

**Hotel Bel-Air and UNITE HERE Local 11.** Case 31–  
CA–029841

September 27, 2012

**DECISION AND ORDER**

BY CHAIRMAN PEARCE AND MEMBERS HAYES  
AND BLOCK

On August 12, 2011, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief. The Acting General Counsel filed cross-exceptions and a supporting brief as well as a brief answering the Respondent’s exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings,<sup>1</sup> findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.<sup>2</sup>

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<sup>1</sup> The Respondent argues that the judge improperly excluded, as irrelevant, its proffered evidence concerning UNITE HERE Local 11’s negotiations with other Los Angeles hotels. According to the Respondent, such evidence would have supported a finding that the parties had reached a bargaining impasse by showing that Local 11 had a practice of “artificially extend[ing] negotiations in bad faith.” In its brief to the Board, however, the Respondent merely asserts that it was prejudiced because it was not permitted to question Karine Mansoorian, the chief negotiator for Local 11, as to the status of Local 11’s negotiations for collective-bargaining agreements with other hotels and that Mansoorian’s testimony on this point would establish that Local 11 “often [strung] out the negotiations at other Los Angeles hotels for more than a year.” We cannot conclude that the Respondent has been prejudiced by the judge’s exclusion of this evidence. As an initial matter, evidence that Local 11 bargained for more than a year before reaching agreement with other hotels and/or that it was seeking a city wide standard does not establish bad faith. Moreover, even assuming Local 11 failed to bargain in good faith in other negotiations, that evidence would not be probative of whether the parties were at impasse in these negotiations.

The Respondent also argues that the judge erred by admitting testimony by UNITE HERE Local 6 representative Richard Maroko regarding out-of-court statements by another Local 6 representative, Business Agent Peter Ward. Those statements, in turn, allegedly related to other out-of-court statements by Arch Stokes, one of the Respondent’s attorneys. Contrary to the Respondent, this testimony was not admitted for the truth of the matters asserted and thus was not hearsay. Fed. R. Evid. 801(c); *Hebert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993). Accordingly, the judge did not err in admitting it.

<sup>2</sup> We shall modify the judge’s recommended Order to conform to the violations found and to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010), enf. 656 F.3d 860 (9th Cir. 2011). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice. In ordering the Respondent to bargain concerning the effects of its temporary closure on unit employees, we do not pass on its contention that it has no obligation to bargain with Local 11 over a successor to the collective-bargaining agreement that expired on September 30, 2009.

1. We adopt the judge’s finding that the parties were not at impasse on July 7, 2010, when the Respondent unilaterally implemented its April 9, 2010 “last, best, and final offer” regarding severance pay for unit employees laid off during a 2-year closure for renovations of its Los Angeles hotel.<sup>3</sup> As the judge found, the parties significantly narrowed their differences during negotiations before and after April 9, including certain “off the record” exchanges between the Respondent’s New York representatives and UNITE HERE Local 6 representatives that continued well into June. Contrary to the Respondent’s contention, those exchanges are properly considered in determining whether the parties were at impasse on July 7. Even assuming the parties had reached impasse on April 9, as the Respondent contends, “[a]nything that creates a new possibility of fruitful discussion breaks an impasse,” *Pavilions at Forrestal*, 353 NLRB 540, 540 (2008), reaffirmed and incorporated by reference 356 NLRB 5 (2010), enf. sub nom. *Atrium of Princeton, LLC v. NLRB*, 684 F.3d 1310 (D.C. Cir. 2012), including informal discussions that are “something less than negotiations,” *Comau, Inc.*, 356 NLRB 75, 83 fn. 20 (2010), enf. denied on other grounds 671 F.3d 1232 (D.C. Cir. 2012).<sup>4</sup>

2. We adopt the judge’s finding that the Respondent violated Section 8(a)(5) and (1) by dealing directly with unit employees regarding severance. In addition to the factors cited by the judge, we note that the Respondent, without having bargained to valid impasse, sent its July 7 letter offering severance terms directly to all bargaining unit employees, sidestepping the Union. In addition, the letter began by stating that the Respondent was “very happy to give you [the employee] the opportunity to decide for yourself whether you want to accept the” offer of severance pay, and that it was “sorry it has taken us so long to finally be able to give you this opportunity.” These statements further support our finding that the Respondent communicated directly with unit employees for the purpose of establishing or changing wages, hours, or terms and conditions of employment without notice to, or to the exclusion of, the Union, in violation of Section 8(a)(5). See *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000).

