

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

HOTEL BEL-AIR,)

Employer,)

) NLRB Case No. 31-CA-29841

UNITE HERE, LOCAL 11)

Charging Party)

EMPLOYER'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

Table of Contents

Standard..... 1

Exception No. 1: The ALJ erred by recommending an order for the Parties to negotiate a collective bargaining agreement even though there is no mention of a collective bargaining agreement in either the Charge or the Complaint. 1

Exception No. 2: The ALJ erred by recommending that the Hotel be ordered to bargain with the Union regarding a successor CBA. 4

Exception No. 3: The ALJ erred by considering irrelevant “off-the-record” discussions as evidence that the parties were no longer at impasse. 7

Exception No. 4: The ALJ erred in finding that the Hotel bypassed the Union when offering non-represented former employees a severance package. 10

Exception No. 5: The ALJ erred in finding that the informal "off-the-record" discussions in May and June 2010 broke the impasse..... 12

Exception No. 6: The ALJ’s decision is incorrectly based on whether the parties declared an impasse. This is contrary to controlling law, which holds that the parties' declaration of impasse is immaterial to whether an impasse has actually been reached. 20

Exception No. 7: The ALJ erred in holding that the Hotel took an illegal unilateral action by implementing its last, best, and final offer on July 7, 2010. The record indicates that the parties were at impasse, and when at impasse, an employer is permitted to implement its last, best, and final offer without committing an unfair labor practice..... 21

Exception No. 8: The ALJ erroneously held information regarding the amount of time Local 11 spent negotiating collective bargaining agreements with other hotels as irrelevant. Such information was indeed relevant because it would show Local 11’s lack of good faith bargaining, its intent to extend the length of time spent negotiating with Hotel Bel-Air, and the existence of impasse..... 24

Exception No. 9: The ALJ erred by allowing inadmissible double-hearsay testimony from Richard Maroko regarding what Peter Ward said Arch Stokes said about Christopher Cowdray.....26

Table of Authorities

Cases

Alan Ritchey, 346 NLRB 241, 243 (NLRB 2006) 11

Amedeo Hotels L.P. v. New York Hotel & Motel Trades Council, 2011 U.S. Dist. LEXIS 55032 at * 23 (S.D.N.Y. May 17, 2011) 13

American Federation of Television and Radio Artists v. NLRB, 395 F.2d 622, 628 (D.C. Cir. 1968)..... 15

American Stores Packing, Co., 277 NLRB 1656, 1658 (1986) 5

Bachall Steel & Pipe, 287 NLRB 1257, 1262 (1988)..... 17

Bottom Line Enterprises, 302 NLRB 373, 378 (1991)..... 25

Brockton Newspaper Guild, 275 NLRB 135 (1985) 16

Buckeye Mold & Die Corp., 299 NLRB 1053, 1080 (1990)..... 5

CalMat Co., 331 NLRB 1084, 1099 (2000)..... 17

Cardio Data Sys. Corp., 264 NLRB 37 (1982) 1

Concrete Pipe & Products Corp., 305 NLRB 152 (1991)..... 16

Dallas General Drivers v. NLRB, 355 F.2d. 842, 845 (1966) 15

E. I. Dupont De Nemours and Co., 303 NLRB 631, 632 (1991)..... 17

E.I. Du Pont & Co., 268 NLRB 1075, 1075 (1984) 15

El Torito-La Fiesta Restaurants, Inc., 295 NLRB 493, 495 (1989)..... 5

Erie Brush & Manufacturing Corp., 2011 NLRB Lexis 424, *12 (Aug. 9, 2011) 20

General Extrusion Co., 121 NLRB 1165, 1167-1168 (1958)..... 5

Golden State Warriors, 1999 NLRB LEXIS 65 (NLRB Feb. 5, 1999) 5

Hall Industries, 293 NLRB 785, 785 fn. 1 (1989) 2

In re Scott, 29 Cal 4th 783 (Cal. 2003)..... 26

Inner City Broadcasting, 281 NLRB 1210, 1213 (1986)..... 8, 9

<u>KRI Constructors, Inc.</u> , 290 NLRB 802 (1988).....	2
<u>L.W. Le Fort Co.</u> , 290 NLRB 344, 344 (1988)	15
<u>Lou Stecher’s Super Markets</u> , 275 NLRB at 476	16
<u>McAllister Bros., Inc.</u> , 312 NLRB 1121, 1122 (1993)	18
<u>Metal Carbides Corp.</u> , 291 NLRB 939, 953-954 (1988)	5
<u>NLRB v. American National Insurance Co.</u> , 343 U.S. 395, 404 (1952)	15
<u>People v. Arias</u> , 13 Cal. 4th 92 (Cal. 1996)	26
<u>Permanente Medical Group, Inc.</u> , 332 NLRB 1143, 1144 (2000).....	22
<u>PRC Recording</u> , 280 NLRB 615, 635 (1986).....	20
<u>Prentice-Hall Co.</u> , 306 NLRB 31 (1992)	16
<u>Proctor & Gamble Mfg. Co.</u> , 160 NLRB 334, 340 (1966).....	23
<u>Providence Med. Ctr.</u> , 243 NLRB 714, 731 (1979).....	18
<u>R.A. Hatch Co.</u> , 263 NLRB 1221 (1982)	16
<u>Retlaw Broad. Co.</u> , 324 NLRB 1148 (1997)	16
<u>San Miguel Hosp. Corp.</u> , 2010 NLRB LEXIS 147 (NLRB June 11, 2010).....	11
<u>Saunders House v. NLRB</u> , 719 F.2d 683, 688-689 (3d Cir. 1983).....	9
<u>Sierra Bullets, LLC</u> , 340 NLRB 242 (2003).....	2
<u>Sierra Publ’g Co.</u> , 291 NLRB 552, 554 (1988)	17
<u>Southern California Gas Co.</u> , 316 NLRB 979, 982 (1995).....	11, 22
<u>Stroehmann Bros. Co.</u> , 268 NLRB 1360, 1361 (1984).....	24
<u>Taft Broadcasting Co.</u> , 163 NLRB 475, 478 (1967).....	15, 16, 21
<u>Textron, Inc.</u> , 302 NLRB 600, 661 (1991)	2
<u>Transp. Services of Watertown, Inc.</u> , 269 NLRB 918 (1984)	2
<u>Triple A Maintenance Corp.</u> , 283 NLRB 44 (1987).....	16
<u>Universal Camera Corp. v. NLRB</u> , 340 US 474 (1951)	1

<u>Wantagh Auto Sales, Inc.</u> , 177 NLRB 150, 154 (1969)	23
<u>Webb Furniture Enterprises</u> , 272 NLRB 312, 312 (1984).....	1
<u>Westwood Import Co.</u> , 251 NLRB 1213, 1214 (1980).....	5
Other Authorities	
29 C.F.R. 102.35(a).....	2
Judges’ Bench Book § 2-300	2
New York Hotel and Motel Trades Council, AFL-CIO	passim
Rules	
Fed. R. Evid. 401	24

COMES NOW the above-named Employer, Hotel Bel-Air, [hereinafter referred to as the “Hotel” or “Hotel Bel-Air”] as Employer in the above-captioned matter, and hereby sets forth the following Exceptions to the Administrative Law Judge's Decision dated August 12, 2011 [hereinafter referred to as the “Decision”].

