. 15, at 10, 271 NLRB 78, 1984 WL 3657 (1984).

"[N]ot every unfair labor practice will taint evidence of a union's subsequent loss of majority support. In *Lee Lumber II*, the Board noted that 'in cases involving unfair labor practices other than a general refusal to recognize and bargain, there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support.'" *Lexus of Concord, Inc.*, 343 NLRB No. 94, at 3, 343 NLRB 851, 2004 WL 2899840 (2004). The Board has identified four "criteria for determining whether a causal relationship has been demonstrated:"

> (1) 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 employee morale, organizational activities, and membership in the union.

Master Slack, 271 NLRB No. 15, at 10.

The unfair labor practices alleged by the Local consist of Coreslab not making pension contributions for non-union members, Coreslab permitting only non-union members to participate in the profit-sharing plan, and Coreslab not bargaining in good faith.[16] Analyzing

[16] Each of these alleged unfair labor practices is addressed *infra*. The additional allegation over Johnson's comment to Evans about talking to a temporary employee who was not in the unit is so weak as to hardly merit attention. Coreslab addresses this allegation in IV.4, *infra*.

each of these alleged unfair labor practices under the above factors demonstrates that there is no causal relationship between the disaffection petition and Coreslab's withdrawal of recognition.

On first factor concerning the length of time between the alleged unfair labor practices and the withdrawal of recognition, a fatal flaw in the General Counsel's argument on pension payments and the profit-sharing plan is that Coreslab had engaged in both practices for more than a dozen years, with the knowledge and acceptance of the Local's Steward, its agent, and in full view of the Steward and the bargaining unit.

The undisputed record evidence is that Coreslab began making pension contributions for only the employees listed on CPF Remittance Forms, which employees were participants in the pension fund and Union members in 2005, and did so continuously through the expiration of the CBA in 2019. Steward Prince was fully aware that this was how the pension plan was initiated in 2005 in conjunction with the first CBA between the Local and Coreslab. *See* III, 3.a, *supra*. Drews testified when he became General Manager in 2011, Coreslab was making pension contributions for the individuals listed in Remittance Forms from the CPF, and that Coreslab continued this practice during the entire time he has been General Manager. *See* III.3.b, *supra*. There is no evidence that this method of pension contributions was unilaterally implemented by Coreslab during bargaining for the 2019 CBA, or close in time to the disaffection petition.

The same is true for profit-sharing participation. Again, Prince testified that in 2006, the plant manager at the time, Morris, approached him to inform him that Coreslab wanted to make the profit-sharing plan available to unit members who were not participating in the CPF. Prince thought that was fair, and did not contend that this violated the CBA. Rather, Prince informed the employees in the bargaining unit of this new benefit. *See* III.4.a, *supra*. Drews continued this practice when he became General Manager in 2011, and met with employees three times

each year to discuss the profit-sharing plan and distributed profit-sharing checks to employees at one of these meetings each March. *See* III.4.b, *supra*. There is no evidence that the company's administration of profit-sharing benefits for employees who did not participate in the pension plan was implemented during negotiations in 2019 or in close proximity in time to the disaffection petition.

With respect to the 2019 negotiations, these negotiations began in April 2019 – five months before the Petition was delivered to Drews. The parties were making progress in negotiations, as evidenced by Coreslab's proposals in the third session and the testimony of both Drews and Evans about the third session. TR 192 (Evans: "a good place to start"); 696 (Drews: "it was a proposal that we could go forward"). Coreslab modified a number of its proposals in the third session, and added a wage increase. At the end of the third session, the parties agreed to meet again to continue negotiations. It was five days after this third session that the Petition was delivered to Drews.

Johnson Controls recognizes that a disaffection petition is likely to come close in time to the expiration of a CBA. Indeed, under *Johnson Controls*, an employer may withdraw recognition of a union based on a disaffection petition *only* within the 90 days before the expiration of the CBA, which is when the parties will be bargaining a successor agreement. The fact that negotiations are ongoing when a disaffection petition is delivered does not demonstrate that withdrawal of recognition is tainted.

On the second factor, there is no evidence that the contract negotiations, including the two extensions, would have any lasting effect on employees. Nor is there any evidence that the way the company paid pension contributions and administered the profit-sharing plan had any detrimental or lasting effect on employees. The Steward was in favor of both the pension plan

being available to union members and the profit-sharing plan being available to unit members who chose not to join the pension plan. Prince testified: "We didn't have a problem with it;" and Coreslab was "just trying to make it equal" because "if you are a Union member, you are getting a pension." TR 528, 529-530. Unit employees could join the pension plan whether or not they joined the Union, and Prince made his pitch to every new hire to join the Union and the CPF. Coreslab did not prevent any unit employee from participating in the CPF. Moreover, Coreslab did not make some sudden change in the way it administered the profit-sharing plan or made pension contributions in 2019. Both were long-standing practices.

