

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9**

**In the Matter of**

**THE PAINTING CONTRACTOR, LLC**

**and**

**INTERNATIONAL UNION OF PAINTERS  
AND ALLIED TRADES, AFL-CIO, CLC,  
DISTRICT COUNCIL 6**

**Cases 09-CA-248716  
09-CA-250898**

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**RESPONDENT THE PAINTING CONTRACTOR, LLC'S  
POST-HEARING BRIEF**

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## I. INTRODUCTION

The Complaint is based almost entirely on the erroneous premise that TPC is bound to the current collective bargaining agreement between the Greater Cincinnati Painting Contractors Association (the “Association”) and the International Union of Painters and Allied Trades District Council #6, Local Nos. 123, 236 (the “Union”), effective (retroactively) May 1, 2019 through May 1, 2021<sup>1</sup> (“New CBA”)<sup>2</sup>, and that therefore TPC’s implementation of its proposed new terms of employment on November 1, 2019<sup>3</sup>, was unlawful. Instead, the undisputed facts show that TPC timely withdrew from the Association in accordance with the previous collective bargaining agreement (“Old CBA”), that TPC offered to negotiate a new collective bargaining agreement with the Union and sent it a proposal, that the Union unlawfully refused to meet with TPC, that TPC maintained the status quo for almost four months while the Union refused to bargain, and that TPC lawfully implemented its proposal and informed its employees. The remainder of the Complaint, which is based on a truthful, non-threatening statement to employees about implementation, is also without merit.

The Old CBA provided that members may “withdraw from The Greater Cincinnati Painting Contractors Association and negotiate separately . . . by written notice to the Union and Association at least 3 days before any extension of this Agreement is executed by the Association.” TPC provided this notice to the Association and Union on May 17, and the Association and Union executed an extension on May 28. Earlier on May 28, the Union and the Association reached a

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<sup>1</sup> References to the hearing transcript are designated as (TR\_\_); references to the joint exhibits are designated as (JX\_\_) and page numbers on the joint exhibits track the bookmarked pages; and references to Respondent’s exhibits are designated as (RX\_\_).

<sup>2</sup> A Union Official testified that “2021” is a typographical error and that the New CBA is actually effective through May 1, 2022 (TR 89-90). Because TPC is not bound in any case, the expiration date is irrelevant.

<sup>3</sup> All dates are in 2019 unless otherwise stated.

tentative agreement for a new collective bargaining agreement, subject to ratification by the members.

The tentative agreement between the Association and Union is the sole reason for the Complaint's erroneous allegation of unlawful conduct by TPC. The erroneous reasoning is as follows:

1. Despite TPC's compliance with the timely notice requirement for withdrawal from the Association, and fulfillment of the sole condition subsequent when the extension was executed, TPC was bound to the tentative agreement between the Association and Union, and then the New CBA.
2. Therefore, TPC's implementation of its proposal was unlawful.

This reasoning fails as a matter of law based on the undisputed facts for three separate and independent reasons:

- 1) Given the Association's and Union's execution of the extension agreement, and TPC's timely notice that doing so would free it to negotiate separately, TPC could not have been a party to a tentative agreement, subject to ratification by the Union membership, that was entered into by the Association and Union earlier that day. When the Association and Union executed the extension agreement on May 28, they knowingly accepted TPC's notice of withdrawal and its freedom to negotiate separately for an agreement to replace the Old CBA.
- 2) Even if TPC was a party to the tentative agreement (which it was not), TPC immediately notified the Union that it would not be bound by any Association agreement and would bargain separately, pursuant to its timely notice of withdrawal

and the Association's execution of the extension agreement. (Because it was subject to ratification, the tentative agreement was not binding on the Association unless that occurred.)

- 3) Because the final agreement between the Union and Association, the New CBA, was materially different than their tentative agreement, it cannot be imposed on TPC, even if TPC was a party to the tentative agreement (which it was not).

Because TPC lawfully and effectively withdrew from the Association and was not bound to the tentative or final agreement between the Union and the Association, TPC lawfully offered to negotiate a new collective bargaining agreement with the Union and proposed terms for that agreement. Despite the Union's immediate and persistent refusal to meet, TPC maintained the status quo for almost four months. Finally, shortly after Region 9 issued a Complaint against the Union for its refusal to bargain with TPC (Case 09-CB-242861), TPC lawfully implemented its proposal and informed its employees.

Given TPC's timely and lawful withdrawal from the Association and the Union's persistent refusal to meet, TPC was privileged to implement its proposal.

Moreover, the allegation that Jack Varney, TPC's Chief Financial Officer, had "interfered with, retrained, and coerced [TPC] employees" by "threatening to retaliate against them if they joined or supported a union" is baseless. Mr. Varney's statement was a truthful, objective statement about the facts of TPC's relationship with a union and was in response to a question from a then current employee.

Therefore, the Complaint is without merit and should be dismissed.