STANDARD

An administrative law judge’s findings and recommendations are by no means binding on the Board.¹ Those decisions which fail to make specific factual findings regarding issues raised by complaints and which fail to include an analysis of its contentions do not satisfy the obligations imposed on administrative law judges and may be remanded.² The administrative law judge should analyze all the case evidence, the briefs submitted by the parties, and the applicable law to issue a decision that contains findings of fact and conclusions of law regarding the matters raised in a Board complaint.³

Here, Administrative Law Judge Pollock [hereinafter referred to as the “ALJ”] made errors in his findings and recommended remedies to which the Hotel now takes exception as itemized and discussed below.

Exception No. 1: The ALJ erred by recommending an order for the Parties to negotiate a collective bargaining agreement even though there is no mention of a collective bargaining agreement in either the Charge or the Complaint.

The ALJ issued a decision that centers its discussion on “failure to bargain” allegations regarding severance provisions offered by the Hotel in conjunction with its renovation closure.⁴

¹ Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)

² Webb Furniture Enterprises, 272 NLRB 312, 312 (1984)

³ Cardio Data Sys. Corp., 264 NLRB 37 (1982) (finding that an ALJ has an obligation to make findings of fact and to reach conclusions of law with respect to all allegations of misconduct set forth in the complaint)

⁴ See generally Decision

The ALJ recommended remedies involving the severance provisions, but he also ordered the parties to negotiate over a new collective bargaining agreement.⁵ The negotiation of a renewed collective bargaining agreement [hereinafter referred to as a “CBA”] was not an issue properly before the ALJ, and constitutes a recommended remedy that he was not empowered to make. The ALJ exceeded his authority by inexplicably recommending a remedy outside the allegations in the Complaint.

The scope and authority of the ALJ's substantive adjudication is limited by the allegations found in the Complaint. An administrative law judge's basic duty is “to inquire fully into the facts . . . whether the Respondent has engaged in or is engaging in an unfair labor practice affecting commerce as set forth in the complaint or amended complaint.”⁶ To allow an ALJ to diverge from the allegations in the complaint is to allow him to move beyond the role of adjudicator and into the General Counsel's role as investigator.

An ALJ does not have the authority to impose relief for claims the Union never alleged.⁷ The Board has made this clear in a number of recent cases.⁸ Indeed, the Judge's Bench Book plainly states that an administrative law judge is limited by the bounds of a complaint.⁹ Without the authority to do so, the ALJ acted squarely against Board precedent by ordering the

⁵ Decision, p. 10

⁶ 29 C.F.R. 102.35(a); see also Hall Industries, 293 NLRB 785, 785 fn. 1 (1989), enfd. mem. 914 F.2d 244 (3d Cir. 1990)

⁷ Decision, p. 10

⁸ Textron, Inc., 302 NLRB 600, 661 (1991) (holding that the ALJ exceeded the scope of his authority by ruling on a matter outside of the violation litigated); see also Transp. Services of Watertown, Inc., 269 NLRB 918 (1984) (stating that findings of violations would not be made on issues that were outside the scope of the complaint, absent an appropriate amendment to the complaint); KRI Constructors, Inc., 290 NLRB 802 (1988) (finding that the ALJ's prescribed relief improperly encompassed employment positions outside the positions specified in the complaint); Sierra Bullets, LLC, 340 NLRB 242 (2003) (holding that the ALJ erred by improperly finding impasse based on a theory not litigated by the parties during their hearing).

⁹ Judges' Bench Book § 2-300

Hotel to negotiate a new collective bargaining agreement with UNITE HERE, Local 11 [hereinafter referred to as the “Union” or “Local 11”].¹⁰

The “failure to bargain” allegations of the Complaint focus exclusively on the severance proposals.¹¹ Negotiations over a collective bargaining agreement are never even mentioned. During negotiations of the severance package, the Union attempted to link the severance package to the negotiations of a successor collective bargaining agreement.¹² However, the Hotel resisted this link between these distinct issues. First, the CBA between the parties had no severance provision whatsoever, and no right to recall in the event of a closure. Second, the Hotel wanted to deliver the severance packages to its employees on or about the time of the Hotel’s closure, and did not want to delay while a successor agreement was also being negotiated.¹³

Moreover, there was no allegation in the Complaint or at the hearing that the Hotel refused to separately bargain over wages, hours, or conditions of employment emanating from the CBA between the parties.¹⁴ Notably, the ALJ’s analysis in his Decision focuses on the

¹⁰ Decision, p.10, ln. 10

¹¹ See generally GC Ex. 1 at ¶ 8-9

¹² Decision, p. 8

¹³ Tr., pp. 559-560

¹⁴ In fact, the Hotel has, at all times, met its duty to bargain with the Union over a successor collective bargaining agreement. The Hotel and the Union met face-to-face for off-the-record discussions in February and May 2010 to discuss, in part, the possible terms of a successor collective bargaining agreement. Tr., pp. 24, 37, and 129. The collective bargaining agreement had expired on September 30, 2009, without the Union requesting an extension of its terms. Tr., pp. 689-90. Finally, even Peter Ward, a facilitator brought in by the Union for the negotiations, declared near the end of June 2010 “we’re done.” Tr., pp. 506 and 632. The Hotel was willing to continue to engage in off-the-record discussions for a successor CBA. Tr., p. 718. More than nine (9) months after the expiration of the CBA and the closure of the Hotel, 84% of the pre-closure employees, who were at the time no longer represented by the Union, accepted severance agreements and surrendered any rights to recall. Tr., pp. 240 and 452. The Union has not requested any further bargaining since that time. Tr., p. 638. Therefore, the Hotel no longer has a duty to bargain with the Union.

negotiation of a severance agreement alone.¹⁵ The ALJ's own Conclusions of Law only discuss 8(a)(5) violations in the context of the April 19 offer (a severance proposal), and a "bypass" allegation in the same context – there is no mention of a failure to bargain over the terms of a collective bargaining agreement.¹⁶ In fact, the ALJ did not permit the Union to put on evidence regarding the Hotel's duty to collectively bargain because the ALJ ruled that it was "not relevant." Most importantly, the ALJ draws no factual or legal link between his findings of fact and conclusions of law, on the one hand, and his recommended order to bargain over the terms of a new collective bargaining agreement on the other. The Decision and record in this case are devoid of any facts or analysis that could possibly justify a wholesale departure of his recommendations beyond the allegations in the Complaint.

Exception No. 2: The ALJ erred by recommending that the Hotel be ordered to bargain with the Union regarding a successor CBA.