On the third factor, there was no evidence that the pension contributions, profit-sharing plan, or contract negotiations tended to cause employees to be disaffected with the Local, certainly not in the time frame of September 2019 when the Petition was delivered to Drews. Coreslab had not changed how it paid pension contributions or for which employees made pension contributions. Nor had Coreslab changed the profit-sharing payment made in early March 2019 for employees' work in 2018. The only new event in 2019 was the CPF audit, and the CPF's assertion that Coreslab was not making the pension contributions correctly. The consequence of the CPF's position did lead to questions from employees which Drews addressed in the voluntary employee meeting on August 1, 2019. But those questions were not about what Coreslab was administering the pension plan contributions or profit-sharing. Rather, the employee questions concerned whether Coreslab was trying to do away with profit-sharing. Drews appropriately told employees that what happened with profit-sharing depended on contract negotiations with the Local. Drews even told employees to contact Evans if they had any questions. Drews statements at the employee meeting reinforced the Local's role as the

bargaining representative for the unit. Drews was telling employees that Coreslab was bargaining with the Local over pension and profit-sharing.

Drews' meeting with employees, and his response to their questions, was well within the bounds of the Act, and there is no allegation otherwise about Drews' meeting with employees. "The Board has long held that 'an employer has a fundamental right, protected by [Section] 8(c) of the Act, to communicate with its employees concerning its position in collective-bargaining negotiations and the course of those negotiations.' This includes informing employees of the status of negotiations and the employer's version of the causes leading to their breakdown." *Mesker Door*, 357 NLRB No. 59, at 6, 357 NLRB 592, 2011 WL 3739685 (2011).

On the fourth factor, there was no evidence presented as to what effect the pension contributions, profit-sharing participation, or contract negotiations had on employee morale, organizational activities, or membership in the union. Neither the General Counsel nor the Local called any members of the bargaining unit to testify. It was undisputed that no employee filed a grievance, or even spoke with the Local or the Steward about filing a grievance, over pension contributions or profit-sharing. The Steward informed employees of what Coreslab was doing with profit-sharing in 2006, and was part of the meetings Drews held with employees about profit-sharing each year. From March 2011 to March 2019, when Drews distributed profit-sharing checks year, there were no grievances over the fact that some unit members participated in the profit-sharing plan and others in the pension plan. Only in September 2019, did the Local file a grievance over profit-sharing after Evans says he learned in the third bargaining session that employees who did not participate in the pension plan had received profit-sharing in the past. But there was no evidence introduced that any bargaining unit member requested that this grievance be filed.

The only record evidence of how any unit members felt about profit-sharing or pension contributions was as to a couple of comments employees made in connection to the voluntary employee meeting Drews held on August 1, 2019. During the meeting, there was a question from an employee about why Coreslab was trying to eliminate the profit-sharing program, to which Drews responded that the company did not want to do away with profit-sharing. After that meeting, two employees commented to Drews that they did not join the Union because of the profit-sharing plan. Drews testified that most of the employees did not seem to be aware they were eligible to participate in the pension plan. *See* III.2.h, *supra*. Far from showing that the profit-sharing program had a negative effect on employee morale, the evidence illustrated that the Local's refusal to seriously consider replacing the CPF with the company profit-sharing plan was contrary to the interests of at least some in the bargaining unit.

The General Counsel may argue that GC-11 shows that Union membership declined because the company permitted employees who were not in the CPF to participate in the profit-sharing plan. But the information in GC-11 is incomplete and inconclusive as it only covers three years – 2017 to 2019. The General Counsel did not offer any evidence of Union membership prior to that time frame, even though Coreslab had permitted employees who were not in the pension plan to receive profit-sharing since 2006. The Steward, Prince, testified that Oklahoma's Right-to-Work law is what caused Union membership to decline. TR 565. Frankly, another factor in the low numbers of employees in the CPF is the Local's failure to attract employees to the pension plan. Outside of giving new hires a booklet about the CPF, the Local's business office did little to generate interest in the pension plan, leaving it up to new hires to contact the CPF office with their participation forms.

Evidence of a causal connection between the alleged unfair labor practices about Coreslab's bargaining in 2019, and Coreslab's long-term administration of CPF contributions and the profit-sharing plan, and the employees' choice to sign the disaffection petition, is wholly lacking. The messenger for the employees, Chalakee, expressed the desires of the majority of the bargaining unit when he delivered the Petition to Drews with his comment "that they didn't want to be represented, that the people in the collective bargaining unit, didn't want to be represented." TR 704 (Drews). The Petition says this as well: "We feel that Local 627 have nothing to do with us and they do not represent us in any manner." J-16. This feeling of the majority of the employees is underscored by the fact that no one in the unit attended contract negotiations.

Neither the disaffection employees from the 18 employees in the bargaining unit, nor Coreslab's withdrawal of recognition were tainted by the alleged unfair labor practices. The employees' right of free choice not to be represented by the Local should be afforded respect. The withdrawal of recognition is not an unfair labor practice, and it should not be disturbed.

2. <u>Coreslab Bargained in Good Faith</u>

In the General Counsel's opening statement, the conduct identified as allegedly showing bad faith bargaining by Coreslab were: refusing to meet and confer with the Local; delaying meeting with the Local; revoking tentative agreements; and refusing to bargain further after the third session on September 6, 2019.[17] The evidence, however, does not support these arguments.

"Both the employer and the union have a duty to negotiate with a 'sincere purpose to find a basis of agreement,' but 'the Board cannot force an employer to make a "concession" on any specific issue or to adopt any particular position." *Atlanta Hilton*, 271 NLRB No. 214, at 5, 271

[17] The General Counsel made the same allegations in the Consolidated Complaint, ¶ 11.