## **II. FACTS**

### **1. TPC, as a member of the Association, enters into a CBA with the Union effective between May 1, 2016 and May 1, 2019.**

TPC is a commercial and industrial painting contractor and surface solution specialist that offers its services in the Greater Cincinnati area (JX 36, ¶ 1). Until May 28, TPC was an undisputed member of the Association (JX 36, ¶¶ 9, 25).

The members of the Association, including TPC, and the Union have been parties to a series of collective bargaining agreements, the last of which (the Old CBA) was effective from May 1, 2016 to May 1, 2019 (JX 36, ¶ 9; JX 1).

### **2. The Union and the Association struggle to reach a new CBA.**

On January 28, the Union sent TPC, as a member of the Association, a notice to negotiate a new agreement as the Old CBA would expire on May 1 (JX 36, ¶ 10; JX 20). Jim Sherwood was the Union's chief negotiator (TR 43). Lee Denney was a business representative for the Union and also participated in the negotiations with the Association (TR 131). Kevin Walker represented TPC's interests at the negotiations (JX 36, ¶ 5).

Actual negotiations between the Union and the Association began around February 11 (JX 36, ¶ 10; JX 20). On or about April 23, the Association and the Union met, reached the first tentative agreement (subject to Union membership ratification), and separately agreed to extend the Old CBA through May 14 (JX 36, ¶ 11; JX 2; JX 21; TR 44-47, 131-133). Mr. Walker remained silent during all negotiations (TR 65-67, 133-134, 137-138).

On or about May 7, the Union membership rejected the first tentative agreement (JX 36, ¶ 12; TR 48). Following the Union membership's refusal, the Union and the Association met on May 13 and could not reach an agreement (JX 36, ¶¶ 13-14; TR 48-50).

On or about May 14, the Association and the Union reached a second tentative agreement and separately agreed to extend the Old CBA through May 23, to allow the Union's members to vote on the tentative agreement. The Union membership rejected the proposal through a ratification vote on May 23 and went on strike beginning on May 24 and ending on May 28.<sup>4</sup> (JX 36, ¶¶ 11, 16, 18; JX 2; JX 3, JX 22; TR 51-52, 58; 133-135.)

**3. TPC notifies the Association and the Union that it will withdraw from the Association if a third extension is granted to the Union.**

Following the May 14 extension, TPC did not want the Association to make more concessions and, under Article XIX of the Old CBA, served notice that should the Association and the Union execute any further extensions, TPC would withdraw from the Association and negotiate separately (JX 36, ¶ 17; JX 4). Article XIX of the Old CBA expressly allowed TPC to do this and provided:

Any contractor that decides to withdraw from The Greater Cincinnati Painting Contractors Association and negotiate separately, may only do so at the expiration of this Agreement, provided such contractor provides written notice of withdrawal to the Union and the Association not more than 120 days before and not less than 90 days prior to the expiration date of this Agreement **or by written notice to the Union and the Association at least 3 days before any extension of this Agreement is executed by the Association.**

(JX 1, p 20.) (emphasis added.)

Pursuant to Article XIX, TPC provided the written notice to the Union and the Association on May

17. TPC's notice stated:

Pursuant to Article XIX of the Agreement, if there is a further extension of the Agreement, then this is TPC's notice of withdrawal from the Association, contemporaneous with such extension. TPC would thereafter negotiate separately with the Union on its own behalf for a new agreement to be effective after the extension expires.

(JX 36, ¶ 17; JX 4.)

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<sup>4</sup> The Union membership did not work on Monday, May 27 because it was Memorial Day.

Both Mr. Sherwood and Mr. Denney received TPC's May 17 emailed notice that same day (TR 105-106, 147-148). After receiving the notice, Mr. Sherwood read Article XIX of the Old CBA—the withdrawal provision TPC cited in its notice—and was aware TPC's notice “tracked exactly the language of Article XIX” (TR 106).

**4. The Union and the Association reconvene following the Union's rejection of the second tentative agreement and agree to a third extension.**

Following the Union membership's rejection of the second tentative agreement, on May 27, Association Member Rick Perry reached out to Mr. Sherwood and requested that the parties meet (JX 36 ¶ 21; JX 5; TR 60). Because TPC wanted to negotiate individually with the Union, on May 27, TPC informed the other members of the Association that it would not oppose an extension but would be a dissenting vote on the tentative agreement under consideration (JX 5, p 1). On May 28, through a video conference, the Union and the Association agreed to a third tentative agreement, subject to ratification by the Union membership (JX 36, ¶ 23; JX 24; TR 63-65). On the same day, after Mr. Walker had left the meeting, the Association and Union signed a third extension agreement (which did *not* incorporate any tentative agreement) agreeing to extend the Old CBA through June 5 so that the Union membership could vote on ratification. (JX 36, ¶ 23; JX 24; JX 6; TR 63-64, 108-109).