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<sup>3</sup> Unless otherwise noted, all dates are in 2010.

<sup>4</sup> *Inner City Broadcasting*, 281 NLRB 1210 (1986), cited by the Respondent, is not to the contrary. The issue there was whether the union had timely accepted the employer’s final contract offer. Although the parties held off-the-record discussions on certain issues, no party contended that those discussions modified the deadline for acceptance. That case did not present an impasse issue, and it sheds no light on whether off-the-record discussions may be considered in determining whether the parties in this case were at impasse on July 7.

The Respondent contends that it did not bypass the Union because the Union no longer represented the unit employees on July 7, when the Respondent sent them its severance offer. The contention is meritless. *Sterling Processing Corp.*, 291 NLRB 208 (1988), upon which the Respondent chiefly relies, is inapposite. In *Sterling*, the employer closed its facility and discharged its employees, and the Board found that the former employees had no reasonable expectation of reemployment. Nineteen months later, the employer reopened the facility. Before doing so, it unilaterally modified its preclosure wages and working conditions. The Board found that the employer did not thereby violate Section 8(a)(5) because at the time it acted unilaterally, it had no employees, and thus there was nobody for the union to represent. Here, by contrast, the unit employees were laid off, not discharged. Moreover, they retained a reasonable expectation of recall from layoff. The Respondent's July 7 severance offer demonstrated as much, even assuming contemplated changes in the hotel's business model made it less than certain that the Respondent would recall all of them. Under the terms of that offer, employees who accepted a severance payment *waived their recall rights*. Thus, the Respondent's own offer took it for granted that unit employees had some expectation of recall. See *Rockwood Energy & Mineral Corp.*, 299 NLRB 1136, 1139 fn. 11 (1990), *enfd.* 942 F.2d 169 (3d Cir. 1991) (finding that lengthy suspension of production did not relieve employer of its bargaining obligation where laid-off employees had "some expectation of recall," and distinguishing *Sterling*, *supra*).<sup>5</sup>

<sup>5</sup> Citing a provision of its expired collective-bargaining agreement with the Union, the Respondent further contends that any "contractual" rights the Union possessed to bargain over severance had expired before the July 7 offers were sent. That is irrelevant. What matters here is whether the Union remained the unit employees' *statutory* bargaining representative at the time the offers were sent. As explained above, we find that it did.

## ORDER<sup>6</sup>

The National Labor Relations Board orders that the Respondent, Hotel Bel-Air, Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively by unilaterally implementing its April 9, 2010 severance, waiver and release offer.

(b) Dealing directly with bargaining unit employees regarding severance, waiver and release terms.

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

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

(a) At the Union's request, rescind the waiver and release agreements signed by individual bargaining unit employees.

(b) Bargain with UNITE HERE Local 11 as the exclusive collective-bargaining representative of the employees in the following appropriate unit regarding the effects on bargaining unit employees of the temporary shutdown of the hotel for renovation and, if an understanding is reached, embody the understanding in a signed agreement:

The appropriate unit is described in section 3, A of the August 16, 2006 to September 30, 2009 agreement between Local 11 and the Respondent.

<sup>6</sup> At least 179 of the approximately 220 unit employees accepted the Respondent's July 7 offer, in which they agreed to waive any right to recall from layoff in exchange for severance pay. We will order the Respondent, at the Union's request, to rescind the waiver agreements. The Acting General Counsel asks us additionally to order the Respondent not to seek to recoup the severance payments. We decline to so order at this time, without prejudice to the Acting General Counsel's (or Charging Party's) right to request such a remedy in a subsequent related unfair labor practice proceeding. See *Webco Industries*, 337 NLRB 361 (2001). Our Order requires the Respondent to bargain with the Union in good faith concerning the effects of the hotel's 2-year closure. At this juncture, we think it proper to leave the issue of severance payments for the parties to address in those negotiations as they see fit.

## HOTEL BEL-AIR

(c) Within 14 days after service by the Region, post at its Los Angeles, California facility copies of the attached notice marked "Appendix."<sup>7</sup> Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 7, 2010.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

## APPENDIX

## NOTICE TO EMPLOYEES

## POSTED BY ORDER OF THE

## NATIONAL LABOR RELATIONS BOARD

## An Agency of the United States Government

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

## FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively by unilaterally implementing our April 9, 2010 severance, waiver and release offer.