NLRB 1600, 1984 WL 36775 (1984). The Board further explained the inquiry under Section 8(a)(5) in *Atlanta Hilton* as follows:

> It is necessary to scrutinize an employer's overall conduct to determine whether it has bargained in good faith. "From the context of an employer's total conduct, it must be decided whether the employer is lawfully engaging in hard bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement." A party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree.

Atlanta Hilton, 271 NLRB No. 214, at 5, citing *NLRB v. Advanced Business Forms Corp*., 474 F.2d 457, 467 (2nd Cir. 1973). Even if the Board believes that "some of the terms are harsh" in Leader's proposals, "that does not give the Board or the courts the power to strike them." *NLRB v. Tomco Comm.*, 567 F.2d 871, 882 (Ninth Cir. 1978). The Board held that it would "not attempt to evaluate the reasonableness of a party's bargaining proposals, as distinguished from bargaining tactics, in determining whether the party has bargained in good faith." *Reichhold Chemicals, Inc*., 277 NLRB No. 73, 277 NLRB 639, 640 (1985).

Review of an allegation of bad faith bargaining requires that the "totality of circumstances" be examined. *United Steel, Paper & Forestry Local 19-G (PPG Industries)*, 356 NLRB No. 127, at 2, 356 NLRB 996 (2011); *see also Mead Corp. v. NLRB*, 687 F.2d 1013, 122 (11th Cir. 1983). Single occurrences in negotiations that occurred over a four month period cannot be presented in isolation to try to prove a lack of good faith. That is exactly what the General Counsel is attempting to do here.

Parties are tasked in bargaining with making a sincere effort to reach an agreement. "In ruling on an allegation that a party has failed to bargain in good faith, it is well established that we look to the totality of circumstances reflecting the party's bargaining frame of mind." *Merrell M. Williams*, 279 NLRB No. 13, 1986 WL 54206, **3 (1986).

There can be no doubt that Drews was making a sincere effort to find common ground on the subjects in bargaining so that the parties could reach a successor agreement, as Drews credibly testified at 735:

> Every time I came to the table, I tried to progress when I was offering different options, that if the audit – once we received the audit, and I was willing to – if Mike and Justin were willing to remove the pension and move forward with profit-sharing, where Union members were still – Union members were still eligible, that would include everybody, and that would include the whole bargaining unit. Therefore, everybody would have been eligible, and I saw that as a positive side.

Drews improved Coreslab's contract proposals in each bargaining session. In the third session, Drews modified the company's position on several articles, made no changes in a large number of articles, and included both a wage increase and new job classifications that would have meant increased wage growth for unit positions. JX-19. In contrast, the Local did not provide Drews with any written proposals, and refused to modify its proposals for unprecedentedly large wage and pension increases. The Local never changed its position on a $6.00 raise over a four-year agreement and a $2.00 increase in pension contributions over four years. Evans testified, "[M]y wage package stayed the same from our very first meeting, from our very first proposal." TR 96.

There is no record evidence that Coreslab refused to meet and confer with the Local. Drews agreed to three meetings, and showed up and bargained at each meeting. Drews did not cancel bargaining sessions. There was a slower pace to negotiations in 2019, which Drews acknowledged. But this was caused solely by the audit by the CPF which began only a week after the first bargaining session. Initially, the CPF audit did not concern Drews, but after comments by the auditor on the first day of the audit, Drews thought the CPF might claim as much as $100,000 in underpaid pension contributions.

"The cost of a pinpointed economic demand by the union is a pertinent factor in the appraisal of an employer's hard or amenable reaction." *The Kroger* Co., 164 NLRB 362, 366 (1967). Drews was concerned with the cost of the Local's proposals on wages and pension contributions, which were "astronomical" in comparison to the prior contract negotiations in 2015. TR 607-608. Drews also was concerned with the cost of pension contributions both in terms of the audit and an on-going basis under the provisions of the audit. TR 639-640. After Drews had an idea what the outcome of the audit might be, Drews called Evans to request that the parties wait to meet until the CPF provided the audit results. Evans agreed to an extension of the CBA of three months as the parties thought it would take 60 days for the CPF's audit report.

The parties then met on July 26 in the second bargaining session, which was only nine days after Drews received the CPF audit letter. The CPF asserted Coreslab owed $119,000 – more than Drews anticipated. Still, at the July 26 session, Drews made a proposal to improve wages for employees in several job classifications by adding new classifications to App. JX-15.

At the end of the second session, the Local brought up the issue of a second extension of the CBA. The Local tried to leverage Drews' concern over the audit results into an unusual temporary raise for employees with the extension. Coreslab did not agree to a temporary wage increase in connection with the extension as the Local was not willing to agree to any of Coreslab's proposals in the extension. The parties then agreed on a second extension of the CBA to September 30, 2019. Evans testified that the second extension was for two months "to give them time to the answers back from the CPF." TR 74. Both extension agreements were mutually negotiated, drafted on the Local's letterhead by Evans, and signed by Drews and Evans.

Between the second and third sessions, Drews was the one who found a way to move the needle for Coreslab on the pension audit. Drews researched the CPF's website and found

information indicating that Coreslab would not have withdrawal liability from the CPF. The issues of withdrawal liability were important to Coreslab in determining how to address the audit results, including the CPF's position that contributions had to be made by Coreslab for all unit employees. Coreslab already had proposed to the Local in the second session that the section on pension contributions, § 16.3, be deleted. If Coreslab could negotiate that provision with the Local, Coreslab still had to address the issue of withdrawal liability with the CPF. When Drews found that withdrawal liability was unlikely, he contacted his corporate office and got the go ahead to proceed with negotiations. Drews then emailed Evans to suggest a date for the third session. *See* III.2.i, at 20, *supra*.

