

Nos. 14-1241, 14-1257

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

HOTEL BEL-AIR

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

USHA DHEENAN
Supervisory Attorney

JOEL A. HELLER
Attorney

National Labor Relations Board
1099 14th Street NW
Washington, DC 20570
(202) 273-2948
(202) 273-1042

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certifies the following:

A. Parties and Amici

Hotel Bel-Air is the petitioner before the Court and was respondent before the Board. The Board is respondent before the Court; its General Counsel was a party before the Board. There are no amici.

B. Rulings Under Review

This case is before the Court on Hotel Bel-Air’s petition to review a Board Order issued on October 31, 2014, and reported at 361 NLRB No. 91. The Board seeks enforcement of that Order against Hotel Bel-Air.

C. Related Cases

The case on review was previously before this Court in *Hotel Bel-Air v. NLRB*, Case No. 12-1386, 12-1404, which was dismissed and remanded upon the Board's motion. Board counsel is unaware of any related cases pending in this Court or any other court.

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1099 14th Street NW
Washington, DC 20570-0001
(202) 273-2960

Dated at Washington, DC
this 22nd day of April, 2015

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GLOSSARY

Act National Labor Relations Act

Board National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Hotel Bel-Air for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Order issued October 31, 2014, and reported at 361 NLRB No. 91. The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”). 29 U.S.C. § 160(a).

The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act, *id.* § 160(e) and (f), which provide that petitions for review of final Board orders may be filed in this Court and allow the Board, in that circumstance, to cross-apply for enforcement. Hotel Bel-Air filed its petition on November 10, 2014, and the Board filed its cross-application on November 24, 2014. Both filings were timely.

STATEMENT OF ISSUES

I. An employer violates Section 8(a)(5) and (1) of the Act by unilaterally changing terms and conditions of employment without bargaining to impasse or after an impasse has been broken. Does substantial evidence in the record support the Board's finding that negotiations were not at impasse at the time that Hotel Bel-Air unilaterally implemented its severance-pay proposal?

II. An employer violates Section 8(a)(5) and (1) by dealing directly with represented employees to the exclusion of their union. Does substantial evidence support the Board's finding that Hotel Bel-Air unlawfully dealt directly with its employees by offering them severance terms without notifying, and in a manner that excluded, their union?

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions appear in the attached addendum.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Acting on an unfair-labor-practice charge filed by UNITE HERE Local 11 (“Local 11”), the Board’s Acting General Counsel issued a complaint alleging that Hotel Bel-Air violated Section 8(a)(5) and (1) of the Act by unilaterally implementing new terms and conditions of employment in the absence of a bargaining impasse and by dealing directly with union-represented employees. The case was heard before an administrative law judge, who issued a decision and recommended order finding violations as alleged. On September 27, 2012, a three-member panel of the Board (Chairman Pearce and Members Hayes and Block) affirmed the judge’s rulings and conclusions and adopted the judge’s recommended order. *Hotel Bel-Air*, 358 NLRB No. 152 (2012). Hotel Bel-Air petitioned this Court for review of that order and the Board sought enforcement (D.C. Cir. Nos. 12-1386, 12-1404). On January 25, 2013, the Court placed the case in abeyance “[u]pon consideration of the court’s opinion and judgment issued January 25, 2013, in No. 12-1115, et al. - *Noel Canning, a Division of the Noel Corporation v. NLRB.*”

On June 26, 2014, the Supreme Court held in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), that three recess appointments to the Board in January 2012 were invalid, including the appointment of Member Block. On August 1,

2014, this Court, granting the Board’s motion, vacated the 2012 Decision and Order and remanded the case to the Board for further consideration in light of *Noel Canning*. On October 31, 2014, a properly constituted Board panel (Chairman Pearce and Member Schiffer; Member Miscimarra, concurring) issued the Decision and Order (361 NLRB No. 91) now before the Court, finding that Hotel Bel-Air violated Section 8(a)(5) and (1) of the Act “to the extent and for the reasons stated in the Decision and Order reported at 358 NLRB No. 152, which is incorporated herein by reference.” (JA 1627.)¹

II. THE BOARD’S FINDINGS OF FACT

A. Hotel Bel-Air Announces a Two-Year Closure and Offers to Bargain Over Effects

Hotel Bel-Air is an historic five-star luxury hotel in Los Angeles, California. Its employees are represented by Local 11, and the most recent collective-bargaining agreement ran from April 16, 2006, to September 30, 2009. (JA 1621; JA 430.)

On July 24, 2009, Local 11 notified Hotel Bel-Air that it intended to reopen the contract to negotiate a successor agreement. (JA 1621; JA 1130.) One week later, Hotel Bel-Air informed Local 11 that it would close for renovations on

¹ References in this brief are to the Deferred Joint Appendix (“JA”). References preceding a semicolon are to the Board’s findings; cites following a semicolon are to supporting evidence. “Br.” cites are to Hotel Bel-Air’s opening brief to the Court.

September 30 and would remain closed for approximately 18 to 24 months. Hotel Bel-Air offered to bargain with Local 11 over “the effects of this closure on bargaining unit employees, and any other terms and conditions you wish to discuss.” (JA 1621; JA 1076.)

B. August-October 2009: The Parties Hold Six Bargaining Sessions; Hotel Bel-Air Makes Its First “Final Offer”

The parties met six times between August 25 and October 1 to discuss the issue of severance payments for employees who would be laid off as a result of the temporary closure. (JA 1621; JA 441-49.) Local 11 was represented by its chief negotiator, Karine Mansoorian, and Hotel Bel-Air was represented by attorney George Preonas. (JA 1621; JA 429, 803.) Local 11 proposed negotiating both severance pay and a successor collective-bargaining agreement that would govern the terms and conditions of employment once the hotel reopened (JA 1621; JA 453), and Hotel Bel-Air preferred to negotiate the issue of severance before any successor agreement. (JA 1621; JA 1156.) Both sides made initial proposals in late August and early September, with Hotel Bel-Air offering one week of severance pay per year of service for employees who would waive recall and Local 11 asking for three months of severance pay per year of service for all employees. (JA 1621; JA 1136, 1419.)

On September 18, Hotel Bel-Air proposed two weeks of severance pay per year of service for employees who waived any right to recall. The proposal did not

include any health-care coverage for laid-off employees, but offered a \$900 separation payment that employees could use to cover health-care costs. (JA 1621; JA 1138-39.) Hotel Bel-Air described the proposal as its “final offer.” (JA 1621; JA 445-46, 1153.)