<sup>7</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT deal directly with bargaining unit employees regarding severance, waiver and release terms.

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

WE WILL, at the request of UNITE HERE Local 11, rescind the waiver and release agreements signed by individual bargaining unit employees.

WE WILL bargain with UNITE HERE Local 11 as the exclusive collective-bargaining representative of the employees in the following appropriate unit regarding the effects on bargaining unit employees of the temporary shutdown of the hotel for renovations and, if an understanding is reached, embody the understanding in a signed agreement:

The appropriate unit is described in section 3, A of our August 16, 2006, to September 30, 2009 collective-bargaining agreement with UNITE HERE Local 11.

## HOTEL BEL-AIR

*Steven Wyllie and Nicole Pereira*, for the General Counsel.

*George E. Preonas*, of Los Angeles, California, and *William J. Dritsas (Seyfarth Shaw, LLP)*, of San Francisco, California for the Respondent.

*Kristen L. Martin (Davis, Cowell & Bowe, LLP)*, of San Francisco, California, for the Union.

## DECISION

## STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial in Los Angeles, California, on April 25-28, 2011. On July 12, 2010, UNITE HERE (the Union) filed the charge in Case 31-CA-29841 alleging that Hotel Bel-Air (Respondent) committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). On October 28, 2010, the Acting Regional Director for Region 31 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(5) and (1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties, I make the following.

## FINDINGS OF FACT

## I. JURISDICTION

The Respondent corporation, with an office and principal place of business in Los Angeles, California, has been engaged in the operation of a hotel providing food and lodgings. In the

12 months prior to October 1, 2009, Respondent, in conducting its business operations, derived gross revenues in excess of \$500,000. Further, Respondent received goods and services valued in excess of \$50,000 directly from points outside the State of California. Accordingly, Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

Respondent operates an historic five star hotel that has had a long standing collective-bargaining relationship with the Union. The Respondent and the Union have been party to a series of collective-bargaining agreements, the most recent of which was effective by its terms from April 16, 2006, to September 30, 2009.

On July 24, 2009, the Union notified Respondent's general manager of its intent to reopen the contract to bargain for a successor agreement. On July 31, Respondent's attorney responded by notifying the Union that Respondent would be closing on September 30, 2009, and offered to bargain over "the effects of this closure on bargaining unit employees, and any other terms and conditions you wish to discuss." The purpose of the closure was to perform major construction and renovation expected to last 18 to 24 months. As of the date of the hearing, the hotel had not reopened.

The Union sought help in its negotiations from UNITE HERE local 6 in New York because of its relationship with the New York Palace Hotel, a hotel affiliated with Respondent. Between August 25 and October 1, 2009, the parties met on six occasions. The Union was represented by Karine Mansoorian and Respondent was represented by attorney George Preonas. From the inception of bargaining, the Union sought to obtain a successor agreement that secures for employees guaranteed recall rights, continued healthcare coverage, and compensation for the loss of work during the temporary shutdown of the hotel. The Union's initial proposal pertaining to severance pay and recall rights were all encompassed in an overall proposal for a successor collective-bargaining agreement. In contrast, the hotel sought to bargain over the effects of the temporary closure before addressing a successor bargaining agreement.

On September 18, 2009, Respondent made its first "last, best and final offer." Respondent proposed 2 weeks of severance pay per year of service for employees who sign a waiver and release. In addition Respondent proposed a \$900 payment that employees could use for continued health care coverage for those employees who signed a waiver and release.

On September 21, 2009, the Union filed an unfair labor practice charge alleging that Respondent failed and refused to negotiate a successor collective-bargaining agreement. This charge was later withdrawn.

Around late September, Mansoorian and Preonas learned that Peter Ward of Local 6 and Chris Cowdray of Respondent's higher management, had reached some overarching principles for a deal between the parties. Accordingly, Mansoorian and Preonas met outside the presence of the Union's employee bargaining committee on September 29 to discuss employee

rights upon the hotel's reopening. Mansoorian took the position of guaranteed recall while Preonas maintained that employees who declined severance pay would be offered rehire, if qualified.