To bolster his arguments, the General Counsel might try to point to Drews's stated need to have approval from the corporate office for bargaining proposals, and the Local's offer of the second contract extension for a temporary wage increase. However, approval from a corporate office is not indicia of bad faith. *Merrell M. Williams*, 279 NLRB No. 13, 1986 WL 54206 (1986). This is particularly true where the requirement for corporate approval was expressed by Drews to the Local at the outset of bargaining in 2019 and was consistent with prior years' bargaining. *Hillard Devel. Corp*., 345 NLRB No. 40, n. 2 (2005); *Las Vegas Sands, Inc*., 324 NLRB No. 169, at 10, 324 NLRB 1101 (1997). Moreover, Evans and Starks, the Local's bargaining representatives had a similar need of ratification from the bargaining unit.

Even at the end of the third bargaining session, Drews expressed optimism that the parties were making progress., especially with the company's proposal at that session: "To me it was a proposal that we could go forward, where they could take it to the bargaining members, and – or the Union members, that make – that vote on this, that they could take it right to them and maybe they could get an agreement." TR 695.

What Evans and Stark did not express to Drews was that they were never going to agree to Coreslab's proposal to delete the pension language. Evans did not think he and Stark ever told Drews that they would not agree to delete the pension language. TR 197. Evans testified that the Union's position was that it would not agree to delete the pension contributions: "Well, that is going to be the Union's stance, always." TR 197. Hence, Drews' efforts to negotiate the pension language out of the CBA was never going to succeed. Instead of simply telling Drews this, Evans and Stark allowed Drews to labor under the misapprehension that he could come up with something in lieu of pension contributions that would be satisfactory to Evans and Drews.

The parties left the third session agreeing to schedule more bargaining meetings. Only five days later Drews received the employees' disaffection petition. The fact that the parties had met on only three dates before the disaffection petition does not show bad faith by Coreslab. "Mere quantity or length of bargaining sessions does not establish or equate with good-faith bargaining; indeed, the reverse may sometimes be true." *King Radio Corp*., 172 NRLB No. 109, at 18, 172 NLRB 1051, 1968 WL 19199 (1968); *Garden Ridge Mgmt., Inc*., 347 NLRB No. 13, at 4, 347 NLRB 131, 2006 WL 1530147 (2016) ("the fact that a party does not meet with sufficient frequency does not necessarily mean that it does not wish to agree to a contract").

The other two items in the General Counsel's opening statements – Coreslab withdrawing from verbal tentative agreements and refusing to bargain after the September 6 session – were the result of the disaffection petition being delivered to Drews on September 11. As such, Coreslab's decision to withdraw from tentative agreements while assessing the disaffection petition was entirely appropriate. Withdrawal of bargaining proposals after receipt of a disaffection petition is not evidence of a failure to bargain in good faith. *Lexus of Concord, Inc*., 343 NLRB No. 94, at 4, 343 NLRB 851, 2004 WL 2899840, (2004) ("Removing the contract

offers from the table was necessary to accomplish the Respondent's stated purpose of 'put[ting] everything on hold,' because if it had failed to do so the Union could have accepted the offers and thereby attempted to forestall any further inquiry into its continued majority status.").[18] Leaving the bargaining proposals on the table could have thwarted the employees' free choice had the Union accepted the proposals. The withdrawal of the proposals was the first step in the Company's response to the employees' disaffection petition.

The second step was notifying the Union that the Company would withdraw recognition of the Union when the CBA expired. This occurred after the Company had reviewed the potential for withdrawal liability to the CPF. Not meeting after September 6 was due to Coreslab's decision to respect the employees' decision in the disaffection petition. The disaffection petition demonstrated that employees no longer desired union representation, including not having a CBA.

Drews bargained in good faith on behalf of Coreslab during the 2019 contract negotiations. The evidence establishes this. There is no § 8(a)(5) violation.

3. Coreslab did not Discriminate Against Employees or Interfere with Employees' Rights by how Coreslab made Pension Contributions (8(a)(1) and 8(a)(3))

The General Counsel's theory on the pension contributions is that Coreslab paying pension contributions for only union members was a mid-term modification of the CBA. Opening Stmt., TR 22-23. However, the record evidence shows that Coreslab utilized the same method of making pension contributions since 2005 – 10 years before the 2015-2019 CBA began and 14 years before the 2019 contract negotiations. Moreover, Coreslab's method of making

[18] Also, withdrawal from a tentative agreement standing alone is not indicia of bad faith in bargaining. *Merrell M. Williams*, 279 NLRB No. 13, at 2. "We have previously declined to find employers who withdrew provisions on which tentative agreement had been reached during negotiations to have failed in their bargaining obligations when the employer's explanation for its retraction did not indicate a lack of good faith." *Id.*

pension contributions was done with the knowledge and acquiescence of the Steward. If the way Coreslab made pension contributions was outside the terms of the CBA, then the Local waived its right to bargain over this subject.