As set forth above, the Complaint does not allege that the Hotel violated its duty to bargain, nor does the ALJ conclude as such in his conclusions of law. In fact, the Hotel did not violate its duty to bargain over the terms of a successor CBA with the Union. The CBA expired on September 30, 2009. Nonetheless, the Hotel continued to negotiate in good faith with the Union over a successor CBA. The Hotel had closed for renovations as of September 30, 2009, and on that date ceased to employ any bargaining unit employees. The Hotel remains closed for business even today. The CBA was not renewed or extended, nor did the Union request such an action. Furthermore, the Union did not ask to bargain with the Hotel over the terms of a

¹⁵ See generally the Decision

¹⁶ Decision, p. 9, lns. 18-22

successor CBA after May 6, 2010.¹⁷ After September 30, 2009 and until today, there has been no business at the Hotel, there have been no employees, there has been no CBA, and therefore there is no duty to bargain. Thus, the ALJ's recommendation to order the parties to bargain over a successor CBA has no basis in fact.

When a business announces its closure, it is no longer obligated to negotiate with a union for a new contract.¹⁸ An employer has no continued duty to bargain where the facility is closed and where the employees do not have a reasonable expectation of continued employment status by virtue of a promise of recall upon re-opening.¹⁹ The Board specifically addressed the issue of whether an employer has a duty to bargain over a collective bargaining agreement during a shutdown like the one implemented in this case. The Board concluded that there is no such obligation without employees to represent, wages to pay, or terms and conditions of employment to enforce.²⁰

In fact, bargaining under these circumstances is not just pointless, it is illegal. In Sterling Processing Corp., a plant was closed with no scheduled reopening date.²¹ The parties' collective bargaining agreement expired during the closure. After reopening, a majority of the former

¹⁷ Informal negotiations that were stipulated to be "off the record" continued into the fall of 2010, but the Union (*i.e.*, UNITE HERE Local 11) never requested additional negotiations over a successor CBA after May 2010. Tr., p. 638

¹⁸ Buckeye Mold & Die Corp., 299 NLRB 1053, 1080 (1990) (citing American Stores Packing Co., 277 NLRB 1656, 1658 (1986)).

¹⁹ Golden State Warriors, 1999 NLRB LEXIS 65 (NLRB Feb. 5, 1999); see also El Torito-La Fiesta Restaurants, Inc., 295 NLRB 493, 495 (1989) (citing Westwood Import Co., 251 NLRB 1213, 1214 (1980), *enf'd.* 681 F.2d 664 (9th Cir. 1982)); General Extrusion Co., 121 NLRB 1165, 1167-1168 (1958)

²⁰ American Stores Packing Co., *supra* at 1658-1659 (once the Respondent had decided to close the plant and lay off all the unit employees, the Respondent had no further duty to bargain about a new contract, and thus the Union had no right to information requested for bargaining on this subject); see also Metal Carbides Corp., 291 NLRB 939, 953-954 (1988)

²¹ 291 NLRB 208 (1988)

employees were rehired. While the Board concluded that the employer's bargaining duty revived upon reopening and rehire of a majority of the former workforce, there was no duty to bargain during the closure. Specifically, the Board held that when a pre-closure workforce is terminated with no reasonable expectation of recall, there are no employees for a union to represent. If the employer and the union were to nonetheless negotiate a successor agreement during this period, it would violate the National Labor Relations Act:

after a lengthy hiatus during which there were no employees for the union to represent, *the employer violated Section 8(a)(2) and (1)* when it recognized the union before hiring a representative complement of the old work force.²²

The facts and reasoning of Sterling apply with even greater force to the current situation because the expiration of the collective bargaining agreement coincided with the Hotel's extended closure for remodeling and renovations.²³ Thus, for the past two years, the Union has not represented any employees at the Hotel. The Hotel cannot be ordered under these circumstances to negotiate a new collective bargaining agreement with a union that represents no employees of the Hotel. By analogy, if Local 11 had refused to bargain with the Hotel over a successor CBA after September 30 2009, a ULP filed against it for failure to bargain on behalf of the laid-off employees would not stand. In other words, just as there was no obligation on the part of the Hotel to bargain a new, successor CBA after the CBA expired and the Hotel closed, there also was no legal obligation on the part of the Union to do so either. Thus, under what facts or legal compulsion can the Hotel now be ordered to bargain about a CBA neither it nor the Union was obligated to renew or negotiate?

²² Id. at 210

²³ Tr., pp. 8-9

Exception No. 3: The ALJ erred by considering irrelevant “off-the-record” discussions as evidence that the parties were no longer at impasse.

Formal collective bargaining negotiations are often accompanied by informal, unrecorded meetings that are, by their nature, not binding on either party. As explained by Arch Stokes in his hearing testimony, off-the-record discussion free the parties to “throw out ideas, [and] argue about things that might not be as easy to overcome if you made them public to everybody in a formal negotiation.”²⁴ Such off-the-record sessions allow negotiators to investigate different methods of overcoming disagreements before they seek the authority to make formal proposals that could be accepted. In other words, by design, on-the-record negotiations are binding on the parties; off-the-record negotiations are not. The ALJ seemed to recognize and adopt this important differentiation in his discussion of the facts,²⁵ and the Union did not dispute that many of the conversations were off-the-record. However, the ALJ failed to incorporate this fact in his Analysis and Conclusions.

The Hotel and the Union engaged in five on-the-record meetings starting on August 25, 2009, and continuing until an initial stalemate on November 16, 2009.²⁶ The parties were unable to make much progress in these on-the-record negotiations, so in February 2010, the Union decided to seek the assistance of the New York Hotel and Motel Trades Council, AFL-CIO in New York City [hereinafter referred to as “NYHTC”].²⁷ The Hotel, in turn, asked representatives of its affiliated hotel – The New York Palace Hotel in New York City [hereinafter referred to as “the Palace”] – to meet with NYHTC to discuss a possible resolution. In order to facilitate negotiations without binding Local 11 and the Hotel Bel-Air – the real

²⁴ Tr., p. 443

²⁵ Decision, p. 3, Ins. 45 - 47

²⁶ Tr., pp. 560, 564, 566, 201, and 440

²⁷ Tr., p. 92

parties in interest – NYHTC and representatives of the Palace explicitly agreed to keep their meetings “off-the-record,” which agreement was intended to ensure that the ideas exchanged in the meetings were non-binding.²⁸ The first off-the-record discussion occurred on February 4, 2010 and continued through the following day.²⁹ Hoping to implement the ideas developed during the February 4 – 5 off-the-record meetings between the Palace representatives and NYHTC, the Hotel met with Local 11 in an on-the-record meeting on February 10 and 11, 2010. However, Local 11 refused to abide by the proposed benchmarks established in the February 4 – 5 off-the-record meetings.³⁰

Local 11 and the Hotel did not meet again until six weeks later, on April 9, 2010, for an on-the-record meeting where the Hotel delivered its last, best, and final offer.³¹ Subsequently, NYHTC and Palace representatives met three more times in off-the-record discussions during May and June 2010 in an effort to push the negotiations beyond impasse, but they were unsuccessful.³² During the last off-the-record meeting, no representative from Local 11 was present, which underscored the fact that the off-the-record meetings were neither binding on the parties nor official negotiations.