The parties met again on October 1. Respondent presented the Union with a written proposal regarding rehire which mirrored what he had proposed to Mansoorian on September 29. Respondent continued to propose 2 weeks of severance pay for employees who signed a waiver and release and \$900 for those employees to pay for health coverage. Mansoorian objected to the term "if qualified" on Preonas' rehire offer and proposed that employees have a guaranteed right to recall.

In October, Peter Ward of Local 6 and Chris Cowdray, CEO of Respondent's management group exchanged letters reflecting principles for an agreement. The three principles were:

1. Employees will be offered severance. *If accepted they would have no right to recall* when the hotel reopens.
2. Employees who choose not to take severance would be *offered their jobs back* provided these jobs still exist (This is not clear because of the renovation and the restructuring of the business model);
3. Employees for whom no job is available, severance will be paid.

By letter dated October 7, 2009, the Union provided a counter proposal offering the same terms for a successor bargaining agreement. The Union proposed 3 weeks severance pay per year of service for employees who wish to return to their jobs. For employees who did not wish to return, the Union proposed 6 weeks of severance pay per year of service. Finally, the Union proposed 1 year of healthcare coverage through the Union's Welfare Fund. By letter dated October 15, Respondent rejected the Union's proposal and held to its final offer.

On November 2, Mansoorian wrote Preonas complaining that Respondent had rejected every union proposal regarding a successor agreement and had made no proposals. By letter dated November 4, Preonas withdrew Respondent's final offer and included a new separation pay proposal which included a new waiver and release.<sup>1</sup> Preonas wrote that Respondent wished to negotiate an agreement over the effects of the closure first. He indicated that the hotel would be closed for 2 years and that there was no urgency to reach an agreement for 2011.

On November 24, 2009, the Union filed an unfair labor practice charge alleging that the Respondent had insisted to impasse on permissive subjects of bargaining. In its response to the charge, Respondent contended that there was no impasse. The charge was ultimately withdrawn or dismissed.

On February 4 and 5, 2010, the parties met in New York. The Union was represented by Mansoorian, Tom Walsh, the Union's president, Peter Ward of Local 6, and Richard Maroko, Local 6's general counsel. Respondent was represented by Preonas, Arch Stokes, attorney and Peter Fisher, attorney. Tim Lee, Respondent's general manager was also present. The parties agreed that these sessions were "off the record." The parties agreed that there would be no need to take notes or have

<sup>1</sup> Respondent's waiver agreement had been a subject of a charge. Preonas amended the waiver language to avoid any legal problems.

## HOTEL BEL-AIR

any formal record of the meetings. There is disagreement between the parties as to the meaning of "off the record." I accept the Respondent's version that off the record meant that the parties could freely discuss settlement but that the parties were not bound by the discussions and that they were not officially negotiations.

During the February 4 and 5 sessions, the parties were able to reach some tentative agreements regarding a collective-bargaining agreement. Regarding the effects of the closure, Respondent offered first preference for rehire and, if qualified, offered an available position, for employees who wish to return to their jobs. For employees who do not wish to return to their jobs, 2 weeks of severance pay per year of service is offered for those who sign a waiver and release. Finally, Respondent offered \$900 pay that employees could choose to use for continued coverage for those who sign a waiver and release.

On February 10, the parties met in Los Angeles in the presence of the employee bargaining committee. Here, the Union proposed 2.5 weeks of severance pay for employees who want to return to their jobs. For employees who do not wish to return to their jobs, 5 weeks of severance pay per year of service. Finally the Union proposed 14 months of healthcare coverage through the Welfare Fund. The Union's proposal was greater than that proposed at the "off the record" meetings, thus indicating that the Respondent's understanding of "off the record" was correct.

On March 29, 2009, Mansoorian emailed Preonas regarding Respondent's February 10 proposals. The parties met again on April 9 at the Union's offices. The employee bargaining committee was present. The Respondent increased its offer of severance pay from 2 to 2.5 weeks' pay per year of service. Preonas came to the meeting with prepared checks that Respondent was willing to distribute that day. Mansoorian informed Preonas that she did not believe that was Respondent's final offer.