"The Board ordinarily will not find a midterm contract modification if the respondent establishes that it had a sound arguable basis for its belief that the contract authorized its action." *Metalcraft of Mayville, Inc*., 367 NLRB No. 116, at 4, 2019 WL 1752821 (2019). Where the dispute is solely one of contract interpretation and there is no evidence of animus, bad faith, or intent to undermine the union, the Board does not seek to determine which of two equally plausible contract interpretations is correct." *Id*.

In a "contract modification" case, "the General Counsel must show a contractual provision, and that the employer has modified the provision" without the union's consent. Where the issue in dispute turns on the resolution of two conflicting interpretations of the collective-bargaining agreement, the Board will not find a violation if the employer has a sound arguable basis for its interpretation of the agreement and is not motivated by union animus or acting in bad faith." *NSL Country Gardens*, 2019 WL 4942481 (NLRB Div. of Judges, 2019) at 39, citing *Bath Iron Works Corp*., 345 NLRB 499, 501 (2005).

The provision of the parties' CBA which is the basis of the General Counsel's contract modification claim is § 16.3, which states in full:

> 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, CBA, Art. XVI, p. 16.

Section 16.3 is clear on the amount the company must contribute for each hour worked. But § 16.3 is anything but clear on who must work the hours for which the contributions are made. There is no language in the section, or in Article XVI for that matter, indicating which employees' work requires a pension contribution. This ambiguity in § 16.3 was the basis for Coreslab's challenge to the audit's findings.

In responding to the audit findings, Drews wrote the auditor, stating:

> Coreslab Structures (Tulsa), Inc. does not agree with the findings of Calibre's audit report concerning contributions to the Central Pension Fund. *The Collective Bargaining Agreement (CBA) between Coreslab and IUOE Local 627 does not provide for pension contributions for all the employees listed in your audit*. *Past practice and the interpretation of the parties to the CBA does not include the employees listed in your audit.* Coreslab did not omit hours worked for employees for whom pension contributions were remitted. The audit includes hours that should not be included per the terms of the CBA. Coreslab reserves its right to make further objections to the audit report.

GC-14 (0214). Drews' letter pointed out that the CBA did not state that pension contributions would be made for "all hours worked *by all employees*," as the CPF's audit claimed. Drews letter also noted that the past practice and interpretation of the Local and Coreslab showed that the CBA did not require pension contributions for "all employees" hours worked. Drews again explained Coreslab's interpretation of the ambiguous language in § 16.3 in his responses to the auditor's subsequent questions. GC-14 (0217).

The Board has stated that the parties' actual intent as evidenced by past practice or bargaining history must be afforded "controlling weight" in an employer's contractual defense:

> In interpreting a collective-bargaining agreement to evaluate the basis of an employer's contractual defense, *the Board gives controlling weight to the parties' actual intent underlying the contractual language in question*. To determine the parties' intent, the Board examines both the contract language itself and relevant extrinsic evidence, *such as a past practice of the parties in regard to the effectuation or implementation of the contract provision in question*, or the bargaining history of the provision itself."

Knollwood Country Club, 365 NLRB No. 22, at 2-3, 2017 WL 1088796 (2017), quoting *Mining Specialists, Inc.*, 314 NLRB 268, 268-269 (1994).

Here, the undisputed past practice with respect to pension contributions is that contributions were made only for employees listed on the CPF Remittance Forms, which employees were also union members. Drews testified this was the practice when he became General Manager in 2011, and he continued the same practice the entire time he has been General Manager. *See* III.3.b, *supra*. Both the General Counsel and Coreslab introduced the CPF Remittance Form which listed only union members. GC-19; R-11. These Remittance Forms were mailed to Coreslab every month with the names pre-printed on the forms. Coreslab paid pension contributions for these members. No one from the Local ever questioned how Coreslab paid pension contributions.

The fact that no Union representative questioned Coreslab's pension contributions is unsurprising when the unrebutted testimony on Prince, the long time Steward, is considered. Prince testified the pension plan first came up when Coreslab purchased the Tulsa plant. TR 523. Prince testified Morris, the Plant Manager at the time, informed him of the pension plan:

> Well he just mentioned that the – that Coreslab had decided to put the pension fund in for the Union employees, and you know, this was something that we hadn't had before, they believed they wouldn't allow it. They had their own pension fund. So it was quite interesting, and I was quite surprised it happened.

TR 524, 525. The other Steward, Merrill, participated in contract negotiations in 2005 when pension contributions were added, and also told Prince about the CPF. TR 530, 549. When he learned about the pension, Prince notified union members because those were the employees who would be receiving the pension. TR 546. Prince testified he did not go to the Union business office over pension payments being made for Union members and profit-sharing being

for non-members because he thought it was a good thing. TR 552. Prince believed the CBA applied to all employees, but he understood the pension was only for union members. TR 560.

Prince testified that he would tell new employees about the pension also and profit sharing: "I would give them the spiel, and then I would tell them that, 'When you are a Union member, you have got a pension plan, and the other one, you have a profit-sharing.' I would tell them that right off the bat." TR 549-550.

Clearly, Prince knew and understood that Coreslab's interpretation of the pension provision in the CBA was that contributions were to be made only for members of the Union. Far from being upset with this interpretation or thinking that it violated the CBA, Prince thought this new benefit in 2005 was good for Union members. Prince, as Steward, acquiesced in and agreed with the company's interpretation, and a 14-year practice on pension contributions began.