During the hearing, the Hotel made a motion *in limine* to prevent the ALJ from considering testimony or documents from these “off-the-record” meetings on the grounds that off-the-record discussions were irrelevant to the consideration of impasse.³³ Contrary to Board

²⁸ Tr., p. 440

²⁹ Tr., pp. 22-23, 578

³⁰ Tr., pp. 592-593

³¹ Tr., pp. 218-219, 599-601

³² Tr., pp. 457, 464, 608, 666, 620-622, 630

³³ Tr., p. 14

precedent, the ALJ denied this motion, heard the evidence,³⁴ and ultimately basing his decision on the content of these off-the-record meetings.³⁵ This is a significant error.

Despite the ALJ's statement to the contrary, there is persuasive authority, cited in the record,³⁶ holding that off-the-record discussion are not evidence of a broken impasse. For example, in Inner City Broadcasting,³⁷ the employer made its last, best, and final offer on the record, and then proceeded to have extensive off-the-record discussions with the Union. During these off-the-record discussions held after the employer's best and final offer, the employer indicated that it might bolster its final offer subject to certain conditions.³⁸ "When no agreement was reached [during the off-the-record meetings] ... the company stood on its previous final offer, and it is clear ... that this offer was not accepted by the Union..."³⁹ The off-the-record discussions failed, the official positions of the parties never changed, and the Board ruled that the employer-established impasse had not been broken.⁴⁰

The facts of Inner City Broadcasting describe a common negotiating practice. Mediators and negotiators in the midst of negotiations often need to use informal channels of communication to float ideas to the opposing party to determine whether it is even worth seeking authority from their respective principals to then make a formal offer. In a mediation session, for example, a mediator does not bind either party by suggesting different problem-solving alternatives as he/she shuttles back and forth between the parties. Nor does shifting an identical proposal from "off-the-record" to "on-the-record" suffice to break an impasse, if it is clear that

³⁴ Tr., pp. 14-15

³⁵ See Decision, at pp. 9-10

³⁶ Tr., pp. 14

³⁷ Inner City Broadcasting, 281 NLRB 1210, 1213 (1986)

³⁸ Id.

³⁹ Id.

⁴⁰ Inner City Broadcasting, 281 NLRB at 1213

the offer had been previously rejected.⁴¹ True movement in negotiations comes when opposing proposals from authorized representatives begin to inch closer and closer to one another. Off-the-record proposals are not true movement in negotiations, and, as such, cannot break an impasse.⁴² The Hotel explained this position to the ALJ and cited Inner City Broadcasting in its post-hearing brief.⁴³ The ALJ simply ignored both the Inner City Broadcasting decision, as well as the common practice in labor negotiations to conduct informal, off-the-record discussions without binding the parties' positions. Accordingly, the ALJ's decision that impasse had been broken by these informal discussions was improper, and contrary to both the facts presented at the hearing and Board authority.

Exception No. 4: The ALJ erred in finding that the Hotel bypassed the Union when offering non-represented former employees a severance package.

The Hotel did not bypass Union representation because former Hotel employees were not represented by the Union when the severance offers were delivered starting on July 7, 2010, and these former employees had no residual contract rights to severance or recall at that time. The Hotel had closed for renovations on September 30, 2009, causing the layoff of all pre-closure employees. The Hotel's CBA with the Union expired on September 30, 2009, and the expiration date was not extended (nor was such an extension ever requested or proposed by the Union). The Hotel had a duty to negotiate with the Union over the effects of the closure, and it did so. The Hotel offered its former employees a generous severance – two and a half weeks pay for every year of service – though no severance was required by the expired CBA. The Hotel and the Union could not reach agreement on the terms of the severance, and all seniority rights under

⁴¹ Saunders House v. NLRB, 719 F.2d 683, 688-689 (3d Cir. 1983) (“We conclude that a mere shift from a position off the record to one on the record is not a concession sufficient to preclude a finding of impasse,” where the substance of the offer had been previously made and rejected).

⁴² Id.

⁴³ Respondent's Brief, at pp. 27, 41-42

the CBA expired no later than June 30, 2010.⁴⁴ Therefore, as of July 1, 2010, there were no Hotel employees, all rights under the CBA had expired, the CBA had not been extended, and the former employees were no longer represented by the Union. It was after that date, on July 7, 2010, that the Hotel began offering its pre-closure employees severance payments with full written notice to the Union.⁴⁵

Employees laid off as part of a plant closure with no reasonable expectation of recall are no longer represented by a union. For example, in Sterling Processing Corp. a plant was closed indefinitely with no scheduled reopening date and the collective bargaining agreement expired during the closure.⁴⁶ The Board stated that when a pre-closure workforce is terminated with no reasonable expectation of recall, then there are no employees for a union to represent.⁴⁷ Under these circumstances, the Board found no violation by an employer who made unilateral changes in areas normally requiring bargaining before such a time as the employer rehired a representative body of employees. It is impossible to bypass a Union unlawfully and directly deal with the bargaining unit when a bargaining unit does not exist.

Stated more simply, if former employees are no longer represented by a union, there can be no unlawful bypass. As the General Counsel pointed out in its post-hearing brief, the first element in an unlawful direct dealing charge is that “the employer was communicating directly with *union-represented* employees.”⁴⁸ The Board has confirmed a 8(a)(5) bypass violation requires proof that the employer undercut the union’s role in bargaining⁴⁹ and that the employer

⁴⁴ GC Ex. 3, § 22(G)(3)

⁴⁵ GC Ex. 37; Tr. 240

⁴⁶ 291 NLRB 208 (1988)

⁴⁷ Id.

⁴⁸ Southern California Gas Co., 316 NLRB 979, 982 (1995); GC Post Hearing Brief, p. 33

⁴⁹ San Miguel Hosp. Corp., 2010 NLRB LEXIS 147 (NLRB June 11, 2010)

was communicating with employees to the exclusion of their exclusive bargaining representative.⁵⁰ That did not occur here.

The ALJ made a significant error in finding that the Hotel bypassed Union representation when it extended severance payments to former Hotel employees beginning on July 7, 2010. With no contract, no employees, no business, and no hotel, there can be no union representation. Any arguable contractual rights that the Union had to bargain over the effects of the closure expired on June 30, 2010, nine months after the expiration of the CBA: “Seniority shall be broken and employee status shall cease upon: . . . Continuation upon layoff status for a period of nine (9) months or the length of his seniority, whichever is less.”⁵¹ Therefore, the Hotel’s decision to offer former employees severance payments was made after the collective bargaining relationship between the employees and the Union had expired, and therefore the ALJ’s finding of unlawful direct dealing was misguided.

Exception No. 5: The ALJ erred in finding that the informal "off-the-record" discussions in May and June 2010 broke the impasse.