By letter dated April 12, 2010, Respondent's attorney Shartin wrote that Respondent had rejected the Union's counteroffer and resubmitted Respondent's April 9 "last, best and final offer." Shartin stated that if the offer was not accepted by April 16, the Respondent would deem negotiations at an impasse and would act accordingly. Ward of Local 6 called attorney Stokes and requested that the deadline be extended as the parties had negotiation sessions scheduled for May 5 and 6. By letter dated April 16, Respondent extended the deadline to May 6, 2010.

The parties met for off the record discussions on May 5, 6, and 21. The May 5 and 6 sessions were held in Los Angeles. The May 5 meeting was brief and the parties discussed the proposed bargaining agreement.

Respondent offered a proposed collective-bargaining agreement. On May 6, attorney Stokes shuttled between Respondent's negotiators and the union representatives. For the first time, Respondent proposed making contributions to the Welfare Fund for the period January 1, 2011, until the reopening of the hotel. The Union proposed right to recall for employees who want to return. The Union also proposed 3 weeks of severance per year of service for those employees who do not wish to return to their jobs. Finally, the Union proposed contribu-

tions to the Welfare Fund for the period July 2010 until the reopening of the hotel.

On May 21, the parties met at Local 6's offices in New York. The parties discussed proposals for a successor agreement. There were no discussions regarding severance and recall.

On June 4, 2010, David Rothfeld, attorney,<sup>2</sup> sent Ward a proposal which made steps toward an agreement. The proposal provided recall rights for employees who want to return to their jobs, 3 weeks' severance pay per year of service for those employees who do wish to return to their jobs and healthcare contributions to the Welfare Fund for the period January 1, 2011 until the reopening of the hotel.

On June 4, Ward met with the employees of the New York Palace. Ward told the employees that Respondent had made insulting proposals. Later that day attorney Fischer wrote to Rothfeld to communicate to Ward that because of what Ward had said to employees at the Palace Hotel, Cowdray had withdrawn Rothfeld's proposal until Ward makes a public apology. The next day, Fischer wrote to Maroko demanding a public apology and withdrawing the proposal until Ward makes a public apology.

On June 7, Ward informed Cowdray the remarks were aimed at Stokes and not Cowdray. Ward expressed the view that an agreement could be reached in a few hours.

On June 9, the parties met at Local 6's offices in another "off the record" meeting. Stokes and Preonas participated by telephone. Maroko asked that the June 4 proposal be reinstated. Stokes declined to do so stating that he did not have the authority to do so. After Maroko raised a question about the date required for severance, Stokes stated that employees employed as of January 1, 2009, were eligible for severance pay. Later that day Maroko emailed Respondent's attorneys "the union's counterproposal to the hotel's June 4 2010 proposal."

On June 10, attorney Fischer emailed Maroko "our counter proposal of 6/10/10." The counter proposal was made with two alternatives:

- 1) Since the Union is tethering its agreement on the severance to the agreement on a CBA without knowing how many employees might accept, Hotel Bel-Air offers 2.5 weeks per year of service and the CBA language in the attached proposal. We agreed during yesterday's negotiations that the severance package would extend to those employees who were laid off between January 1, 2009 and September 30, 2009, due to the Hotel's renovation. Without knowing how many employees might accept the severance offer, the employer must plan for the possibility that a small percentage of the current workforce would accept, and therefore needs to have more flexibility in the CBA to deal with some historic operational concerns that have developed with the current workforce. The medical coverage will begin on January 2011 and last until the hotel re-opens so long as there is an agreement in place.
- 2) In the alternative, if the Union chooses to agree to present the severance offer to the employees immediately and sepa-

<sup>2</sup> Ward had made a request of attorney Stokes that Rothfeld be brought into the negotiations.

rate from the bargaining over the CBA language, the employer will offer 3 weeks severance for every year of service. As discussed yesterday, an immediate presentation of this offer to the employees will result in quick determination of what percentage of the employees intend to accept the severance offer and therefore waive reinstatement. Depending on the percentage who accept, the employer may be willing to be more flexible on the CBA language in subsequent negotiations, which we are prepared to commence immediately after the severance offer is presented to the employees and their responses are ascertained.

3) A copy of a proposed successor agreement was attached.

On June 11, Fischer followed up with Maroko with an email concerning Respondent's latest counterproposal. Fischer invited the Union to make a counterproposal. Later that day, Maroko told Fischer that he needed to speak with Mansoorian before responding.