Prince, as Steward, was an agent of the Union. The determination of whether a Steward is an agent of the Union "rests on an analysis of the facts under common law agency principles" and can be based on actual or apparent authority. *Tyson Fresh Meats, Inc.*, 343 NLRB No. 129, at 3, 2004 WL 2967808 (2004). The Board stated further in *Tyson Fresh Meats at 3*:

> [A]ctual authority refers to the power of an agent to act on his principal's behalf when that power is created by the principal's manifestation to him. That manifestation may be either express or implied. *Apparent authority, on the other hand, results from a manifestation by a principal to a third party that another is his agent. Under this concept, an individual will be held responsible for actions of his agent when he knows or "should know" that his conduct in relation to the agent is likely to cause third parties to believe that the agent has authority to act for him.*

With respect to the actions of the purported agent:

> A principal is responsible for its agents' conduct *if such action is done in furtherance of the principal's interest and is within the general scope of authority attributed to the agent*…it is enough if the principal empowered the agent to represent the principal within the general area in which the agent has acted.

Tyson Fresh Meats, Inc., 343 NLRB No. 129, at 1337 (employer established the stewards had actual and apparent authority to represent the union).

The facts the Board relied on in *Tyson Fresh Meats* for finding of actual authority, included: the steward's role as the first person the members looked to; the union gave the steward responsibility of orienting new hires to the benefits of unionization; employees sought information from stewards; CBA provisions providing that stewards had express authority to present grievances on behalf of employees; participation in labor-management meetings throughout the year.

All of these factors are present here under the CBA and in the actions Prince undertook on behalf of the Local. *See* III.1.3.b, *supra*. Evans testified the Steward is a representative of the Local. TR 155. Evans testified the Steward "gives me a point of contact to be able to hand out the receipts that I could get the guys that I caught on break, and then I would go that – that Steward, 'Here are the rest of the receipts, dues receipts, and if you don't mind, give them out, and give me a call if you ever need anything.'" TR 126; *see also* TR 154.

Prince testified he distributed Union packets, including CPF booklets, to new hires, and gave them his "spiel" on the benefits of joining the Union. TR 549. The CBA provided Prince with the express authority to file grievances and represent employees in grievances. Prince met with Morris, the Plant Manager, without Evans to work out issues. Prince participated in contract negotiations, held meetings with union members about contract negotiations, and took the final tentative agreement back to the membership for ratification. Prince testified that in negotiations he was "there to represent the members – in our plant." TR 555.

The evidence establishes that Prince was the Local's agent. "It is enough if the principal actually empowered the agent to represent him in the general area within which the agent acted."

Tyson Fresh Meats, 343 NLRB No. 129, at 4. "[T]he *Board has placed great probative value on an alleged agent's position as steward*. In a decision whose venerability is underscored by its outdated use of gender-specific language, the Board noted that *a steward is 'the first union representative the members look to, and the man from whom they take their cues insofar as union policy is concerned*.'" *Battle Creek Health System*, 341 NLRB No. 119, at 14-15, 1256 WL 1091058 (20004), at 14-15, quoting *Teamsters Local 886*, 229 NLRB 832, n. 5 (1977).

The General Counsel may attempt to disavow Prince as an agent of the Local when it came to the subject of pension contributions. However, under established Board case law, it is enough if a steward acted in the "general area" of his authority:

> It is enough if the principal actually empowered the agent to represent him in the general area within which the agent acted. Since that decision, *the question of union responsibility for the words or actions of its steward has arisen repeatedly, and has been determined on the basis of whether or not the steward was empowered to act in the "general area" within which he exercised his authority, even though by such exercise he may have exceeded his specific, delegated powers*.

Carpenters, Local 2067, 166 NLRB No. 78, at 539, 1967 WL 18849 (1967).

As Prince was the Local's agent under the CBA to represent employees in grievances, to file grievances, and to discuss contract issues with management, the Local is bound by Prince's inaction in not filing a grievance. Prince did not interpret Coreslab's actions in making pension contributions only for union members as a violation of § 16.3. Prince either agreed with Morris's statement that pension contributions were for union members only or he acquiesced in that interpretation by Morris. Either way, the Local is bound by Prince's actions.

Prince knew the company's interpretation of § 16.3 in 2005. Prince then participated in contract negotiations in 2007, 2011, and 2015. In none of these three separate contract

negotiations did Prince raise any issue with respect to Coreslab's pension contributions. The Union has thus waived its right to bargain for another interpretation of § 16.3.

A bargaining representative "may surrender or waive its right to be consulted and to bargain about such mandatory subjects of bargaining." *Justesen's Food Stores, Inc*., 160 NLRB No. 52, at 6, 160 NLRB 687, 1966 WL 18012 (1966). "Waiver may be based on express contractual language, bargaining history, the parties' past practice, or a combination thereof." *MV Transportation, Inc*., 368 NLRB No. 66, at 4, 2019 WL 4316858 (2019).