In late September, Peter Ward from UNITE HERE Local 6 (“Local 6”) in New York City and Chris Cowdray, CEO of the management company that operated Hotel Bel-Air, communicated several times regarding a possible framework for a severance agreement for Hotel Bel-Air’s employees. In October, they agreed that employees who accepted severance would have no recall rights and that employees who declined severance would be offered their jobs back when Hotel Bel-Air reopened if such jobs still existed. (JA 1621; JA 1434-36.)

On October 7, Mansoorian wrote to Preonas with a counterproposal to the September 18 offer seeking six weeks of pay per year of service for employees who were willing to accept severance in lieu of recall and three weeks of pay per year of service for employees who wished to return. Local 11 also proposed that Hotel Bel-Air provide one year of medical coverage for laid-off employees through Local 11’s Welfare Fund. (JA 1621; JA 1152.) Hotel Bel-Air rejected that proposal on October 15. (JA 1621; JA 1153-54.)

C. February 4-5, 2010: The Parties Meet Off the Record in New York City

The parties next met in an off-the-record session on February 4 and 5, 2010, in New York City. In addition to Mansoorian, Richard Maroko and Peter Ward of Local 6 joined the negotiations on behalf of Local 11. Local 11 asked Ward and Maroko to participate because they had an existing relationship with a New York hotel run by the same management company as Hotel Bel-Air. (JA 1621; JA 439-40, 454-55.) Along with Preonas, attorneys Arch Stokes and Peter Fischer represented Hotel Bel-Air. (JA 1621; JA 454-55.) Because those sessions were off the record, the parties were not bound by their discussions. Hotel Bel-Air again offered two weeks of severance pay per year of service and a \$900 lump-sum separation payment. (JA 1622; JA 269-71.)

D. February 10: The Parties Return to Los Angeles to Meet On the Record

At the next formal bargaining session, which was held in Los Angeles on February 10, Local 11 proposed five weeks of severance pay per year of service for employees who agreed to waive recall and two and a half weeks of pay per year of service for returning employees. In addition, Local 11 asked for fourteen months of health-care coverage through the Welfare Fund. (JA 1622; JA 459-60.)

E. April 9: Hotel Bel-Air Proposes a New Severance Plan That It Describes as Its “Last, Best, and Final Offer”

The parties met again in Los Angeles for formal negotiations on April 9. Hotel Bel-Air increased its offer to two and a half weeks of severance pay per year of service and a lump sum of \$900. (JA 1622; JA 462-64.) Preonas brought checks and release forms to Local 11’s offices for distribution if the proposal was accepted. (JA 1622; JA 578-79.) The offer had a deadline of April 16; Hotel Bel-Air stated that, if Local 11 did not accept by that date, it would declare impasse and implement the offer unilaterally. (JA 1622; JA 1159-60.) The deadline was later extended to May 6. (JA 1622; JA 1161.) Hotel Bel-Air described the proposal as its “last, best and final offer,” but Mansoorian responded that she did not believe that it was truly Hotel Bel-Air’s final offer. (JA 1622; JA 468, 1159, 1162.) Local 11 made a counteroffer of four and a half weeks of pay per year of service for employees who waived recall and two weeks of pay per year for returning employees, which Hotel Bel-Air rejected on April 12. (JA 1622; JA 467-68, 1159.)

F. May 5-6: Both Parties Make New Proposals on Severance in an Off-the-Record Session

The parties next met for an off-the-record session in Los Angeles on May 5 and 6. Hotel Bel-Air again offered two and a half weeks severance pay per year of service, but for the first time also agreed to contribute to Local 11’s Welfare Fund.

(JA 1622; JA 283-86.) Such contributions would begin in January 2011 and continue until the hotel reopened. (JA 1622; JA 475-76.) Hotel Bel-Air also presented a proposed successor collective-bargaining agreement. (JA 1622; JA 475.)

In response, Local 11 decreased its proposal to three weeks of severance pay per year of service for employees who waived recall. It also proposed Welfare Fund contributions beginning in July 2010. The proposal dropped any request for severance pay for employees who would return to work upon Hotel Bel-Air's reopening. (JA 1622; JA 287, 477.)

G. June 4-9: Hotel Bel-Air Proposes Additional Severance Pay, but Later Withdraws the Offer; Local 11 Makes a Counteroffer

At Ward's request, Stokes arranged for David Rothfeld, an attorney who represented the New York Hotel Employers Association, to join the discussion. (JA 1622 & n.2; JA 724-25.) On June 4, Rothfeld made a proposal, which Hotel Bel-Air approved, that included three weeks of severance pay per year of service for employees who waived recall and Welfare Fund contributions beginning January 1, 2011. The proposal also contained terms for a successor collective-bargaining agreement. (JA 1622; JA 796, 1278-81.) In response to reports that, in a talk to hotel employees in New York, Ward had insulted Cowdray, the CEO of Hotel Bel-Air's management company, Hotel Bel-Air withdrew the June 4 offer the next day and demanded that Ward make a public apology. (JA 1622; JA 1282.)

At an off-the-record meeting in New York on June 9, Maroko asked Hotel Bel-Air to reinstate its June 4 offer. Stokes replied that he did not have the authority to do so. (JA 1622; JA 303-05.) Later that afternoon, Maroko circulated a document that he described as “the union’s counter-proposal to the hotel’s June 4, 2010 proposal.” Like the June 4 offer, the counterproposal provided for three weeks of severance pay per year of service for employees who waived recall, and for Welfare Fund contributions starting January 1, 2011. (JA 1622; JA 1287-90.)

H. June 10: Hotel Bel-Air Offers Two Alternative Proposals on Severance Pay

On June 10, Fischer e-mailed Maroko with a new counterproposal containing two alternatives: (1) two and a half weeks of severance pay per year of service for employees who waived recall, along with a successor collective-bargaining agreement, or (2) three weeks of severance pay per year of service if Local 11 accepted a severance agreement separately from a successor contract. Hotel Bel-Air also would make contributions to the Welfare Fund beginning in January 2011. (JA 1622-23; JA 775-77, 1295.) The next day, Fischer suggested holding a conference call to discuss Local 11’s June 9 proposal and Hotel Bel-Air’s June 10 counterproposal. Fischer also invited Local 11 to make another counterproposal in response to the June 10 offer. (JA 1623; JA 1346.)

Hotel Bel-Air presented another proposed successor collective-bargaining agreement on June 21, which the parties discussed later that day at an off-the-

record meeting in New York. The parties did not discuss severance at the meeting. (JA 1623; JA 318-20.)