**5. TPC withdraws from the Association by virtue of the third extension.**

That same day, shortly after the May 28 video conference meeting, TPC notified the Union and the Association that because the Association executed another extension, and under TPC's timely notice of withdrawal if that were to occur, TPC was no longer represented by the Association and that “no agreement reached between the Association and the Union . . . would apply to TPC” (JX 36, ¶ 25; JX 7). On May 30, TPC again explained to the Union that “TPC

separated from the Association, and [TPC] is not bound by any alleged Tentative Agreement or any other agreements between the Association and Union . . .” (JX 36, ¶ 29; JX 9; TR 69-70).

**6. The Union and the Association make material changes to the third tentative agreement.**

On June 5, after TPC told the Union and the Association it had withdrawn from the Association, the Union membership ratified the third tentative agreement (JX 36, ¶ 31; TR 72). On or around June 26, the Union and the Association signed a wage sheet for a new CBA based on the third tentative agreement (JX 36, ¶ 36<sup>5</sup>; JX 10; TR 149). Neither the third tentative agreement nor the wage sheet became the actual final agreement between the Union and the Association. Indeed, the Union membership met on July 11 and changed the allocation. (TR 96, 112, 140-141, 149.) The Union sent TPC the final CBA (New CBA) on October 22, and it materially differed from the third tentative agreement (JX 36, ¶ 51; JX 11; JX 33). For example, the wages for brush and roll, spray, paperhanger, and sandblaster employees as well as the required contributions to pension and health and welfare funds were materially different (*compare* JX 24 and JX 10 with the 5/1/2019-5/1/2021 wage rates and benefit contribution amounts in Article IV of the New CBA (JX 11)).<sup>6</sup>

<sup>5</sup> There is a typographical error in JX 36, p 7. There are two paragraphs numbered 36. This cite is to the second paragraph 36.

<sup>6</sup> \$0.69 per hour allocated to wage rates by the 6-26-19 tentative agreement was reallocated to Pension (\$0.08) and Health & Welfare (\$0.61) benefit fund contributions in the New CBA:

	<b>6-26-19 Wage Sheet based on TA3</b>	<b>New CBA – Art. IV</b>
<b>Pension</b>	4.86 per hr.	4.94 per hr.
<b>H&amp;W</b>	5.08 per hr.	5.69 per hr.
<b>Brush/Roller</b>	25.30 per hr.	24.61 per hr.
<b>Spray</b>	25.80 per hr.	25.11 per hr.
<b>Paperhanger</b>	25.30 per hr.	24.61 per hr.
<b>Sandblaster</b>	26.05 per hr.	25.36 per hr.

**7. The Union refuses to meet and negotiate with TPC.**

Also on May 28, TPC asked the Union to negotiate and proposed a May 30 meeting (JX 36, ¶ 26; JX 7). The Union refused to bargain with TPC (*see* JX 36, ¶¶ 27-28; JX 7; JX 8; TR 71). The Union conceded that TPC had withdrawn from the Association, but argued that TPC was somehow bound by the third tentative agreement—which had not yet been ratified by the Union membership (JX 8; JX 6, Section 3.4; JX 36, ¶ 31; *see also infra* n. 10). The Union suggested that because Mr. Walker was at the May 28 meeting where the Association agreed to the third tentative agreement—and the third extension shortly after—that TPC agreed to the terms of the third tentative agreement (JX 36, ¶ 27; JX 8). TPC responded that TPC was not representing itself at the May 28 meeting since it was still part of the Association; its withdrawal did not occur until the Association and the Union executed the third extension (JX 36, ¶ 29; JX 9). TPC had already informed the Union and Association eleven days before the May 28 meeting that any further extension of the CBA would mean TPC was no longer a member of the Association and would negotiate for a separate agreement (JX 36, ¶ 17; JX 4).

On May 30, TPC emailed its proposal for a separate collective bargaining agreement to the Union (JX 36, ¶ 30; JX 9).

**8. TPC files a charge against the Union and the Union continues to refuse to negotiate.**

On June 6, TPC filed an Unfair Labor Practice Charge against the Union for its refusal to bargain with TPC (JX 36, ¶ 32; JX 12). In early September, Region 9 of the NLRB found probable cause and issued a complaint against the Union, alleging that the Union's refusal to bargain with TPC violated Section 8(b)(3) of the Act (*see* JX 13). Given this, TPC again asked the Union to negotiate and sent it a robust summary of its health benefits proposal. The Union again refused to negotiate. (JX 36, ¶¶ 39, 40; JX 14; JX 26; TR 78-80).

On June 28, the Union filed a grievance against TPC alleging TPC was not adhering to the New CBA (despite TPC's withdrawal) and that TPC was refusing to make certain contributions under the Old CBA (JX 36, ¶ 38, JX 25; TR 98). On July 1, TPC, through counsel, offered to discuss the grievance but also stated that it was not waiving or changing its position that it had lawfully withdrawn from the Association, that it was not bound by the New CBA, that its bargaining unit employees were working under the Old CBA terms, and that the Union's refusal to bargain with TPC was unlawful. TPC then renewed its offer to meet and bargain for a separate new Labor Agreement. (RX 1.)