The ALJ found that informal negotiations between representatives of The Palace and NYHTC in New York in May, June, and July 2010 broke the impasse over severance pay between Hotel Bel-Air and Local 11 in California. The root of the ALJ’s error is that he incorrectly treats NYHTC in New York, and Local 11 in Los Angeles as one and the same. Unrebutted evidence shows that Local 11 specifically repudiated the informal proposals put forth by NYHTC on at least two different occasions.⁵² NYHTC became involved only to protect what they believed was anti-union behavior at The New York Palace – concerns about Hotel Bel-Air

⁵⁰ See e.g. Alan Ritchey, 346 NLRB 241, 243 (NLRB 2006) (where the Board found that an employer did not bypass the Union when communicating with represented employees in a manner that was not to the exclusion of the Union).

⁵¹ GC Ex. 3, §22(G)(3)

⁵² Tr., pp. 592-593

were secondary.⁵³ In fact, NYHTC facilitators did not even know about the Hotel Bel-Air negotiations prior to February 2010, and indicated on many occasions that they felt the need to “convince Local 11” of the efficacy of its off-the-record proposals.⁵⁴ Mr. Maroko expressly stated that he would still need to gain approval from Local 11, that the discussions were off-the-record (*i.e.*, not binding on Local 11), and spoke of Local 11 in the third person.⁵⁵ Thus, by the Union’s own admission, though NYHTC was a facilitator of the negotiations, it was not an authorized agent of Local 11 and certainly was not standing in Local 11’s shoes.

The Restatement 2d of Agency establishes that liability may attach to a principal based on apparent authority except where the other party has notice that the apparent agent was not authorized to act for the principal on the particular occasion. An agent for a disclosed or partially-disclosed principal subjects his principal to liability for acts done on his account if, “although they are forbidden by the principal, the other party reasonably believes that the agent is authorized to do them and *has no notice that he is not so authorized.*”⁵⁶ The Hotel was on express notice that NYHTC was not authorized to act on behalf of Local 11 – Local 11 refused to abide by the agreements reached by NYHTC,⁵⁷ NYHTC said they did not have authority to cut a deal for Local 11,⁵⁸ and NYHTC indicated that they had taken part in the negotiations based upon their own interests in New York.⁵⁹ Therefore, pursuant to black-letter principles of agency law, NYHTC could not be held to have acted as Local 11’s agent.

⁵³ Tr., p. 100

⁵⁴ Tr., p. 92

⁵⁵ Tr., pp. 488-490, 622-624

⁵⁶ Restatement 2d, Agency § 161

⁵⁷ Tr., pp. 284, 593 and 596

⁵⁸ See *e.g.*, Tr. pp. 90-91, 93, 247, 283-284, 286, 327

⁵⁹ Tr., p. 100

Similarly, the ALJ improperly conflates the Palace with the Hotel Bel-Air as the same entity for purposes of negotiations. Contrary to the ALJ's assumption, a note from the Hotel Bel-Air's management reminded New York Palace representatives that they did not have authority to act on behalf of Hotel Bel-Air.⁶⁰ The United States District Court for the Southern District of New York considered this very same set of facts and concluded that "[i]n this instance, there is simply no basis for finding that [The New York Palace] was involved in the California negotiations ..."⁶¹ Noting Mr. Stokes' May 6 shuttle diplomacy between the parties, New York attorneys Stokes, Fischer, and Rothfeld acted more as mediators than advocates.⁶² The Palace offered ideas regarding the collective bargaining agreement, but never communicated a severance proposal to NYHTC that was (a) authorized by the Hotel Bel-Air or (b) communicated directly to Local 11 (according to Mr. Maroko).⁶³ In short, at no time did Palace representatives purport to bind the the Hotel Bel-Air or act as its negotiating agent. By incorrectly equating Local 11 and the Hotel Bel-Air with NYHTC and the Palace, the ALJ placed Local 11 in the midst of the May and June 2010 negotiations, in which it had explicitly chosen not to participate.⁶⁴

Local 11 intentionally distanced itself from post-impasse negotiations and never adopted any of the proposals discussed between the New York facilitators. There was only one bargaining session that occurred between Local 11 and the Hotel Bel-Air after April 9, 2010 – the unproductive May 5 and 6 meetings which centered exclusively on the collective bargaining

⁶⁰ Resp. Ex. 5

⁶¹ Amedeo Hotels L.P. v. New York Hotel & Motel Trades Council, 2011 U.S. Dist. LEXIS 55032 at * 23 (S.D.N.Y. May 17, 2011)

⁶² Tr., p. 38; see also Decision at p. 10

⁶³ Tr., pp. 33-34, 121, and 127

⁶⁴ Tr., pp. 486, 608-609, 620-624, and 630-631

agreement and left the severance issues to the side.⁶⁵ Local 11 did not put forward any new proposals, nor did it request to bargain with the Hotel by offering any specific dates on which its committee would be available after the severance impasse of April 9, 2010.

As the Union pulled back, the Hotel's severance proposal remained unchanged. The real parties in interest exchanged only four (4) communications between April 9, 2010 and July 9, 2011: an April 16, 2010 e-mail from the Hotel extending the Union's response deadline to May 6; an April 19, 2010 e-mail from the Union claiming "The union want [sic] to continue negotiating and has more proposals to make;" an unanswered June 25, 2010 e-mail to the Union requesting a meeting; and finally a letter on July 7, 2010 informing the Union that the Hotel planned to implement its impasse offer.⁶⁶ In short, Local 11 abandoned its bargaining efforts over severance terms after May 6, 2010, leaving the parties at precisely the same impasse as was cast on April 9, 2010.

Impasse is reached, where, as here, the parties engaged in hard bargaining but remained far apart on key issues.⁶⁷ In the view of the court in American Federation of Television and Radio Artists v. NLRB, "some bargaining may go on even in the presence of deadlock."⁶⁸ Simply put, an impasse can still exist even when there is progress with small issues but little

⁶⁵ Tr., pp. 467, 615-616

⁶⁶ Tr., pp. 607, 342, G.C. Ex. 21, 635, G.C. Ex. 36, and G.C. Ex. 37

⁶⁷ See, e.g., L.W. Le Fort Co., 290 NLRB 344, 344 (1988); Dallas General Drivers v. NLRB, 355 F.2d 842, 845 (1966) (impasse is warranted where good faith bargaining has not resolved a key issue and there are no definite plans for further efforts to break the deadlock); American Federation of Television and Radio Artists v. NLRB, 395 F.2d 622, 628 (D.C. Cir. 1968) ("the continued meetings and occasional progress...were overborne in the Board's view by the conceded impasse on the critical issue of staff assignment on which the progress had been "imperceptible" and, had led in some aspects...to a widening of the gulf between them."); see also NLRB v. American National Insurance Co., 343 U.S. 395, 404 (1952) (holding the Act does not contemplate that a party will "engage in fruitless marathon discussions").