I. June 22: Local 11 Responds to Hotel Bel-Air's June 10 Counterproposal

On June 22, Maroko presented an agreement to a severance plan that provided for three weeks of severance pay per year of service for employees who chose to waive recall, and contributions to the Welfare Fund beginning January 1, 2011. (JA 1623; JA 1403.) In addition to setting forth the terms of the severance plan, the agreement noted that the parties “will continue to negotiate in good faith regarding other changes, if any, to the CBA.” (JA 1623; JA 1403.) Other pages in the document containing the severance-plan agreement featured proposed modifications to the existing collective-bargaining agreement. (JA 1623; JA 1401-02.) Maroko intended the proposal as an acceptance of the second alternative in Hotel Bel-Air's June 10 offer, as it contained the same terms. (JA 1623; JA 400.)

On June 25, Preonas e-mailed Maroko thanking him for the June 22 proposal and seeking clarification about some of the terms for a successor collective-bargaining agreement. The e-mail did not address severance. (JA 1623; JA 1406.) Maroko did not respond. (JA 1623; JA 409.)

J. July 7: Hotel Bel-Air Unilaterally Implements Its April 9 Offer

On July 7, Hotel Bel-Air mailed each bargaining-unit employee a severance plan and a waiver and release form. (JA 1623; JA 1410-18.) The accompanying

letter stated that Hotel Bel-Air was “very happy to give you the opportunity to decide for yourself whether you want to accept the Hotel’s offer of severance pay” and was “sorry it has taken us so long to finally be able to give you this opportunity.” (JA 1618; JA 1410.) Under the terms of the severance plan, which Hotel Bel-Air had last proposed on April 9, each employee who signed the waiver and release would receive two and a half weeks of severance pay per year of service, plus \$900. The waiver included an individualized calculation of how much severance pay the employee would receive and notified the employee that she was waiving any right to recall. Local 11 was not a party to the release and waiver. (JA 1623-24; JA 1410-14.)

In an e-mail to Mansoorian on the same day that Hotel Bel-Air mailed the severance plan to its employees, Preonas declared impasse and announced that Hotel Bel-Air was implementing its “last, best and final offer” of April 9. (JA 1623; JA 1408-09.) Hotel Bel-Air had not provided Local 11 with any advance notice that it was going to contact the employees individually and provide them with the severance packet. (JA 1623; JA 332-33, 485.)

K. Summary

The following chart summarizes the severance proposals of Hotel Bel-Air and Local 11 between Hotel Bel-Air’s presentation of its “last, best, and final offer” on April 9, when Hotel Bel-Air claims that bargaining reached impasse (Br. 32), and its unilateral implementation of that offer on July 7:

Date	Hotel Bel-Air Position	Local 11 Position
4/9/10	<ul style="list-style-type: none"> • 2.5 weeks pay per year of service for employees who waived recall • No severance for returning employees • Lump-sum payment of \$900 (JA 463-64, 1159) 	<ul style="list-style-type: none"> • 4.5 weeks pay per year of service for employees who waived recall • 2 weeks pay per year of service for returning employees (JA 467-68)
5/5/10-5/6/10	<ul style="list-style-type: none"> • 2.5 weeks pay per year of service • Welfare Fund contributions starting January 2011 (JA 284, 476) 	<ul style="list-style-type: none"> • 3 weeks pay per year of service for employees who waived recall • No severance for returning employees • Welfare Fund contributions starting July 2010 (JA 287, 477)
6/4/10 (withdrawn 6/5/10)	<ul style="list-style-type: none"> • 3 weeks pay per year of service • Welfare Fund contributions starting January 2011 (JA 1278-79) 	
6/9/10		<ul style="list-style-type: none"> • 3 weeks pay per year of service • Welfare Fund contributions starting January 2011 (JA 1287-88)

6/10/10	<ul style="list-style-type: none"> • 2.5 weeks pay per year of service and a successor collective-bargaining agreement <p><i>Or</i></p> <ul style="list-style-type: none"> • 3 weeks pay per year of service without a successor agreement • Welfare Fund contributions starting January 2011 (JA 775-77, 1295) 	
6/22/10		<ul style="list-style-type: none"> • 3 weeks pay per year of service • Welfare Fund contributions starting January 2011 (JA 1403)
7/7/10 (Implemented 4/9/10 proposal)	<ul style="list-style-type: none"> • 2.5 weeks pay per year of service • Lump-sum payment of \$900 (JA 1413-14) 	

III. THE BOARD'S CONCLUSIONS AND ORDER

On October 31, 2014, the Board issued a Decision and Order finding that Hotel Bel-Air violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its April 9 severance plan and by dealing directly with employees rather than with Local 11. The Board's Order requires Hotel Bel-Air to cease and desist from refusing to bargain collectively by unilaterally implementing its April 9 offer on severance and waiver and release, dealing directly with unit employees regarding those issues, and in any related manner interfering, restraining, or

coercing employees in their exercise of Section 7 rights. Affirmatively, the Order directs Hotel Bel-Air to rescind the signed waiver and release agreements if Local 11 so requests, bargain with Local 11 regarding the effects of the temporary closure and embody any understanding in a signed agreement, and physically and electronically post a remedial notice. (JA 1627-28.)

STANDARD OF REVIEW

The Board's factual findings "shall be conclusive" if they are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e); *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011). The Court likewise will "defer to the Board's interpretation of the Act if it is reasonable." *Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1075 (D.C. Cir. 2002). Because the existence of impasse is a question of fact, "this court ordinarily defers to the Board's fact-finding as to the existence of a bargaining impasse." *Monmouth Care Ctr. v. NLRB*, 672 F.3d 1085, 1089 (D.C. Cir. 2012) (quoting *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011)). Indeed, "in the whole complex of industrial relations[,] few issues are less suited to appellate judicial appraisal than evaluation of bargaining processes or better suited to the expert experience of a board which deals constantly with such problems." *Dallas Gen. Drivers v. NLRB*, 355 F.2d 842, 844-45 (D.C. Cir. 1966). Whether an employer has engaged in direct dealing is also a question of fact that this Court reviews

under the substantial-evidence standard. *Ne. Beverage Corp. v. NLRB*, 554 F.3d 133, 137 (D.C. Cir. 2009). That deferential standard of review reflects a recognition of Congress’s “delegation to the Board of the primary responsibility of marking out the scope . . . of the statutory duty to bargain.” *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979).