In *Justesen's Food Stores*, the employer unilaterally installed a new wrapping machine and implemented a new method of operation utilizing this machine in 1957, which resulted in layoffs of two employees. The machine was in use at the time the parties executed a bargaining agreement in 1960. The union failed to object to the employer's unilateral action, failed to protest the two layoffs, did not grieve the new method of operation, and did not raise any issue about the method of operation in contract renewal negotiations in 1965. The Board affirmed the Trial Examiner's determination that the union, through its inaction, "effectively bargained away its right to require Respondents to negotiate regarding that matter, vesting in management the right to determine that question." *Justesen's Food Stores*, 160 NLRB No. 52, at 6. See also, Omaha World-Herald, 357 NLRB No. 156, at 3, 357 NLRB 1870, 2011 WL 7299660 (2011) (union waived right to bargain over pension plan changes when union did not object to similar, prior unilateral change by employer during term of contract).

Coreslab's method of making pension contributions did not discriminate against union members. It was the union members for whom Coreslab made pension contributions as only union members participated in the pension plan.

The fact that Coreslab made pension contributions in the same way since 2005, with the knowledge and acquiescence of the Union's Steward, demonstrates that the pension contributions had nothing to do with the disaffection petition 14 years later. Nothing about the way Coreslab made pension contributions violated the Act. Coreslab did not violate §§ 8(a)(1) or (3) with respect to pension contributions.

4. Coreslab did not Discriminate Against Employees or Interfere with Employees' Rights in Coreslab's Profit-Sharing Program (8(a)(1) and 8(a)(3))

The profit-sharing plan has a similar history at the Tulsa plant to pension contributions. Coreslab made the profit-sharing plan available to employees after it purchased the Tulsa plant in December 2004. The first profit-sharing payments were made in 2006, as employees had to have at least oneyear of service to participate in the profit-sharing plan.

Morris discussed the profit-sharing plan with Prince in 2005, including the company's decision to make profit-sharing available to employees who did not participate in the pension plan. Prince testified Morris talked to him and Merrill about profit sharing in 2005: "[H]e told me that the Union members got a pension fund, and to make it fair, the Coreslab was giving a profit-sharing so they could put their money into 401(k) or whatever." TR 527. Prince testified: "*We didn't have a problem with it*." TR 528. Prince testified Coreslab was "just trying to make it equal" because "if you are a Union member, you are getting a pension." TR 528, 529-530. After Morris talked to him, Prince talked "to each and every one" of the Union members: "I told them what Jerry told me, that this is what the Union is providing and this is what the Company is going to provide." TR 530. Prince did not have any objection to Coreslab doing this, and did not file any grievance over it or raise it in contract negotiations in 2007, 2011, or 2015.

While the CBA is silent on profit-sharing, may the parties through their actions reaching a verbal agreement on profit-sharing as a benefit for employees who did not participate in the pension plan. The profit-sharing plan was implemented with the knowledge and agreement of Prince, the Union's Steward. Prince testified the members of the Local "didn't have a problem with it." TR 528. The Union is bound by its agent's actions in accepting the company's decision on which employees participated in profit-sharing. A verbal agreement on a benefit is enforceable. *Noel Canning*, 2011 WL 4454810 (NLRB Div. of Judges, 2011)

Moreover, the Union did not grieve the Coerslab's implementation of the profit-shearing plan, and the Union did not raise the issue in negotiations in 2007, 2011, or 2015, which Prince participated in. "The Board has long recognized that principles of equitable estoppel will preclude a party a party from complaining of a unilateral change in a term or condition of employment where it has, by its conduct, led the other party to reasonably believe that it could deal unilaterally with the subject." *Manitowoc Ice, Inc*., 344 NLRB No. 145, at 3, 344 NLRB 1222, 2005 WL 1827772 (2005); *see also Speidel Corp*., 120 NLRB 733 (1958). In *Manitowoc Ice*, the Board found that the Union had "acquiesced" in the employer's unilateral changes to the company profit-sharing plan that the employer had made without giving notice to the union to bargain. *Id*., at 4. The Board found there was a "'clear understanding' that the profit-sharing plan would remain a management prerogative, and that the Unino by its conduct … 'bargained away' its interest in the plan." *Id*.

As with the pension contributions, the length of time that Coreslab has administered the profit-sharing in this way shows that profit-sharing has no connection to the disaffection petition. Profit-sharing was not implemented to discourage Union support. Prince's testimony shows this. It is disingenuous to suggest that an action taken by the company in 2006 with the agreement of

the Union could have been intended to discourage union membership, or in fact discourage union membership, 13 years later in 2019.

The General Counsel asserts that Coreslab making the profit-sharing plan available to non-union members was discrimination under § 8(a)(3). However, an employer denying benefits it has granted to other employees may be found to violate § 8(a)(3) only "if there is sufficient evidence to show that the employer intended to penalize its represented employees because they selected a bargaining agent." *WOWK-TV*, 1990 WL 599024, *2 (NLRB G.C. 1990). The General Counsel failed to prove that any anti-union animus on Drews' part in the way Coreslab administered the profit-sharing plan. *Wild Oats Markets, Inc.*, 2001 WL 1631379, at 13 (NLRB Div. of Judges, 2001), applying the Board's *Wright Line* test.

Here, there is no evidence that Coreslab offered profit-sharing to employees who did not participate in the CPF pension plan. There is no evidence that Coreslab did this to penalize union members who were participating in the pension plan. To the contrary, the unrebutted evidence at the hearing from Prince was that the company offered profit-sharing to provide an equal sort of retirement benefit to employees in the bargaining unit who were not in the pension plan. This was a benefit to unit employees, and one that Prince agreed with. The evidence demonstrates that parties had a verbal agreement on the profit-sharing plan. Coreslab did not violate §§ 8(a)(1) or (3) in the way it administered its profit-sharing plan.