⁶⁸ 395 F.2d 622, 628 (D.C. Cir. 1968)

headway with critical issues. Thus, the vital consideration is whether the employer reasonably assumed further negotiations were futile.⁶⁹

Here, the ALJ ignored undisputed evidence from the Hotel that further bargaining over the severance pay issues after April 9, 2010 would be futile. Notwithstanding the absence of any severance or recall rights in the parties' expired CBA, Local 11 insisted on double the already-generous severance offer, “guaranteed recall,” and payments into union health and welfare funds during the closure.⁷⁰ The Hotel’s unwavering opposition to each of these key issues created an insoluble impasse that persisted to implementation.⁷¹ The existence of an impasse is governed by five factors: (1) the length of the negotiations, (2) the importance of issues as to which there is disagreement; (3) the parties’ bargaining history; (4) good faith in negotiations; and (5) the parties’ contemporaneous understanding of the state of the negotiations.⁷²

The length of negotiations for this dispute was nearly a full year of official meetings and off-the-record discussions, and it is not unusual for the Board to acknowledge the existence of impasse between parties within a much shorter bargaining history.⁷³ The parties thoroughly explored their options, and they bargained at length over alternatives until they reached impasse.

⁶⁹ See e.g., E.I. Du Pont & Co., 268 NLRB 1075, 1075 (1984)

⁷⁰ See e.g., Tr., p. 514-515

⁷¹ Taft Broadcasting Co., 163 NLRB 475, 478 (1967)

⁷² Id.

⁷³ R.A. Hatch Co., 263 NLRB 1221 (1982) (finding impasse after two bargaining sessions); Lou Stecher’s Super Markets, 275 NLRB at 476 (finding impasse after three bargaining sessions); Concrete Pipe & Products Corp., 305 NLRB 152 (1991), rev. den. 983 F.2d 240 (D.C. Cir. 1993) (finding impasse after four bargaining sessions); Triple A Maintenance Corp., 283 NLRB 44 (1987) (finding impasse after five bargaining sessions over a five month period); Brockton Newspaper Guild, 275 NLRB 135 (1985) (finding impasse after five bargaining sessions); Prentice-Hall Co., 306 NLRB 31 (1992) (finding impasse after eight bargaining sessions).

The severance issue was *the* essential issue between the parties because the closure of the Hotel put bargaining unit employees out of work and in need of the generous severance payment offered by the Hotel in the absence of any contractual obligation to do so. Even a single critical issue that is important to the negotiation can be the basis of a deadlock.⁷⁴ Though the Union insisted on negotiating over other issues wrapped up in a renewed collective bargaining agreement, this did not change the fact that the parties had clearly reached impasse on the severance. A party has to actually offer a substantial change in its position to break an impasse and, in this case, neither party did so after April 9, 2010.⁷⁵

Judging the bargaining history between parties is an intensely fact-driven determination. There is no uniform analysis for examining a bargaining history, but there are ample Board examples to help contextualize this factor. Among other things, the Board takes into consideration when parties violate negotiation ground rules in determining the existence of an impasse.⁷⁶ Here, it was Local 11 that did not abide by the ground rules set in place for the “off-the-record” negotiations taking place in New York.⁷⁷ Indeed, Local 11 argued that Hotel Bel-Air should be bound by the proposals made in the off-the-record discussions, while it actively disavowed any binding effect from proposals made by NYHTC.⁷⁸

⁷⁴ See e.g., Taft Broadcasting Co., *supra* at 478 (“[A]n impasse is no less an impasse because the parties were closer to agreement than previously, and a deadlock is still a deadlock whether produced by one or a number of significant and unresolved differences in positions.”)

⁷⁵ Retlaw Broad. Co., 324 NLRB 1148 (1997)

⁷⁶ See E. I. Dupont De Nemours and Co., 303 NLRB 631, 632 (1991) (holding that a party broke the negotiation ground rules regarding topics of negotiation, which resulted in a finding that an impasse did not exist.)

⁷⁷ See Decision, p. 3, lns. 45-47

⁷⁸ Tr. pp. 284, 593, and 596

Another relevant factor is the overall progress made on the critical issues over a number of bargaining sessions.⁷⁹ Sometimes the Board will find impasse after only six (6) bargaining sessions involving critical issues, but sometimes the Board will not find impasse even after seventeen bargaining sessions involving the same issues.⁸⁰

Here, it is abundantly clear that after nearly a year of bargaining, Local 11 sought to avoid any agreement on severance by making proposals it knew would not be accepted. The Union had experienced negotiators at the table, but did not make significant progress on these critical issues, despite considerable movement from the Hotel. Local 11 even filed an unfair labor practice charge against the Hotel alleging that an impasse had been reached as of October, 2009.⁸¹

Subsequent negotiations remained deadlocked on the issue of severance pay, Local 11's demand for a "me too" collective bargaining agreement,⁸² and the issue of "guaranteed" recall rights. The fact that the Union did not request another bargaining session or even respond to the Hotel's June 25, 2010 request for information proves that the Union was unwilling to make meaningful concessions that addressed the Hotel's severance pay obligations and concerns.⁸³

⁷⁹ CalMat Co., 331 NLRB 1084, 1099 (2000) (finding that impasse existed after parties made no significant progress on critical topics after seven months and ten bargaining sessions)

⁸⁰ Bachall Steel & Pipe, 287 NLRB 1257, 1262 (1988) (finding impasse after six sessions of bargaining when the parties could not agree on critical topics); Sierra Publ'g Co., 291 NLRB 552, 554 (1988) (holding that after seventeen bargaining sessions the parties were still not at impasse due to a failure to fully discuss the issue on which impasse was claimed)

⁸¹ Tr., pp. 292-293 and 639-640

⁸² Local 11 never once submitted a proposal that did not demand the Hotel assent to unknown terms that other hotels might negotiate in the future. (See, e.g., Tr. 293). The Hotel was equally consistent in rejecting these demands.

⁸³ McAllister Bros., Inc., 312 NLRB 1121, 1122 (1993) (failure of parties to meet four months after final session supported a finding of impasse); Providence Med. Ctr., 243 NLRB 714, 731 (1979) (impasse proven by the fact that parties failed for 6 to 7 weeks to hold another bargaining meeting)

The bargaining history between the Hotel and Union illustrates just how immovable the parties' positions remained with respect to the issue of severance by April 9, 2010. In other words, the parties were at impasse.

Finally, the parties both understood that the Hotel was not planning to provide any more money for severance. Mr. Preonas and Ms. Mansoorian remember their conversation after negotiations between the Union and the Hotel on May 6.⁸⁴ The “last, best, and final” position of the Hotel was clear on April 9, 2010 and remained unchanged on May 5 and 6, 2010. The parties were in clear disagreement over the terms of the severance provisions.

After nearly a year of bargaining, the Hotel reasonably believed that further negotiations after the failed May 6, 2010 session were futile. The parties were moving farther apart, not closer together. Local 11 continued to insist on the inclusion of an objectionable collective bargaining agreement alongside the severance payment, and Local 11 demanded severance terms far greater than the Hotel was willing to provide.⁸⁵ Similarly, NYHTC’s June 22, 2010 “counterproposal” regressed from its position on June 9, 2010 and was communicated along with copies of letters from Local 11 to The Beverly Hills Hotel (a separate affiliated hotel), which stated that Local 11 intended to organize the employees of The Beverly Hills Hotel pursuant to Section 2(B) of the expired collective bargaining agreement between Local 11 and the Hotel Bel-Air. Notably, this was a significant departure from NYHTC’s commitment that this section would not be applied to the Beverly Hills Hotel.⁸⁶ In other words, not only were the parties at impasse, but the Union once again took positions directly inconsistent with the informal proposals made by the NYHTC to the Palace representatives in New York.