SUMMARY OF ARGUMENT

Hotel Bel-Air acted in derogation of its statutory duty to bargain with Local 11 as the representative of its employees by unilaterally implementing a severance proposal and offering that proposal directly to employees. Substantial evidence in the record supports the Board’s finding that bargaining was not at impasse regarding severance pay at the time that Hotel Bel-Air acted unilaterally. Both parties continued to communicate and make proposals in between Hotel Bel-Air’s presentation of its “final offer” on April 9 and its unilateral implementation of that offer on July 7, consistently moving closer together in their respective bargaining positions. Further, contemporaneous evidence reveals that the parties believed that further negotiations could be fruitful and that they did not understand bargaining to be at impasse. The Board’s consideration of evidence from off-the-record discussions and proposals was consistent with longstanding precedent and the policy rationale underlying the impasse analysis.

Substantial evidence also supports the Board’s findings that Hotel Bel-Air unlawfully dealt directly with represented employees to the exclusion of Local 11 by mailing the severance-pay plan and an accompanying waiver and release form to each employee in the bargaining unit. Without notice to Local 11, Hotel Bel-Air offered severance terms to the employees and requested a broad waiver of claims and rights. Hotel Bel-Air’s actions created the impression that employees should deal with it rather than Local 11 and thus undermined Local 11’s position as the employees’ exclusive bargaining representative.

ARGUMENT

By acting unilaterally and otherwise excluding Local 11, Hotel Bel-Air circumvented the collective-bargaining process in derogation of its statutory duty to bargain with the representative of its employees. Substantial evidence supports the Board’s finding that Hotel Bel-Air violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its April 9 severance proposal when bargaining was not at impasse and by dealing directly with employees rather than with Local 11 as their collective-bargaining representative.

I. Hotel Bel-Air Unilaterally Implemented its April 9 Severance-Pay Proposal When Bargaining Was Not at Impasse

A. Unilateral Changes to Terms and Conditions of Employment Absent a Bargaining Impasse Are Unlawful

An employer commits an unfair labor practice in violation of Section 8(a)(5) of the Act by “refus[ing] to bargain collectively with the representatives of his

employees.” 29 U.S.C. § 158(a)(5).² Accordingly, an employer that unilaterally changes terms and conditions of employment when bargaining is not at impasse violates Section 8(a)(5). *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (citing *NLRB v. Katz*, 369 U.S. 736 (1962)); *Nw. Graphics, Inc.*, 343 NLRB 84, 90-91 (2004). Such changes “injure[] the process of collective bargaining itself . . . by emphasizing to the employees that there is no necessity for a collective bargaining agent.” *Honeywell Int’l, Inc. v. NLRB*, 253 F.3d 125, 131 (D.C. Cir. 2001) (internal quotations omitted). “The Board does not lightly find an impasse,” *Powell Elec. Mfg. Co.*, 287 NLRB 969, 973 (1987), *enforced*, 906 F.2d 1007 (5th Cir. 1990), because unilateral implementation of new terms goes against the policies of fostering stable bargaining relationships and effectuating employee choice of representative that are at the center of the Act. *Honeywell Int’l*, 253 F.3d at 131.

The party asserting impasse bears the burden of proving it. *Wayneview Care Ctr.*, 664 F.3d at 347. Impasse exists only if “there [i]s no realistic possibility that continuation of discussion . . . would [be] fruitful” and “the prospects of reaching an agreement ha[ve] been exhausted.” *Am. Fed’n of Television & Radio Artists v. NLRB*, 395 F.2d 622, 628-29 (D.C. Cir. 1968). A finding of impasse requires

² An employer that violates Section 8(a)(5) also derivatively violates Section 8(a)(1). *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

futility, not just frustration. *Powell Elec.*, 287 NLRB at 973. In determining whether impasse has been reached, the Board considers the totality of the circumstances, including “[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations.” *Taft Broad. Co.*, 163 NLRB 475, 478 (1967), *enforced sub nom. Am. Fed’n of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). In addition, “continuous negotiating progress is strong evidence against an impasse.” *Teamsters Local 175 v. NLRB*, 788 F.2d 27, 31 (D.C. Cir. 1986).

Because “[b]oth parties must believe that they are at the end of their rope” for impasse to exist, *PRC Recording Co.*, 280 NLRB 615, 635 (1986), *enforced sub nom. Richmond Recording Corp. v. NLRB*, 836 F.2d 289 (7th Cir. 1987), the contemporaneous understanding of the parties “is of central importance to the Board’s impasse inquiry,” *Teamsters Local 639 v. NLRB*, 924 F.2d 1078, 1084 (D.C. Cir. 1991). Demonstrations of flexibility and willingness to compromise reflect an understanding that further negotiations could be fruitful, and thus cut against a finding of impasse. *Grinnell Fire Protection Sys. Co.*, 328 NLRB 585, 585-86 (1999), *enforced*, 236 F.3d 187 (4th Cir. 2000). Whether the parties state that bargaining is at impasse also can be relevant. *See Teamsters Local 639*, 924

F.2d at 1084 (finding no impasse when, “immediately after the [employer’s] negotiator declared impasse, . . . the Union negotiator[] ‘strongly disagreed’ with that characterization of the negotiations”); *Corp. for Gen. Trade (WKJG-TV 33)*, 330 NLRB 617, 617 (2000) (finding no impasse when the employer “had not informed the Union that it believed the parties were at impasse”).

Even if negotiations have temporarily reached impasse, the duty to bargain (and the concomitant duty to refrain from unilateral implementation) revives if the impasse is broken. *Richmond Elec. Servs., Inc.*, 348 NLRB 1001, 1003-04 (2006). Likewise, a unilateral change is lawful only if impasse existed “at the time the . . . change was made.” *Nw. Graphics*, 343 NLRB at 91. The Board and courts have long held that “[a]nything that creates a new possibility of fruitful discussion breaks an impasse.” *Pavilions at Forrestal*, 353 NLRB 540, 540 (2008), *adopted by* 356 NLRB No. 6, 2010 WL 4318370 (2010), *enforced sub nom. Atrium of Princeton, LLC v. NLRB*, 684 F.3d 1310 (D.C. Cir. 2012); *see also Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390, 1399 (5th Cir. 1983) (citing cases). Thus, impasse can be broken by “something less than negotiations,” including informal or off-the-record discussions or proposals. *Comau, Inc.*, 356 NLRB No. 21, 2010 WL 4622509, at *13 n.20 (2010), *enforcement denied on other grounds*, 671 F.3d 1232 (D.C. Cir. 2012); *see also Storer Comm’ns, Inc.*, 294 NLRB 1056, 1070,

1086-87 (1989) (finding no impasse based in part on union’s statements in an off-the-record meeting).