On June 21, the parties met at Local 6's offices in New York. The Union was represented by Ward and Maroko. Respondent was represented by Stokes, Rothfeld, Fischer, and Preonas (by telephone). The parties discussed terms of a successor agreement but did not discuss severance or recall.

The following day, Maroko sent an email to Rothfeld, which Rothfeld forwarded to Stokes, Preonas, Fischer, and Wagner. There was a 3-page attachment to the email. The first page consisted of nine items, the first of which stated "Adopt existing Bel-Air CBA, except as expressly modified herein." The next eight items consisted of modifications to the existing bargaining agreement.

The third page of the attachment consists of a 1-page agreement. It states that "the parties will continue to negotiate in good faith regarding changes, if any to the CBA." Finally the "agreement" contains four terms:

- 1) All employees employed by the Hotel on or after January of 2009, shall be offered recall to his/her former position or, if the position is unavailable, a substantially similar position.
- 2) Each employee may, in his/her sole discretion elect to receive severance pay in an amount equal to three (3) weeks pay for each year of continuous service with the Hotel in lieu of recall. Any employees accepting severance pay shall waive his/her recall rights and execute a general release [attached].
- 3) The Hotel shall make contributions to the Local 11 Welfare Fund beginning January 1, 2011, on behalf of employees who do not accept severance and continuing until the Hotel reopens, provided that any such employee is not then receiving coverage from another participating employer. Employees accepting recall shall not accrue benefits or seniority during the period from the closing of the Hotel for renovations until their recall.
- 4) This agreement is subject to ratification.

The Union intended this agreement to be a separate agreement from a successor bargaining agreement. Maroko testified that the intent was to accept the second option of Fischer's June 10 counteroffer. However, the email never separated the con-

tract demands from the alleged acceptance and the email never stated that the Union was making an acceptance. The email also attached a demand regarding another hotel.

On June 25, Preonas thanked Maroko for his June 22 proposal and asked several questions regarding the proposed contract. Maroko did not respond. However, on July 7, 2010 Respondent implemented its last, best, and final offer of April 9, 2010. Respondent sent each employee a cover letter, a severance plan document, and a personalized waiver and release form. After receiving the packet, approximately 179 employees signed the waiver and release forms and received severance pay. Preonas emailed the Union a copy of the severance packet but did not notify the Union in advance of his intent to mail the packet to employees.

#### Respondent's Defense

Respondent contends that the parties were at impasse on April 19, 2010, when it made its last, best, and final offer. It contends that all bargaining which took place thereafter was off the record. Respondent further contends that Fischer's off the record proposal of June 10 was never accepted by the Union. In this regard it states that in the June 21 bargaining, the Union was pursuing a successor agreement, the first option in the June 10 counter proposal. Further, Maroko's June 22 email was entitled "counter proposal" and included items not agreed to by Respondent. Accordingly, Respondent contends that it bargained to impasse over the effects of the closure and was entitled to implement its last, best, and final offer.

### III. ANALYSIS AND CONCLUSIONS

#### A. The Respondent Was Obligated to Bargain

The general rule is that when parties are engaged in negotiations for a new agreement, an employer's obligation to refrain from unilateral changes encompasses a duty to refrain from implementation unless and until an overall impasse has been reached on bargaining for the agreement as a whole. *Pleasantview Nursing Home*, 335 NLRB 96 (2001) citing *Bottom Line Enterprises*, 302 NLRB 373 (1991).

The Board considers negotiations to be in progress, and thus will find no genuine impasse to exist, until the parties are warranted in assuming that further bargaining would be futile or that there is "no realistic possibility that continuation of discussion . . . would be fruitful." *Saint-Gobain Abrasives, Inc.*, 343 NLRB 542, 556 (2004).

The existence of impasse is a factual determination that depends on a variety of factors, including the contemporaneous understanding of the parties as to the state of negotiations, the good faith of the parties, the importance of the disputed issues, the parties' bargaining history, and the length of their negotiations. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967).

The first issue to be decided is Respondent's contention that the off the record negotiations should not be considered in deciding whether the parties were at impasse. Respondent cites *Berbiglia, Inc.*, 233 NLRB 1476, 1495 (1977) for the proposition that "the parties must be able to formulate their positions and devise their strategies without fear of exposure." The holding was in the context of a subpoena for internal bargaining communications. I have found no case holding that off the

## HOTEL BEL-AIR

record negotiations, particularly written communications, are not part of negotiations. I will therefore, consider the written communications of June 2010 in deciding whether the parties were at impasse.