⁸⁴ Tr., p. 615-619

⁸⁵ Tr., pp. 337-339 and 618

⁸⁶ See GC Ex. 35(b)

Exception No. 6: The ALJ's decision is incorrectly based on whether the parties declared an impasse. This is contrary to controlling law which holds that the parties' declaration of impasse is immaterial to whether an impasse has actually been reached.

The ALJ's decision incorrectly relies on his finding that that neither party "declared impasse" in June or July 2010, and therefore, according to the ALJ, there was no impasse.⁸⁷ This finding and conclusion not only misconstrues the facts, but also misapplies the law.

First, the ALJ's belief that neither party declared impasse in June or July, 2010 ignores the Hotel's clear declaration of impasse on April 9, 2010, and ignores the fact that Local 11 ceased communicating with the Hotel after the failed negotiations on May 6, 2010. That neither party shouted a renewed declaration of impasse in June or July misses the point – the Hotel had declared impasse just weeks before, and the parties were no longer communicating by June 2010. The fact that neither party broke the silence to reaffirm that which had already been declared is irrelevant.

Second, contrary to the ALJ's analysis, a party's decision to officially declare impasse, or to refrain from doing so, is not determinative of whether a true impasse actually exists.⁸⁸ A party's use of the word "impasse" is not considered a binding determination of impasse.⁸⁹ "The use of words like 'impasse' or 'deadlock' by the parties, even relating to overall issues...are legal conclusions not binding on the Board."⁹⁰ Therefore, the ALJ's suggestion that there was no bargaining impasse because neither party "declared" impasse in June or July 2010 is not supported by the Board law.

⁸⁷ Decision, p. 7, ln. 47

⁸⁸ Decision, p. 7, ln. 47

⁸⁹ Erie Brush & Manufacturing Corp., 2011 NLRB Lexis 424, *12 (Aug. 9, 2011)

⁹⁰ PRC Recording, 280 NLRB 615, 635 (1986)

The Hotel made its last, best and final severance offer on April 9, 2010 and reiterated that same severance offer by letter April 12, 2010. The Hotel then extended the deadline on its offer to May 6, 2010 at the request of NYHTC. Local 11 never accepted that offer, and never made any subsequent binding proposals on the issue of severance. Accordingly, the ALJ erred when he found that impasse could not result simply because an impasse was not declared during the off-the-record discussions during June and July 2010.

Exception No. 7: The ALJ erred in holding that the Hotel took an illegal unilateral action by implementing its last, best, and final offer on July 7, 2010. The record indicates that the parties were at impasse, and when at impasse an employer is permitted to implement its last, best, and final offer without committing an unfair labor practice.

The record reveals that Local 11 did not make any severance proposals or even communicate with the Hotel in on-the-record severance negotiations after April 9, 2010, other than to receive a letter on April 12, 2010 reiterating the Hotel's final severance offer. As discussed above, all discussions and negotiations thereafter were off-the-record and directed by NYHTC and representatives of the Palace in New York. On July 7, 2010, more than eleven months after it first offered to bargain over the effects of the closure, the Hotel wrote to Local 11 stating that it was implementing its April 9, 2010 “last, best, and final” offer. Since implementation, roughly 80% of the pre-closure employees voluntarily accepted the Hotel’s severance offer.⁹¹

The record demonstrates that the real parties in interest – Local 11 and the Hotel Bel-Air – were still at impasse on July 7, 2010. Although Local 11 claimed at the hearing that it considered the off-the-record discussions in New York to be binding, its actions at the time belied this self-serving assertion. Indeed, Local 11 repeatedly disavowed any progress made

⁹¹ Tr., p. 240

during the off-the-record discussions by the respective New York facilitators.⁹² Furthermore, the Union showed only a token willingness to negotiate in the first place by consistently insisting on the same rejected terms multiple times.⁹³

According to Taft Broadcasting Co., an employer's unilateral action of implementing reasonable pre-impasse proposals is not illegal if the parties bargained to impasse in good faith prior to implementation.⁹⁴ The Hotel bargained in good faith and the parties were at impasse starting April 9, 2010 and continuing through July 7, 2010, when the Hotel implemented its last, best, and final offer. However, even if the parties were not at impasse during the implementation of July 7, 2010, the Hotel's actions did not violate the law. In order to constitute an illegal unilateral action three requirements must be met: 1) the employer was communicating directly with union-represented employees; 2) for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining, and 3) such communication was made without notice to, or to the exclusion of the union.⁹⁵ Insufficient evidence exists in this record to satisfy these three elements.

At no point did the Hotel take any action that excluded the Union from the conversation. The Union cannot claim that they did not know the Hotel was going to implement its last, best, and final offer on July 7, 2010 because the Hotel explicitly informed them of such. During the April 9, 2010 meeting, the Hotel brought the checks that were to be distributed to the pre-closure employees and showed them to the Union negotiators. Not only did the Hotel inform the Union of the Hotel's intended unilateral action, but copies of all documents sent to the pre-closure

⁹² Tr., pp. 284, 593, 596

⁹³ Tr., p. 278

⁹⁴ 163 NLRB 475 (1967)

⁹⁵ Southern California Gas Co., 316 NLRB 979, 982 (1995)

employees were delivered to the Union.⁹⁶ The Union knew exactly what was given to its former members, and the Union chose not to direct its former members to reject these severance agreements. As a matter of fact, the Union never once contacted the Hotel after its implementation in an effort to further negotiate the issue. Instead the Union chose to file an Unfair Labor Practice charge.

The Union claimed in its post hearing brief, and the ALJ erroneously agreed, that the Hotel improperly excluded the Union when it sent the *2009 Separation Pay Plan for Represented Employees* and the *Waiver and Release Agreement* to the pre-closure employees because the *Waiver and Release Agreement* did not include references to the Union.⁹⁷ It is not uncommon, and indeed it is not required, that every document passing from the Hotel to, in this case, former employees, go through or mention the Union.

In fact, it is not even forbidden for employers to communicate directly with active bargaining unit members while negotiations between the employer and the union are occurring, so long as the employer does not communicate anything that is coercive.⁹⁸ Such communications can include statements regarding “the status of negotiations . . . proposals previously made to the union . . . [and] its version of a breakdown.”⁹⁹ There was nothing coercive in the Hotel’s *2009 Separation Pay Plan for Represented Employees* and the *Waiver and Release Agreement*.¹⁰⁰ As the General Counsel stated in its post-hearing brief, there was no mention of

⁹⁶ Permanente Medical Group, Inc., 332 NLRB 1143, 1144 (2000) (The Board held that an employer did not exclude the Union in its direct dealing with members of the bargaining unit because the employer kept the Union informed).

⁹⁷ General Counsel’s Post-hearing Brief [hereinafter referred to as “GC’s Brief”], pp. 40-41, and Decision, p. 9.