B. Continuous Negotiations, Evidence of Movement, and the Contemporaneous Understanding of the Parties Show That Hotel Bel-Air Failed to Meet Its Burden of Proving That Bargaining Was at Impasse

Substantial evidence supports the Board’s finding that Hotel Bel-Air failed to show that bargaining was at impasse on the severance-pay issue when it unilaterally implemented its April 9 offer. Both parties showed consistent and considerable movement in their negotiating positions before and after the April 9 proposal and throughout May and June, and, as the Board found (JA 1618), “significantly narrowed their differences” during that period. Such movement suggests the efficacy of further negotiations and demonstrates the parties’ contemporaneous understanding that bargaining was not at impasse.

1. Discussions and proposals before and after April 9 show consistent and considerable progress

The parties started quite far apart—in their respective initial proposals in August and September 2009, Hotel Bel-Air offered one week of severance pay per year of service for employees who would waive recall (JA 1419) and Local 11 asked for three months of severance pay per year of service for all employees (JA 1136). By the time of Hotel Bel-Air’s purported “last, best and final offer” on April 9, it had increased its proposal to two and a half weeks of severance pay per year of service. (JA 463-64, 1159.) Local 11 had dropped to four and a half weeks

pay per year of service for employees who waived recall, and two weeks pay per year of service for returning employees. (JA 467-68.)³

The progress continued thereafter. The parties exchanged new proposals at least five times after April 9 (May 6, June 4, June 9, June 10, and June 22), consistently narrowing the differences that separated their positions on severance; such “continuous negotiating progress is strong evidence against an impasse.”

Teamsters Local 175, 788 F.2d at 31. Hotel Bel-Air increased its severance-pay offer to three weeks pay per year of service and from no health-care coverage to contributions to the Welfare Fund beginning in January 2011. For its part, Local 11 decreased its severance-pay proposal for employees who waived recall to three weeks pay per year of service, dropped its request for severance pay for returning employees entirely, and shortened its appeal for Welfare Fund contributions by six months.⁴ By June 22, both parties had proposed three weeks of severance pay per

³ Although Hotel Bel-Air described its April 9 proposal as its “last, best and final offer,” that label is not dispositive as to whether bargaining was at impasse. *Teamsters Local 175*, 788 F.2d at 31. This Court found no impasse in *Teamsters Local 175* after the employer announced its “final” offer in part because the employer had already described a previous offer as “final” and had nonetheless continued to bargain. *Id.* Like the employer in *Teamsters Local 175*, Hotel Bel-Air made multiple “final” offers; prior to its April 9 proposal, Hotel Bel-Air described its September 18, 2009, offer as “final.” (JA 1153.)

⁴ Hotel Bel-Air’s assertion that “[t]he parties never bridged the gap over the issue of whether all employees would receive severance, or just those willing to waive recall rights” (Br. 33) is simply incorrect. Starting May 6, no proposal included severance for returning employees. (JA 477, 1288, 1403.) Hotel Bel-Air’s

year of service and Welfare Fund payments from January 2011. (JA 775-77, 1295, 1403.) Thus, evidence of movement both before and after Hotel Bel-Air announced its “final” offer on April 9 supports the Board’s finding of no impasse. And even if the parties were at impasse on April 9, the impasse had long been broken by the time Hotel Bel-Air unilaterally implemented that proposal on July 7. (JA 1618.) Because, under either scenario, the parties were not at impasse at the time of implementation, Hotel Bel-Air’s unilateral action was unlawful. *Nw. Graphics*, 343 NLRB at 91-92.

2. Both parties understood negotiations to be moving forward

As further evidence in support of the Board’s finding of no impasse, contemporaneous evidence in the record shows that both parties believed that the negotiations were moving forward. In response to Hotel Bel-Air’s description of its April 9 proposal as its “last, best and final offer,” Mansoorian wrote to Preonas stating that “we are not at impasse” and explaining that “[t]he union wants to continue negotiating and has more proposals to make.” (JA 1162.) *Teamsters Local 639*, 924 F.2d at 1084; *cf. Chicago Local No. 458-3M, Graphic Comm’ns Int’l Union v. NLRB*, 206 F.3d 22, 34 (D.C. Cir. 2000) (finding impasse where employer’s attorney “stated that he believed the parties were at an impasse” and

statement that “the discussions in May 2010 did not even address the severance issue” (Br. 45) is likewise inaccurate. (JA 283-87, 474-77.)

the union “did not disagree”). Local 11 demonstrated that belief by making additional concessions in its May 6 and June 9 proposals and continuing to meet and correspond with Hotel Bel-Air. Moreover, its June 22 proposal set forth the same terms as the second alternative in Hotel Bel-Air’s June 10 offer. Thus, as in *Grinnell Fire Protection*, Local 11 “not only continued to declare its intention to be flexible, but demonstrated this throughout its dealings” with Hotel Bel-Air. 328 NLRB at 585; *cf. TruServ Corp. v. NLRB*, 254 F.3d 1105, 1116-17 (D.C. Cir. 2001) (finding impasse when the union requested additional meetings, but made no further proposals after the employer announced its final offer). Because “[b]oth parties must believe that they are at the end of their rope” for impasse to exist, *PRC Recording*, 280 NLRB at 635, Local 11’s belief that further negotiations could be fruitful, and its conduct reflecting that belief, was enough to forestall a finding of impasse.⁵

Yet evidence in the record also shows that Hotel Bel-Air did not understand bargaining to be at impasse. As detailed above, it continued to meet and

⁵ Hotel Bel-Air asserts that Ward stated “we’re done” at the end of the June 21 meeting (Br. 41), but Maroko did not recall him making such a statement (JA 320). Hotel Bel-Air provides no context for the alleged statement, but even in Preonas’s account, it was made in the late afternoon at the end of a lengthy discussion (JA 877), and thus could simply have meant done for the day. Indeed, Maroko presented a new severance proposal the next day. (JA 1400-03.) Similarly, Local 11’s decision not to put the April 9 proposal to a ratification vote, which is an internal union matter, does not, as Hotel Bel-Air suggests (Br. 40), prove impasse. *Jano Graphics, Inc.*, 339 NLRB 251, 258 (2003).