On July 8, Sherwood suggested that the Union and TPC meet on July 22 to discuss the grievance and TPC agreed to meet. Later that day, TPC sent the Union TPC's bargaining unit's wage and fringe benefits report for June 2019 as requested by the Union in its grievance (*id.*). On July 17, the Union and TPC agreed to meet at the Union Hall in Lockland, Ohio. However, the Union cancelled the meeting and said it would reschedule. It never did. (RX 2; TR 83, 118-122.) On September 13, TPC again sought to negotiate with the Union and sent it a CBA proposal (JX 36, ¶ 39, JX 14). The Union again refused to negotiate (TR 80).

On September 19, after almost four months of trying to negotiate with the Union, TPC informed the Union that because of the Union's continued refusal to bargain, TPC and the Union were at impasse and that TPC would implement its proposal effective October 23 (TPC later moved this date to November 1) (JX 36, ¶¶ 40, 41; JX 26; JX 15; TR 79-80).

**9. The Union files a charge against TPC despite refusing to bargain.**

On September 23, despite the Union's persistent refusal to negotiate with TPC, the Union filed its own Unfair Labor Practice Charge against TPC, alleging that TPC failed and refused to

bargain in good faith with the Union by making unilateral changes in terms and conditions of employment (JX 36, ¶ 44).

**10. TPC maintains the status quo under the Old CBA while it tries to negotiate with the Union and the Union's refusal to negotiate continues.**

Because TPC believed it was not a party to any new agreement between the Association and the Union, TPC maintained the status quo under the Old CBA while it tried to reach its own agreement with the Union (*see* JX 36, ¶¶ 34, 35; JX 16).

Maintaining the status quo over the fringe benefit contributions was complicated as to two of the funds, the “target fund” and the drug and alcohol program (*id*). While Region 9 was investigating whether the Union was obligated to bargain with TPC, or whether TPC was bound to the New CBA, TPC understood that it might ultimately have to pay contributions under the New CBA (if TPC was bound) or the Old CBA (if TPC was not bound and was required to maintain the status quo) (*id*). Some of the fringe contributions in the New CBA, however, increased, but the target fund and drug and alcohol program contributions decreased (*see* JX 1; JX 11).

Given the varying contribution levels, TPC determined a reasonable way to remit the contributions during the status quo period and made its intentions clear to the Union through a June 16 email. Counsel for TPC informed the Union's counsel that although TPC will make other contributions directly to the fringe benefit funds as provided in the Old CBA, since the New CBA reduced the contribution to the target fund from \$0.25/hour to \$0.05/hour, TPC would remit only \$0.05/hour, and it would set aside \$0.20/hour. TPC stated that the reason for this is that if the Union prevailed in its position that TPC is bound to the New CBA, TPC would only be obligated to pay \$0.05 per hour to this fund. TPC offered that should the Board dismiss TPC's charge, and the Office of Appeals affirm the dismissal, based on finding that TPC is bound to the New CBA, the money set aside would return to TPC. Alternatively, should that not occur, TPC would

determine its course of action in accordance with its legal rights and obligations. In that email, TPC also stated it would follow a similar procedure for a \$0.03 deduction on the drug and alcohol program cancelled by the New CBA. (JX 36, ¶¶ 34, 35; JX 16).

The Union's counsel responded the next day with acknowledgment of receipt, and said she would send a substantive response later (JX 36, ¶ 35; JX 16). There is no evidence in the record as to any such substantive response from the Union about these benefits. On September 24, in accordance with its June 16 email, as soon as TPC learned the Board would issue a complaint against the Union for its refusal to bargain, TPC mailed all of the money it set aside to the target fund (*see* JX 36, ¶ 43; JX 28).<sup>7</sup> On October 1, Region 9 of the NLRB issued a Complaint against the Union alleging that the Union's refusal to bargain with TPC violated Section 8(b)(3) of the Act (JX 36, ¶ 46; JX 13).

On October 7, as a follow up to its attempts to negotiate in September, TPC sent the Union its proposed "Implemented Terms Handbook" which showed which parts of the Old CBA TPC changed (JX 36, ¶ 47; JX 30; TR 80). On October 16, the Union responded by stating it disputed there was an impasse because it believed it was not required to bargain and asked TPC to preserve the status quo (instead of implementing its proposal) pending determination of the NLRB charges filed by both TPC and the Union. On October 18, TPC sent the Union an email about changes TPC made to its proposed group health plan (emailed to TPC on September 13). (JX 36, ¶ 49; JX 32.)