⁹⁸ Wantagh Auto Sales, Inc., 177 NLRB 150, 154 (1969).

⁹⁹ Proctor & Gamble Mfg. Co., 160 NLRB 334, 340 (1966).

¹⁰⁰ General Counsel’s Exhibit 37, pp. 4-12.

the Union in the *Waiver and Release Agreement*, so there were no slurs, insults, disparaging remarks, or anything else negative directed towards the Union in an effort to drive a wedge between the pre-closure employees and their former bargaining representative.¹⁰¹ Furthermore, the Hotel gave clear written notice to the Union that it was contacting the pre-closure employees directly in order to implement its final severance offer.¹⁰² If the Union truly felt that it was being excluded, and that the Hotel's final offer was not fair, it could have told its former members not to agree to the terms of the severance proposal. Instead the Union remained silent while more than 80% voluntarily accepted the deal.

Furthermore, it would have been legally inconsistent to take unilateral action as a result of impasse, yet continue negotiate with the Union on the terms of the unilateral action at the same time. Those two actions preclude one another. Either an employer is allowed to follow Board precedent and take unilateral action when impasse is reached, which in this case meant conveying its final offer directly to pre-closure employees, or negotiate with the Union concerning the communication and content of that offer. There was nothing left to negotiate, and so the Hotel was within its rights to send its offers directly to the pre-closure employees.

Exception No. 8: The ALJ erroneously held information regarding the amount of time Local 11 spent negotiating collective bargaining agreements with other hotels as irrelevant. Such information was indeed relevant because it would show Local 11's lack of good faith bargaining, its intent to extend the length of time spent negotiating with Hotel Bel-Air, and the existence of impasse.

Karine Mansoorian, the chief negotiator for Local 11, was present for several of the on and off-the-record discussion sessions.¹⁰³ Ms. Mansoorian testified that she wanted the Hotel Bel-Air to adopt a collective bargaining agreement that mirrored agreements made by other

¹⁰¹GC's Brief, pp. 42

¹⁰²GC Ex. 37

¹⁰³Tr., p. 184

Hotels with other employees represented by Local 11 in order to maintain a city wide standard.¹⁰⁴ When Mr. Preonas questioned Ms. Mansoorian as to the status of the collective bargaining agreements with other hotels and to the time frame involved in the negotiations, there was an objection on the grounds of relevance, which was sustained by the ALJ,¹⁰⁵ stating that he did not “want to get into the negotiations with the other hotels.”¹⁰⁶

To be admissible, evidence must be factually relevant and not fall under one of the categories of evidence that are expressly deemed to be inadmissible.¹⁰⁷ The Federal Rules of Evidence define relevance as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”¹⁰⁸ Proof of common practice or motive is relevant to a consideration of bargaining irregularities.

Evidence of comparable bargaining situations is relevant to the ALJ’s consideration regarding the establishment of impasse.¹⁰⁹ The matter before the ALJ was the existence of a properly established bargaining impasse over the effects of Hotel Bel-Air’s closure. Introduction of evidence of the Union’s common negotiating practice at other nearby hotels during the same period of time was relevant to prove the strategy, practice, and motive of the Union’s behavior at the bargaining table. The ALJ’s decision to exclude this evidence limited the Hotel’s ability to present the Union’s established practice of obstructionist negotiations, often stringing out the negotiations at other Los Angeles hotels for more than a year. The goal of Mr. Preonas’

¹⁰⁴ Tr., p. 260

¹⁰⁵ Tr., p. 262

¹⁰⁶ Tr., p. 262

¹⁰⁷ Fed. R. Evid. 401; Stroehmann Bros. Co., 268 NLRB 1360, 1361 (1984)

¹⁰⁸ Fed. R. Evid. 401

¹⁰⁹ Bottom Line Enterprises, 302 NLRB 373, 378 (1991)

questioning was not to “get into” the substance of negotiations with other hotels, but was instead designed to illustrate Local 11’s relevant efforts to artificially extend other negotiations in bad faith. This strategy was similar to the Local 11’s actions in this case of repeatedly presenting severance proposals it fully expected the Hotel to reject,¹¹⁰ including proposals that would pay employees more during the closure than they would have earned as full-time employees,¹¹¹ and renegeing on tentative understandings reached between the New York facilitators.¹¹²

In denying the Hotel the opportunity to further explore evidence of Local 11’s bad faith tactics at other hotels, the ALJ precluded the Hotel from presenting relevant, timely evidence that would have supported the conclusion that impasse had, in fact, been reached. Therefore, the ALJ improperly excluded this evidence from the record.¹¹³

Exception No. 9. The ALJ erred by allowing inadmissible double-hearsay testimony from Richard Maroko regarding what Peter Ward said Arch Stokes said about Christopher Cowdray.

Mr. Maroko testified that on June 4, 2010, Peter Ward spoke to members of NYHTC at the New York Palace Hotel. Maroko testified that Ward relayed to the Palace employees what Stokes allegedly told Ward about Cowdray.¹¹⁴ Mr. Preonas objected on hearsay grounds and moved to strike Maroko’s hearsay testimony.¹¹⁵ The General Counsel’s response was that the statements were not being offered for the truth of the matter asserted but instead to show what

¹¹⁰ Tr., p. 278

¹¹¹ Tr., pp. 265-266 and 564

¹¹² Tr., pp. 284, 593 and 596

¹¹³ Decision p. 8

¹¹⁴ Tr., p. 54

¹¹⁵ Tr., p. 54

Ward said to Palace employees.¹¹⁶ The ALJ ruled that what was said to Palace employees was relevant and therefore admissible.¹¹⁷

Both the General Counsel and the ALJ seem to miss the fact that admitting hearsay to prove what was said at the Palace meeting while simultaneously not offering the Palace hearsay statements to prove the truth of the matter asserted are mutually exclusive.¹¹⁸ Also, Maroko's statements are an example of double hearsay, which requires a hearsay exception for each individual hearsay statement.¹¹⁹ Furthermore, there is no relevance hearsay exception. A statement may be relevant but still inadmissible hearsay if the statement is offered for the truth of the matter asserted by someone other than the testifying witness. Accordingly, this evidence should have been excluded, and its introduction at the hearing unduly prejudiced the Hotel's position.

¹¹⁶ Tr., p. 54-55

¹¹⁷ Tr., p. 55

¹¹⁸ In re Scott, 29 Cal 4th 783 (Cal. 2003)

¹¹⁹ People v. Arias, 13 Cal. 4th 92 (Cal. 1996)

This 27th day of September 2011.

STOKES ROBERTS & WAGNER, ALC

A handwritten signature in black ink, appearing to be 'A. Y. Stokes', written in a cursive style.

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

HOTEL BEL-AIR)	
)	
Employer,)	
)	NLRB Case No. 31-CA-29841
)	
)	
)	
UNITE HERE, LOCAL 11)	
)	
Charging Party)	

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below I served a copy of Employer's Exceptions to Administrative Law Judge's Decision, by the NLRB's electronic e-file system and via e-mail to:

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This 27st day of September, 2011.



Peter G. Fischer