correspond with Local 11, as well as to make proposals and respond to counterproposals, well after April 9. Rothfeld characterized Hotel Bel-Air's June 4 proposal as "a marked step forward" that "provides the foundation for a settlement between the parties." (JA 1278.) In a June 11 e-mail, Fischer described Local 11's June 9 counterproposal as an "offer [that] showed movement." (JA 1346.) Fischer also invited Maroko to make an additional offer (JA 1346), and, in a subsequent e-mail, reiterated that "we are ready [to] continue our off-the-record discussions . . . and receive any counterproposal Local 11 may have" (JA 1428). As the Board noted (JA 1624), no Hotel Bel-Air representative ever stated in June or July that he believed that negotiations were at impasse. *Corp. for Gen. Trade*, 330 NLRB at 617. Indeed, if Hotel Bel-Air truly believed that "there was no realistic possibility that continuation of discussion . . . would [be] fruitful," *Am. Fed'n of Television & Radio Artists*, 395 F.2d at 628, it would not have continued to discuss severance or to increase its offer.⁶

⁶ To the extent that Hotel Bel-Air is now hinting at bad faith on the part of Local 11 (Br. 16-17 & nn.4-5), the conduct that it cites occurred in February 2010—months before the point at which the Board found evidence of progress sufficient to break any impasse. That evidence of movement from Local 11 undermines any suggestion of bad faith. *See Grinnell Fire Protection*, 328 NLRB at 597 (making "modifications and concessions during the negotiations . . . is evidence of good faith").

3. The Board’s consideration of off-the-record discussions and proposals was consistent with precedent and well-established policy

The Board reasonably found (JA 1618, 1624) that evidence of movement from off-the-record discussions and proposals was relevant to the impasse analysis, and properly recognized that formal negotiations between Local 11 and Hotel Bel-Air were not necessary to break an impasse—“informal discussions that are ‘something less than negotiations’” could suffice. Indeed, the Board and courts have long held unqualifiedly that “[a]nything that creates a new possibility of fruitful discussion breaks an impasse,” *Pavilions at Forrestal*, 353 NLRB at 540, including off-the-record or informal discussions. In *Comau*, for example, discussions and proposals in subcommittee meetings constituted evidence of movement that precluded a finding of impasse even though the subcommittees were not authorized to enter binding agreements. 2010 WL 4622509, at *6, 13 & n.20; *see also Storer Comm’ns*, 294 NLRB at 1070, 1086-87.⁷ Likewise, in *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 232-33 (D.C. Cir. 1996), this Court considered statements and conduct from off-the-record meetings in determining that bargaining was at impasse. As part of its institutional role of

⁷ In denying enforcement of the Board’s Order in *Comau*, this Court did not disagree with the Board that the subcommittee meetings broke the impasse, but held that the employer did not violate Section 8(a)(5) because its unilateral implementation occurred prior to those meetings. *Comau, Inc. v. NLRB*, 671 F.3d 1232, 1237 (D.C. Cir. 2012).

construing the scope of the statutory bargaining obligation, the Board's determination as to what evidence is relevant to the impasse analysis warrants significant deference. *Ford Motor Co.*, 441 U.S. at 496; *Dallas Gen. Drivers*, 355 F.2d at 844-45.

In contending otherwise (Br. 36-37), Hotel Bel-Air asks the Court to ignore evidence in the record and take an artificially narrow view of what transpired between the parties. Hotel Bel-Air cites no authority from the Board, this Court, or any court that supports its proposition that the Board should not consider evidence from off-the-record discussions or proposals. Thus, although the parties did not consider themselves bound in subsequent bargaining sessions by the off-the-record proposals, Hotel Bel-Air has not shown that the Board was precluded from considering them in assessing the true picture of the negotiations. Moreover, treating those proposals as evidence of movement did not “negate the purpose” (Br. 36) of the off-the-record meetings where testimony from Hotel Bel-Air's own representatives revealed that it viewed such meetings as a means of continuing negotiations and reaching a compromise. Hotel Bel-Air attorney Stokes told Maroko or Ward that Hotel Bel-Air's June 10 off-the-record proposal “might help break the impasse.” (JA 742-43.) Similarly, in a January 2010 letter, Hotel Bel-Air attorney Preonas referred to an upcoming off-the-record meeting in New York and stated that “the fact that the parties are scheduled to meet in New York next

month demonstrates there is no impasse.” (JA 1431.) Even in its brief to this Court, Hotel Bel-Air acknowledges that “[o]ff-the-record discussions can be a useful tool for parties seeking to break impasse.” (Br. 32.)

4. Hotel Bel-Air’s remaining arguments are undermined by the record and rely on inapplicable legal principles

Hotel Bel-Air’s arguments in opposition are premised upon erroneous characterizations of the record and inapplicable legal principles, and are inconsistent with the policies established in the Board’s impasse cases. Its contention (Br. 42-44) that Local 11 was not involved in the off-the-record discussions is undermined by the record and misrepresents the relationship between Local 6 and Local 11. Maroko and Ward were authorized to make proposals on behalf of Local 11. (JA 571-72, 596.) Indeed, Maroko told the Hotel Bel-Air negotiators that he had such authority. (JA 336.) In addition, Maroko spoke with Mansoorian about the off-the-record discussions and proposals in May and June, and Mansoorian approved any proposal before Maroko presented it to Hotel Bel-Air. (JA 313, 440, 478-83.) Hotel Bel-Air thus also misreads the facts in asserting that its unilateral implementation of the severance plan was lawful because Local 11 “avoid[ed] . . . bargaining” (Br. 43). Local 11 participated in the off-the-record sessions through its authorized representatives Ward and Maroko.⁸

⁸ Hotel Bel-Air cites *Spriggs Distributing Co.*, 219 NLRB 1046, 1049 (1975), for the proposition that an employer must “bargain solely with the statutory

Nor did Local 11 revoke Ward or Maroko's authority to negotiate on its behalf. Hotel Bel-Air points (Br. 10-11, 15-17) to two occasions on which Mansoorian took a position in on-the-record meetings regarding severance for returning employees that differed from off-the-record positions, but those instances occurred on October 1, 2009 and February 10, 2010—well before both the point at which Hotel Bel-Air claims negotiations reached impasse and its unilateral implementation. Local 11 did not “renege[]” (Br. 39) on any of its proposals from the off-the-record meetings in May and June that the Board relied upon in finding no impasse. Further, Hotel Bel-Air's assertion that Ward and Mansoorian “openly disagreed” at the May 6 meeting (Br. 22, 43) is belied by the record; any purported disagreement over severance for returning employees was resolved, because Local 11's proposal from that meeting did not include severance for such employees—nor did any subsequent proposal.⁹

representative and no other person or group” (Br. 42-43), but that case also makes clear that “the bargaining representative may expressly delegate authority to its agents or by its conduct confer authority upon some person,” 219 NLRB at 1049. Unlike the shop steward in *Spriggs Distributing* who had neither actual nor apparent authority, *id.*, Ward and Maroko were authorized to negotiate on behalf of Local 11.