Also on October 18, TPC responded to the Union's October 16 response by stating that an impasse did exist because of the Union's refusal to bargain. TPC also stated that even if there was no impasse, TPC was still entitled to implement its proposal because of the Union's refusal to

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<sup>7</sup> TPC determined that the drug/alcohol fund contribution had already been made (*see* JX 28).

bargain. TPC confirmed it would implement its proposal on November 1 and again offered to bargain for a new agreement. (JX 36, ¶ 48; JX 31.)

On October 22, the Union sent TPC the New CBA between the Union and the Association. TPC replied by stating it was not bound to it because TPC had timely and lawfully withdrawn from the Association on May 28. TPC also noted many differences between the New CBA and the June 26 Wage Sheet that was based on the third tentative agreement reached by the Union and the Association on May 28 and ratified by the Union on June 5. (JX 36, ¶ 51; JX 33.)

On October 24, TPC sent the Union the benefit documents it would provide its employees. TPC also noted that it decided to add a GAP plan, at no cost to its employees, that reduced the maximum annual out of pocket employee costs and that it would offer three new voluntary benefits at employee cost—visual, dental and term life. TPC again offered to bargain about its proposal, including these items. (JX 36, ¶ 52; JX 34.)

On October 29, the Union responded to TPC stating that the Union was willing to continue working under the Old CBA while the charges were pending. TPC replied and noted that it had maintained the status quo on wages and benefits since the Old CBA expired, which included sending all of the contributions to the various Union benefit funds under the amounts required by the Old CBA. Moreover, TPC noted that the Union funds had rejected some of these contributions and that, given the Union's newly found willingness to maintain the status quo, TPC hoped these funds would now accept payment. (RX 3; TR 123.) TPC maintained the wages and made all of the fringe benefit contributions required by the Old CBA for all bargaining unit work performed through October 31 (*see* JX 28, RX 3). There is no evidence in the record to the contrary.

**11. TPC repeatedly informs its employees of their union membership rights.**

Throughout the time the Union refused to bargain, TPC repeatedly informed its employees of their Union rights. For example, shortly after TPC notified the Union and the Association of its withdrawal from the Association, TPC informed all of its new hires that they were free to join the Union and that TPC would deduct Union dues from their paychecks if they wished. (JX 36, ¶ 33; JX 18). On September 23, TPC sent its employees a memorandum on Health Insurance sign-up and updating them on the Union's continued refusal to bargain (JX 36, ¶ 42; JX 27). On October 28, in conjunction with implementation of its proposal, TPC distributed a memorandum to its employees that made their right to remain a Union member clear. The memorandum stated in part:

In accordance with the new terms, the Company will no longer make contributions to the Union fringe benefit plans, and will stop deducting Union dues and fringe contributions from your paychecks, for hours worked on and after November 1. If you wish to maintain your Union membership after November 1, the choice is yours, but you will have to make arrangements to pay your dues directly to the Union.

(JX 36, ¶ 53; JX 19.)

**12. TPC meets with its employees and implements its proposal.**

On October 28, TPC called a meeting with about fifteen of its employees to explain implementation of its proposal (TR 169-170). At that meeting, Mr. Varney, TPC's Chief Financial Officer, spoke to the employees about the new terms and conditions of employment as described in the October 28 memorandum to employees (JX 36, ¶ 54, JX 19). David Henn, a then current TPC employee and member of the Union, was present at that meeting (TR 168-169). Mr. Henn was frustrated by TPC's benefits proposal (TR 170-172). Mr. Henn got up in the middle of the meeting and asked Mr. Varney,

So let me get this straight, these are my two options? I either have to take what you're offering me . . . I have to take what you have to offer or find another

contractor to work for after Friday, another union contractor? If I want to keep my benefits, I have to find another union contractor?

(TR 173-175.) Mr. Varney answered Mr. Henn’s question with a “yes” (TR 173).

TPC implemented its proposal on November 1 (JX 36, ¶ 56).

### **13. The Union files another charge against TPC.**

On October 30, the Union filed a second Unfair Labor Practice Charge against TPC alleging that TPC had “interfered with, retrained, and coerced its employees . . . by threatening to retaliate against employees if they joined or supported a Union” (JX 36, ¶ 55; Consolidated Complaint, ¶¶ 1(b), 5, 6(a), 9)(*see* TR 173-175).