Impasse is a recurring feature in the bargaining process which is only a temporary deadlock or hiatus in negotiations, eventually broken in almost all cases through either a change of mind or the application of economic force. *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 412 (1982). Indeed, anything that creates a new possibility of fruitful discussion breaks an impasse.

The June proposals of the parties show a willingness to compromise. The Hotel made movement from its April 19 “last, best and final offer.” The Union’s June 22 counterproposal set forth Respondent’s offer regarding severance and recall rights. Even if Respondent did not understand the Union’s proposal to be an acceptance of its June 10 offer, there was clearly movement to break any purported impasse. Further, neither party claimed an impasse in June or July. Apparently, the only thing lacking was a clear indication from the Union that it was willing to agree to an agreement on the Hotel’s closure in the absence of agreement on a collective-bargaining agreement.

“Both parties must believe they are at the end of their rope.” *Larsdale, Inc.*, 310 NLRB 1317, 1318 (1993); *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1177 (5th Cir. 1982). See also *NLRB v. Powell Electrical Mfg.*, 906 F.2d 1007, 1011–1012 (5th Cir. 1990). In *Grinnell Fire Protection Systems Co.*, 328 NLRB 585 (1999), the Board concluded that the parties had not yet reached a legal impasse even though the employer asserted that it had reached its final position, as during the final session, the charging party-union “not only continued to declare its intention to be flexible, but demonstrated this throughout its dealings with the Respondent that day.” The Board stated:

Where as here, a party who has already made significant concessions indicates a willingness to compromise further, it would be both erroneous as a matter of law and unwise as a matter of policy for the Board to find impasse merely because the party is unwilling to capitulate immediately and settle on the other party’s unchanged terms. . . . Further, even assuming arguendo that the Respondent has demonstrated it was unwilling to compromise any further, we find that it has fallen short of demonstrating that the Union was unwilling to do so. [Id. at 586.]

In this case, the Union argued that the parties were not at impasse. It is not sufficient for a finding of impasse to simply show that the Employer had lost patience with the Union. Impasse requires a deadlock. As the Board stated in *Powell Electrical Mfg. Co.*, 287 NLRB 969, 973 (1987):

That there was no impasse when the Company declared is not to suggest that if the parties continued their sluggish bargaining indefinitely there would have been agreement on a new contract. Such a finding is not needed, nor could it be made

without extra-record speculation, to find on this record that when the Company declared an impasse there was not one, even as far apart as the parties were. They had most of their work ahead of them, and judging by the opening sessions clearly had different goals in mind for a contract. Whether their differences ever would have been resolved cannot be known; but that is the nature of the process. It is for the parties through earnest, strenuous, tedious, frustrating and hard bargaining to solve their mutual problem—getting a contract—together, not to quit the table and take a separate path.

Accordingly, I find that the parties were not at impasse when Respondent implemented its offer of April 19. Respondent was obligated to bargain to impasse before implementing its bargaining proposals.

*B. Respondent Bypassed the Union and Dealt Directly With Employees*

It is well settled that the Act requires an employer to meet and bargain exclusively with the bargaining representative of its employees, and that an employer who bypasses the bargaining representative to make offers regarding the terms and conditions of employment directly to employees violates Section 8(a)(5) and (1) of the Act. *Allied Signal, Inc.*, 307 NLRB 752 (1992).

To establish unlawful direct dealing, the Board has set forth a 3-factor test: (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.

First the July 7 letter to each unit employee was a direct communication to represented employees. Second, the purpose of the letter was to establish terms and conditions of employment, i.e., severance. Third, the communication was to the exclusion of the Union, in that it requested a broad waiver of claims and rights. The Union was not named as a party to the release and waiver.

Accordingly, I find that when Respondent sent the waiver and release to employees, in the absence of impasse, it bargained directly with employees in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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

3. Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its offer of April 19.

4. Respondent violated Section 8(a)(5) and (1) when it dealt directly with employees regarding severance pay and waiver and release.

5. Respondent's conduct above is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and

desist therefrom and take certain affirmative action to effectuate the purposes and policies of the Act. Accordingly, I shall order Respondent to rescind the waiver and release forms signed by bargaining unit employees.

[Recommended Order omitted from publication.]