⁹ In its brief, Hotel Bel-Air describes the purported disagreement as involving the issue of “guaranteed recall rights” (Br. 22), but the cited testimony from its own witness was that the subject was severance pay for returning employees (JA 713).

Moreover, Hotel Bel-Air consistently dealt with Maroko as if he represented Local 11 and had the authority to bargain on its behalf. In Fischer’s June 10 e-mail to Maroko, he stated that “[w]e assume you have authority to speak for Local 11.” (JA 1295.) On June 11, he similarly stated that “Richard [Maroko] made an offer on behalf of Local 11.” (JA 1346.) Preonas and Fischer both contacted Maroko to discuss pending proposals and to solicit counteroffers. (JA 1346, 1406.) Indeed, Hotel Bel-Air would not have dealt with Maroko if they thought that he had no authority to bargain on behalf of Local 11 or that doing so could not lead to progress towards a formal agreement.

In addition, Hotel Bel-Air presents (Br. 33, 39, 45) an exaggerated account of its procedural disagreement with Local 11 over whether the parties would discuss a successor collective-bargaining agreement at the same time as severance terms. Although Local 11 preferred to negotiate a successor contract at the same time as severance so that employees could know what their terms would be if they returned to Hotel Bel-Air after the shutdown, it did not “insist” (Br. 39) upon that process or otherwise condition agreement to severance terms on such negotiations. (JA 584.) And Hotel Bel-Air points to no example of Local 11’s concessions on severance being “tied to tit-for-tat concession on a new CBA” (Br. 38)—Local 11’s May 6 offer contained concessions on severance but no collective-bargaining-

agreement terms, for example.¹⁰ Likewise, Hotel Bel-Air never refused to bargain over the terms of a successor agreement at the same time as severance (JA 760); indeed, as it admits (Br. 13), it bargained over a successor contract throughout the process—including by submitting its own proposed contracts at least four times in May and June. (JA 318-20, 475, 1278-81, 1295).

Moreover, because any disagreement on when to discuss a new contract did not halt progress on the amount of severance, *see supra* pp. 21-23, it did not justify Hotel Bel-Air’s unilateral implementation of the severance terms. There may have been frustration as to process, but not futility as to substance. *Powell Elec.*, 287 NLRB at 973. As the Board found, “there was clearly movement” on severance terms sufficient to break an impasse even without “a clear indication from [Local 11] that it was willing to agree to an agreement on the Hotel’s closure in the absence of agreement on a collective-bargaining agreement.” (JA 1624.) Whether, as Hotel Bel-Air argues (Br. 39, 42), deadlock on one issue can result in impasse and justify unilateral implementation on that issue even if there is movement on other issues is thus immaterial; the Board did not base its finding of

¹⁰ Nor does the record support Hotel Bel-Air’s assertion that Local 11’s offer on that day “never ripened beyond the ‘trial balloon’ stage” (Br. 22)—it was made verbally, but a proposal need not be written to constitute evidence of movement. *Wycoff Steel, Inc.*, 303 NLRB 517, 521, 523 (1991).

no impasse regarding severance on evidence of movement on other issues, but on severance itself.

Because the parties' positions on severance moved closer together throughout the period between Hotel Bel-Air's April 9 presentation of its "final offer" and its July 7 implementation of that offer, and because Hotel Bel-Air offers no basis for ignoring that movement, substantial evidence in the record supports the Board's conclusion that bargaining was not at impasse and that Hotel Bel-Air's unilateral implementation of its severance-pay proposal thus violated Section 8(a)(5).

II. Hotel Bel-Air Engaged in Unlawful Direct Dealing By Presenting Its Severance-Pay Proposal to Represented Employees to the Exclusion of Local 11

Because "the Act requires an employer to meet and bargain exclusively with the bargaining representative of its employees," an employer violates Section 8(a)(5) by "deal[ing] directly with its unionized employees . . . regarding terms and conditions of employment." *Allied-Signal, Inc.*, 307 NLRB 752, 753 (1992); *see also Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683-84 (1944). The Board will find unlawful direct dealing when "(1) the employer was communicating directly with union represented employees; (2) the discussion was 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.” *Vincent/Metro Trucking, LLC*, 355 NLRB 289, 295 (2010). The central question is whether the employer’s action “is likely to erode the Union’s position as exclusive representative,” *Allied-Signal*, 307 NLRB at 753 (internal quotations omitted), by “creat[ing] the impression that the employer rather than the union is the true protector of the employees’ interests,” *Texas Elec. Coop, Inc.*, 197 NLRB 10, 14 (1972) (internal quotations omitted). Such erosion can occur when an employer presents a proposal to employees without the union having “the opportunity to discuss [the] new policy with unit employees.” *NLRB v. Roll & Hold Warehouse & Distrib. Corp.*, 162 F.3d 513, 519-20 (7th Cir. 1998).

Substantial evidence supports the Board’s finding that Hotel Bel-Air unlawfully dealt directly with employees over severance. On July 7, Hotel Bel-Air mailed a packet to each bargaining-unit employee, offering severance terms in exchange for signing a waiver and release. (JA 1410-18.) Hotel Bel-Air does not dispute that it “communicat[ed] directly with union represented employees” or that the July 7 packet was sent “for the purpose of establishing or changing wages, hours, and terms and conditions of employment.” *Vincent/Metro Trucking*, 355 NLRB at 295; *see also Ne. Beverage*, 554 F.3d at 140 (offering severance pay to an employee can constitute direct dealing). And as the Board found, the offer was made “to the exclusion of [Local 11].” (JA 1624.) The severance plan included a

waiver and release agreement to be signed only by Hotel Bel-Air and the individual employee; as the Board observed (JA 1624), Local 11 would not be a party to the agreement. The waiver and release expressly superseded any other obligations of Hotel Bel-Air to the employee, and thus appeared to supersede, without input from Local 11, any rights or obligations in the collective-bargaining agreement that Local 11 negotiated with Hotel Bel-Air. (JA 1411-12.) Such actions erode Local 11's position as exclusive bargaining representative. *Allied-Signal*, 307 NLRB at 753.

Moreover, the letter to employees that accompanied the severance packet expressed Hotel Bel-Air's intent "to give you the opportunity to decide for yourself whether you want to accept the Hotel's offer of severance pay" and states that Hotel Bel-Air was "sorry it has taken us so long to finally be able to give you this opportunity." (JA 1410.) As the Board explained (JA 1618), "[t]hese statements further support [the] finding that [Hotel Bel-Air] communicated directly to unit employees . . . to the exclusion of [Local 11]." Indeed, they intimate that Local 11 had been an obstacle and that employees were better off acting independently of it and directly with Hotel Bel-Air. *Texas Elec. Coop*, 197 NLRB at 14.