## **II. ARGUMENT**

### **A. TPC’s Notice of Withdrawal from the Association was Lawful, Timely and Unequivocal.**

In *CNH Indus. v. Reese* and *M & G Polymers USA v. Tackett* the Supreme Court held that collective-bargaining agreements *must be interpreted according to ordinary principles of contract law*. 574 U.S. 427, 435 (2015); 583 U.S.\_\_\_\_, 138 S.Ct. 761, 763 (2018). *Reese* and *Tackett* overruled a long line of Sixth Circuit decisions holding that when a Union contract provides for retiree group health coverage, ex-employees who are retired or who retire during its term are guaranteed lifetime coverage unless the contract expressly says otherwise. *Id.* The Supreme Court held that the general duration clause unambiguously terminated the employer’s obligation to continue those benefits, and that *unless language elsewhere in the contract itself* provides for post-expiration coverage, it could not be implied. *Id.* The Court further noted that such exception to the duration clause could have been included by the parties but was not. *Id.* Similarly, the parties to the Old CBA could have included an exception to the extension/withdrawal/separate bargaining provision in Article XIX for concurrent tentative agreements subject to ratification, but did not

(and the Union admitted that “it’s . . . common that along with the short extensions, the parties have reached a tentative agreement subject to ratification”)(TR 104). Accordingly, the Board must apply ordinary contract law principles to this case and must not imply any additions or exceptions to the applicable collective bargaining provisions.

Article XIX of the Old CBA unambiguously provides that *three days advance notice plus a signed extension equals withdrawal and separate bargaining*. There are no other conditions. (JX 1, p. 20.) The parties *could* have included an exception for any tentative agreement subject to ratification, but did not.<sup>8</sup>

It is well-established law that an employer may withdraw from multiemployer bargaining when it provides timely and unequivocal notice. *Walt’s Broiler, et al. and Culinary Alliance and Bartenders Union, Local No. 791*, 270 N.L.R.B. 556 (1984); *see also Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 420 (1982)(Stevens, J., concurring)(noting an employer’s right to withdraw from multi-employer bargaining group based on an agreed-upon contingent occurrence).<sup>9</sup>

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<sup>8</sup> Moreover, the argument that TPC’s withdrawal was successful but it is still bound to the Association-Union CBA would read the “separate bargaining” provision out of Article XI; withdrawal without the right to bargain separately would be meaningless.

<sup>9</sup> “The Court’s holding does not preclude an employer from explicitly conditioning its participation in group bargaining on any special terms of its own design. Presumably, an employer could refuse to participate in multi employer bargaining unless the union accepted the employer’s right to withdraw from the bargaining unit should an impasse develop.” Here, as per Article XIX, each and all of the members *explicitly conditioned their participation in group bargaining on the right to withdraw if the parties signed an extension, and the withdrawing employer had given at least 3 days advance notice of such intent*, and the Union agreed to that condition (JX 1, p. 20). *See also Retail Associates, Inc.* 120 NLRB 388 (1958) and its progeny, all holding that withdrawal must take place before bargaining begins *unless there is “mutual consent.”* Article XIX of the Old CBA is “mutual consent” by the Association and the Union to a member or members’ withdrawal if the parties sign an extension and the withdrawing employer had given at least 3 days advance notice of such intent. Article XIX is also a clear and unmistakable waiver by the Union and Association of their right to demand continued membership if the stated conditions for withdrawal occur.

TPC's notice was timely. Article XIX of the Old CBA provided that TPC could withdraw by giving notice to the Union and Association at least three days prior to the Association executing any extension (JX 1, p. 20). TPC gave this notice on May 17—which Mr. Sherwood and Mr. Denney admit receiving and which Mr. Sherwood admits “tracked exactly the language of Article XIX”—and the Association and Union executed a third extension on May 28 (JX 36, ¶ 17; JX 4; TR 105-107, 148). Article XIX requires no other conditions for withdrawal and TPC met those requirements (JX 1, p. 20).

TPC's notice was unequivocal. TPC's May 17 notice clearly provided that it intended to negotiate separately for its own agreement should the Association and Union reach another extension (JX 36, ¶ 17; JX 4). TPC again made its intentions clear by telling the Association that it would not support a new tentative agreement but would support an extension (JX 5, p 1). Moreover, the Union could not have believed otherwise. Mr. Walker remained silent at the New CBA meetings between the Association and the Union and at no point did he or TPC change their stance on the noticed withdrawal (TR 65-67, 133-134, 137-138). *See Int'l Ladies' Garment Workers' Union*, 286 NLRB 226, 231 (1987)(an employer representative's presence at, and limited participation in, a multiemployer bargaining meeting was not inconsistent with employer's timely and unequivocal withdrawal because the representative was not a negotiator for the Association and there was no evidence that he took any role in the negotiations). The instant the extension occurred, TPC's relationship with the Association severed.

Accordingly, TPC lawfully withdrew from the Association and was free to bargain separately with the Union.

## **B. TPC Is Not Bound by the Association and Union’s New CBA.**

### **1. TPC never entered into a tentative agreement with the Union.**

TPC did not enter into a tentative agreement with the Union. The Association and the Union discussed a tentative agreement during a video conference on May 28 (JX 36, ¶ 23; JX 24; TR 63). Mr. Sherwood’s assertions that he would have made Mr. Walker leave if he was not part of the Association and that “Walker was there so he could in some way benefit TPC from [the third tentative agreement]” are misleading (TR 91-92, 125). When those contract discussions occurred, TPC was *still* a member of the Association and its withdrawal did not occur until the moment the extension was executed, which happened after the meeting ended and Mr. Walker had left (JX 1, p. 20; TR 108-109). Accordingly, TPC’s silence during that meeting—while it was still part of the Association—cannot mean that TPC, apart from the Association, agreed to the terms of the third tentative agreement (TR 65-67, 133-134, 137-138).