5. <u>CORESLAB DID NOT STOP UNION FROM SPEAKING WITH EMPLOYEES</u>

Johnson did not prohibit Evans from speaking with employees, even the temporary employee with whom Evans was speaking when Johnson saw Evans in the break room.

Section 8(a)(1) of the Act makes it unlawful for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. "The test for evaluating

whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities." *Farm Fresh Co*., 361 NLRB No. 83, at 18-19, 361 NLRB 848, 2014 WL 5500709 (2014).

Here, Johnson saw Evans talking to a temporary employee who was employed by a staffing agency, not Coreslab. Johnson told Evans that he should leave the individual alone. Johnson said this to Evans because he did not think a temporary employee was covered by the CBA. Evans responded to Johnson that Evans could talk to anyone he wanted. Johnson then left the break room. Significantly, Evans and the temporary employee were still in the break room. Evans testified that the temporary employee signed an authorization card. This demonstrates that Johnson's statement to Evans did not have any effect on the temporary employee. Johnson's statement did not interfere with any Section 7 rights the temporary employee had. *See* III.5, *supra*.

Johnson did not make any threats to Evans or the temporary employee. The temporary employee was not disciplined after this. Evans' right to visit the plant was not curtailed. In fact, Evan testified that Drews did not have any problem with him talking to employees. TR 165.

It is significant that Johnson was correct in his view that the Union did not represent the temporary employee. Article III, Recognition, provides that Union is the bargaining representative for "all production and maintenance employees, employed by the Company at its plant at 3206 North 129th East Avenue in Tulsa, Oklahoma…." JX-1. The undisputed record evidence is that this temporary employee was employed by a staffing agency, and was not employed by Coreslab. Johnson's actions did not interfere with the rights of any of the employees in the bargaining unit.

6. **Coreslab's Responses to the Union's Requests for Information provided the Information Sought.**

The evidence demonstrated that Coreslab produced information responsive to all of the Union's requests, save one – the request for the "trigger" for profit-sharing payments that Evans testified was part of his September 16, 2019 email. RX-17 (0276). At the time, Drews responded to this request by reiterating that Coreslab's proposal on profit-sharing had been withdrawn on September 12 when Drews told Evans that all proposals were off the table. R-17 (0276). Drews' response on September 16, 2019, that the company's proposals had been withdrawn did not violate the Act because any obligation that it had to provide the information ended with the withdrawal of recognition of the Union. *See Champion Home Builders Co*., 350 NLRB 788, 792-793 (2007); *Renal Care of Buffalo*, 347 NLRB 1284, 1286 (2006).

At the hearing, Evan testified that what he sought in the September 16, 2019 email was the "trigger" for profit-sharing payments in this email, although the email does not use that term. TR 105, 207; R-17 (0276). Evans testified, "that is what I am asking, is – is – when do they consider the profit? What is the trigger mechanism that says, 'Okay, boom. Everyone gets the profit-sharing.'" TR 106; see also TR 211. When Drews was questioned at the hearing about how the company decides if a profit-sharing payment will be made in a given year, and responded: "If the company profits a dollar, somebody get the profit." TR 325. Thus, Drews has now responded to this request by Evans for information on the "trigger" for profit-sharing payments.

Coreslab did not fail to bargain in good faith in its responses to the requests for information from the Local.

V. CONCLUSION

WHEREFORE, the Respondent, Coreslab Structures (Tulsa) Inc., submits that it has not violated the provisions of the Act alleged in the Consolidated Complaint, and the Complaint should be dismissed.

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CERTIFICATE OF SERVICE

This is to certify that on this 31st day of December, 2020, three copies were sent via first class mail postage prepaid to the following:

Judge Ringler, Robert A.
Washington, D.C. Office
1015 Half Street SE
Washington, DC 20570-0001.

and a true and correct copy was sent via email, to the following:

George Miles
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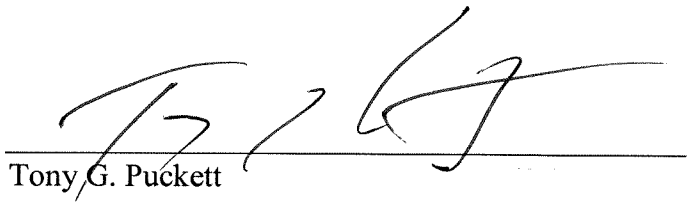

Tony G. Puckett

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

CORESLAB STRUCTURES (TULSA) INC.

And

Cases 14-CA-248354
14-CA-248812

INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 627, AFL-CIO

STATEMENT OF SERVICE
RESPONDENT'S POST HEARING BRIEF

December 31, 2020

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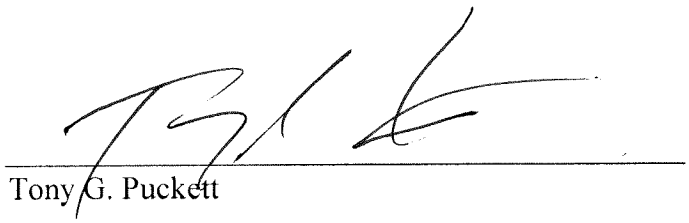

Tony G. Puckett