In addition, Hotel Bel-Air gave no advance notice to Local 11 that it was sending the April 9 severance proposal directly to employees on July 7. Local 11 thus had no timely opportunity to discuss the proposal with its members before

they received it. *Roll & Hold Warehouse*, 162 F.3d at 519-20. Although Hotel Bel-Air presented the severance proposal to Local 11 in April, Local 11 had no reason to discuss that offer with its members in May, June, or July when other, more generous offers were on the table and negotiations were ongoing. Nor did it have any reason to expect that Hotel Bel-Air was going to abandon negotiations and revert to a position last expressed nearly three months earlier.

Further, Hotel Bel-Air did not just “communicate[] with employees” (Br. 46) about its severance proposal, but “offer[ed] severance terms directly to” them that they could accept or reject on an individual basis without Local 11’s involvement (JA 1618); the letters did not simply publicize Hotel Bel-Air’s offer and were not just an exchange of ideas. This case is thus distinct from the cases that Hotel Bel-Air cites finding no direct-dealing violation (Br. 46), which involved only *communications* between employer and employee regarding bargaining proposals; further, those communications were made in the course of ongoing negotiations and did not explicitly undercut the union in the way that Hotel Bel-Air’s letter did. *See United Techs. Corp.*, 274 NLRB 609, 609-10, 616-17 (1985) (employer distributed leaflets explaining its proposals and encouraged employees to express their views to the union), *enforced sub nom. NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.2d 121 (2d Cir. 1986); *Endo Labs., Inc.*, 239 NLRB 1074, 1078-80, 1084 (1978) (employer read summaries of bargaining sessions to

employees while negotiations were ongoing and sent employees a proposal in advance of its presentation at a union meeting); *Stokely-Van Camp, Inc.*, 186 NLRB 440, 449-50 (1970) (employer met with employees to clarify its proposal and to answer questions while negotiations with the union continued). Unlike in those cases, Local 11 was not “consistently acknowledged as the legitimate bargaining representative.” *Pratt & Whitney*, 789 F.2d at 135. *Adolph Coors Co.*, 235 NLRB 271, 272, 276-77 (1978), is likewise distinguishable, as the employer’s letters in that case informed the employees of new terms that had already been implemented; they did not solicit any action by the employees. Instead, this case is more like *Baltimore News American*, 230 NLRB 216, 217-18 (1977), *enforced as amended*, 590 F.2d 554 (4th Cir. 1979), in which the Board found a direct-dealing violation when the employer presented individual employees with a voluntary retirement plan that they could choose whether to accept.

Nor do the cases that Hotel Bel-Air cites stand for the blanket proposition that “[d]irect dealing does not occur when the employer communicates with employees about a proposal that has already been made to the Union.” (Br. 46.) No such per se rule exists. In *Baltimore News American*, for example, the employer engaged in unlawful direct dealing when it presented a retirement plan directly to employees in July that had been presented to and rejected by the union in May. 230 NLRB at 217-18; *see also Royal Motor Sales*, 329 NLRB 760, 761,

798, 801-02 (1999) (finding direct dealing in June regarding a proposal made to the union in May), *enforced sub nom. Anderson Enters. v. NLRB*, 2 F. App'x 1 (D.C. Cir. 2001).

Finally, Hotel Bel-Air's contention (Br. 46-47) that its actions were lawful because implementation of the severance proposal required direct communication with employees is based upon the faulty premise that it was privileged to implement that proposal; as explained above, the unilateral implementation itself was unlawful. Even if bargaining was at impasse, though, Local 11 remained the employees' representative, and Hotel Bel-Air acted unlawfully by implementing its severance proposal in a manner that further eroded that status. *See Inland Tugs v. NLRB*, 918 F.2d 1299, 1310 (7th Cir. 1990) (“[T]he existence of impasse does not permit an employer to cease recognizing the union as the employees' exclusive representative.”). Without the opportunity to explain that Hotel Bel-Air had declared impasse and was preparing to implement an offer, Local 11 would appear uninformed as to the status of bargaining. Further, employees who heard directly and initially from Hotel Bel-Air about an issue that they knew had been the subject of negotiations may have viewed Local 11 as weak or ineffective. Indeed, the language that Hotel Bel-Air used in its letter to employees conveyed that very message. Moreover, alternative means of implementing the severance plan were available that would have kept Local 11 in the process—Hotel Bel-Air could have

brought the severance packets to Local 11 to distribute among its members, as it had done on April 9. (JA 578-79.) Instead, Hotel Bel-Air presented its severance-pay offer directly to its employees to the exclusion of Local 11—their designated bargaining representative—and thus violated Section 8(a)(5).

Hotel Bel-Air engaged in unfair labor practices by unilaterally implementing its April 9 severance proposal when negotiations were not at impasse and dealing directly with employees in a manner that exacerbated the damage to Local 11's status as bargaining representative. Moreover, those actions occurred against a backdrop of indefinite layoff and ongoing uncertainty as to job prospects following Hotel Bel-Air's closure. Thus, at a time that employees may have increasingly relied on the protective force of their bargaining rights under the Act, Hotel Bel-Air undermined those very rights by breaching its duty to bargain in violation of Section 8(a)(5).

CONCLUSION

The Board respectfully asks the Court to deny Hotel Bel-Air's petition for review and to enforce the Board's Order in full.

/s/ Usha Dheenan

USHA DHEENAN

Supervisory Attorney

/s/ Joel A. Heller

JOEL A. HELLER

Attorney

National Labor Relations Board

1099 14th Street NW

Washington, DC 20570

(202) 273-2948

(202) 273-1042

RICHARD F. GRIFFIN, JR.

General Counsel

JENNIFER ABRUZZO

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

NATIONAL LABOR RELATIONS BOARD

April 2015

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

HOTEL BEL-AIR)	
)	
Petitioner/Cross-Respondent)	Nos. 14-1241
)	14-1257
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	31-CA-29841
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 8,887 words of proportionally spaced, 14-point type, and the word-processing system used was Microsoft Word 2007.

s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 22nd day of April, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the address listed below:

Arch Y. Stokes
Karl M. Terrell
Stokes Wagner Hunt Maretz & Terrell
3593 Hemphill Street
Atlanta, GA 30337

s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 22nd day of April, 2015

STATUTORY ADDENDUM

Section 8(a) of the Act, 29 U.S.C. § 158(a):

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

...

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.