TPC did nothing to suggest it agreed to the terms of that tentative agreement (*see* TR 65-67, 133-134, 137-138). Indeed, TPC notified the other members of the Association that it would be a dissenting vote on the tentative agreement but that it approved of an extension. TPC did this because it wanted to negotiate with the Union independently from the Association. (JX 5, p 1.) As soon as TPC found out the Union and the Association had entered into a third extension, TPC sent the Union and the Association an email notifying them of TPC’s effective withdrawal (JX 36, ¶ 23; JX 7). All of TPC’s actions—both before and after the May 28 meeting—show TPC never entered into a tentative agreement with the Union.

In contrast, the Union and Association executed the May 28 extension knowing full well that by doing so they were freeing TPC to negotiate separately (JX 1, p. 20; TR 105-107). By voluntarily executing the extension, the Union accepted this outcome.

**2. TPC immediately notified the Union that it was not a party to any agreement between the Association and Union.**

Moreover, even if TPC was a party to the third tentative agreement (which it was not), TPC immediately withdrew from any such tentative agreement that same day and confirmed this on May 30. On May 28, TPC notified the Union that it understood an extension was agreed upon, that TPC was no longer represented by the Association, and that no agreement reached between the Association and the Union would apply to TPC. On May 30, TPC again explained to the Union that TPC separated from the Association, and that TPC was not bound by any post-Old CBA agreements between the Association and Union. (JX 36, ¶¶ 23, 29; JX 7; JX 9; TR 70.) Accordingly, TPC was not a party to any tentative agreement, and if for a moment on May 28 it was, TPC effectively withdrew before ratification.<sup>10</sup>

**3. TPC was not bound by the Association's tentative agreement with the Union because it was not the final agreement.**

Moreover, TPC cannot be bound by the third tentative agreement because that agreement and the final agreement (the New CBA) between the Union and the Association materially differ. The Union claims that TPC was bound by the third tentative agreement because it was present during the negotiations (JX 36, ¶ 27; JX 8). That agreement, however, was not the final agreement; the New CBA was. On October 22, the Union sent the New CBA to the Association, and it materially differed from the third tentative agreement the Union and Association reached on May

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<sup>10</sup> An employer may withdraw from a tentative agreement before ratification if the Union made it clear that the agreement would not be final unless ratified by the members. *See Sunderland's Incorporated*, 194 N.L.R.B. 118, n. 1 (1971). Here, the Union made this perfectly clear in the Contract Extension Agreement, Section 3.4. (JX 36, ¶ 23, JX 6) (“In the event the Union ratifies a new collective bargaining agreement prior to the expiration of this Contract Extension Agreement . . .”) This confirmed TPC’s and the Association’s understanding that the tentative agreement was not final unless it was ratified.

28 (JX 36, ¶ 51; JX 11; TR 96, 112, 140-141, 149; n. 6, *supra* Section I(6)). Accordingly, the New CBA displaced the third tentative agreement.

Since TPC was no longer a member of the Association during the post-May 28 New CBA negotiations, and since the New CBA displaced the tentative agreement, TPC cannot possibly be bound by it.

**C. TPC Did Not Engage in Bad Faith Bargaining and It Lawfully Implemented Its Proposal Because the Union Continued to Refuse to Negotiate.**

The Union claims that TPC unlawfully made unilateral changes in its implemented proposal by reducing the target fund and eliminating the drug/alcohol contribution (*see* JX 36, ¶¶ 34, 35; JX 16). Since May 28, however, the Union has refused to bargain with TPC (*see* JX 36, ¶¶ 27-28, 35, 39-40, 47-49; JX 7; JX 8; JX 14; JX 16; JX 26; JX 30; JX 31; JX 32; TR 71, 78, 80, 83, 118-122; RX 1; RX 2). Accordingly, TPC can legally implement its proposed unilateral changes. *AAA Motor Lines*, 215 NLRB 793 (1974) (union's refusal to bargain justified employer's implementation of proposed unilateral changes even though impasse had not been reached); *M&M Contractors*, 262 NLRB 1472 (1982) (same). Moreover, the Union's concerns about TPC's reduction of the target fund and the elimination of the drug/alcohol contribution were raised in the Union's grievance—which TPC agreed to meet and discuss. The Union, however, cancelled the meeting and never attempted to reschedule. (JX 25; RX 2; TR 83, 118-122.) Additionally, the email that explained how TPC would handle these items was a proposed solution, (JX 36, ¶ 35; JX 16), and the Union waived any claim of unlawful change by failing and refusing the offer to meet, in general, and specifically as to the grievance. In any event, TPC sent the payments required under the Old CBA through October 31 (*see* JX 36, ¶ 43; JX 28).

Further, it is axiomatic that if TPC and the Union have not bargained at all because of the Union's refusal, none of TPC's actions could amount to bad-faith bargaining. Thus, the Union

cannot claim that any of TPC's actions amount to bad-faith bargaining. The NLRB has acknowledged that when a union will not bargain at all, whether an employer acted in good faith or not cannot be determined. *See Times Publishing Co.*, 72 NLRB 676, 683 (1947)(“A Union’s refusal to bargain in good faith may remove the possibility of negotiation and thus preclude the existence of a situation in which the Employer’s own good faith can be tested. If it cannot be tested, its absence can hardly be found.”).

For these reasons and because TPC is not bound to the New CBA, the Complaint’s 8(a)(5) allegations must be dismissed.

**D. TPC Did Not Engage in Regressive Bargaining.**

TPC did not make “regressive” proposals that amounted to bad faith. Mr. Sherwood’s testimony tried to characterize TPC proposals as regressive. He compared TPC’s September 13 proposal to the third tentative agreement between the Union and the Association and estimated TPC’s proposal was “around four dollars less.” However, he did not mention that TPC’s proposal included a \$1.15 hourly raise, which was more than the New CBA (freeze as to wages) and did not put any value on TPC’s group health program. (TR 78-79; JX 14; JX 24.) Moreover, “[a]bsent other evidence of bad faith, regressive contract proposals are not violative of the Act.” *National Steel & Shipbuilding Co.* 324 NLRB 1031, 1042 (1997).<sup>11</sup> There is no other evidence of bad faith. To the contrary, in its initial proposal, TPC said that it was willing to remain with the Painters H & W Fund, which shows that it was sincerely interested in reaching an agreement. (JX 9, p. 3.)

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<sup>11</sup> Additionally, along the same lines, the NLRB recently held that it “is ... prohibited from sitting in judgment on a party’s substantive bargaining proposals.” *Phillips 66*, 369 NLRB No. 13 at p.4.

**E. TPC's Statement to Its Employees Regarding Their Union Membership Rights Was Truthful, Objective and Lawful.**

An employer's truthful, objective statements about the facts of its relationship with a union do not violate Section 8(a)(1) of the Act. *P.S. Elliott Services, Inc.*, 300 N.L.R.B. 1161, 1162 (1990)(truthful statement to a prospective employee that a company was "nonunion" was not coercive). This is especially true when, as here, there is no evidence that a company intended to coerce employees in the exercise of their Section 7 rights. *See The American Bottling Company, Inc.*, 357 N.L.R.B. 1804, 1810 (2011). Indeed, TPC had every right to provide truthful information to its employees. Especially after an employee asked it a direct question regarding benefits options (TR 173). Here, TPC did exactly that: it informed its employees that its implemented proposals would not include contributions to the Union's benefit funds, and that if employees wished to continue participation in those funds, then they would need to seek employment at a participating contractor (*id*). Accordingly, Mr. Varney's answer to Mr. Henn's question did not violate the Act, and therefore the 8(a)(1) allegation must be dismissed.

**F. The Union's Refusal to Bargain Violates Section 8(b)(3) of the Act.**

A Union violates Section 8(b)(3) of the Act when it refuses to negotiate individually with an employer that lawfully departs a multi-employer bargaining association. *Road Sprinkler Fitters Local Union No. 669, et al. and Lexington Fire Protection Group, Inc.*, 318 N.L.R.B. 347 (1995). Here, that is precisely what occurred.

TPC lawfully exited the Association on May 28 when the Association and the Union agreed to extend the CBA (JX 1, p 20; JX 36, ¶¶ 23, 25, 29-30; JX 6; JX 7; JX 9). Upon TPC's withdrawal and its requests to bargain at the end of May, in July, in September, and in October, the Union had an obligation to negotiate with TPC. The Union refused and continues to refuse to negotiate with TPC (*see* JX 36, ¶¶ 26-29, 35, 39-40,47-49; JX 7; JX 8; JX 9; JX 14; JX 16; JX 26; JX 30; JX 31;

JX 32 TR 71, 78, 80, 83, 118-122; RX 1; RX 2). Its refusal to negotiate violates Section 8(b)(3) of the Act.

### III. CONCLUSION

For all of the foregoing reasons, the Consolidated Complaint should be dismissed in its entirety. The Board should proceed with the Complaint against the Union (Case 09-CB-242861), which is currently held in abeyance.

Respectfully submitted,

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Dated: February 10, 2021

**CERTIFICATE OF SERVICE**

This is to certify that on February 10, 2021, a copy of the foregoing Respondent The Painting Contractor, LLC's Post Hearing Brief was served, via electronic mail where possible and first class mail, postage prepaid upon the following:

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