UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

CP ANCHORAGE HOTEL 2, LLC, D/B/A HILTON ANCHORAGE and UNITE HERE! LOCAL 878 and PATRICK WHITE, an Individual	Cases 19-CA-193656 19-CA-193659 19-CA-203675 19-CA-212923 19-CA-212950 19-CA-218647 19-CA-228578 19-RD-223516

RESPONDENT'S CLOSING BRIEF

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I. Introduction

In early March 2017, Respondent CP Anchorage Hotel 2, LLC, d/b/a Hilton Anchorage ("Respondent") sent a proposal to Charging Party UNITE HERE! Local 878 ("Union") to modify a single provision in the parties' implemented agreement concerning the Union's access to Respondent's hotel. The Union countered by saying it would make material proposals that it claimed would break the longstanding bargaining impasse between the parties. But in the ten months after Respondent made its access proposal, the parties had only a few very short meetings in which no progress was made on the access issue and in which the Union never made its bargaining proposals. What the Union did do during this time was delay the process by subjecting Respondent to innumerable most mostly irrelevant information requests from multiple Union representatives, and by avoiding bargaining for months at a time. What Respondent did during this time, besides doing its best to respond to a veritable storm of information requests, was repeatedly request that the Union provide bargaining dates and any counterproposal on the access issue.

On December 20, 2017, the parties finally met for a third time, but only after Respondent threatened to implement its access proposal if the Union did not resume bargaining. That day, the Union finally appeared with bargaining proposals (one of which had earlier been emailed to Respondent) and it finally provided a counterproposal on the single issue for which Respondent had requested bargaining. After this meeting, Respondent declared impasse on that single issue and informed the Union that it intended to implement its access proposal ten days hence.

Other than saying it did not agree with the Union's other proposals, Respondent's letter limits the impasse declaration to the access issue. Despite that, the Union has done nothing to pursue its own alleged bargaining aims. It has not requested bargaining on its proposals since

the December 20, 2017 meeting, and Respondent has never refused to bargain over them. In fact, Respondent said in a couple of NLRB settlement agreements that it would resume bargaining upon request, but the Union still has never made that request.

Other charges are offshoots of the main bargaining event just described. One concerns Respondent having conferred with the local police about whether it could enforce its private property rights after the Union defied Respondent's effort to implement its access proposal. Another charge resulted when Respondent advised the Union that its interns were no longer permitted to access hotel property after they trespassed at a sister hotel to solicit employees as they were working. Another charge relates to a posted memo that responded to a Union posting that denigrated Respondent. Two other charges relate to isolated information requests and in another, the Union claims that managers who had a right to eat lunch in the employee cafeteria were really watching union representatives while they talked with bargaining unit members.

II. Background Facts.

A. The parties

Respondent operates the Anchorage Hilton hotel in downtown Anchorage. Jt. 1, ¶1.[1] The Union has since December 28, 2005 been recognized by Respondent as representing a bargaining unit that fluctuates to as many as 200 employees, Tr. 68, in hotel operations jobs. *Id.*, ¶¶6, 7.

Respondent's key management personnel have been as follows. Soham Bhattacharyya was in several positions before serving as General Manager from late January to mid-October 2017. Tr. 666. Steve Rader, was Assistant General Manager from early January to mid-October

[1] Exhibits are delineated as follows: General Counsel exhibits are "GC __"; Respondent's exhibits are "R. __", the Charging Party's exhibits are "CP __", and Joint exhibits are "Jt. __".

2017 and General Manager from mid-October 2017 until late May 2019. Tr. 765.

Marvin Jones is the Union local President. Tr. 512. Daniel Esparza has been the local Vice President since 2009 and responsibility for the Anchorage Hilton labor agreement. Tr. 69. Business Agent Dayra Valades works with Esparza on that contract. *Id*, Tr. 381-82. David Glaser, from the International office in San Francisco, handles the Union' boycott and bargaining for Local 878.

B. The parties' pre-2017 bargaining history.

The last negotiated agreement between the parties ran from 2005 to 2008. Jt. 1, ¶7. On April 13, 2009, after bargaining in 2008-09 resulted in an impasse, Respondent implemented its last best offer. *Id.*, ¶¶8-10. Sometime after this, the Union began a secondary boycott against Respondent, which has continued to the present. Tr. 318-19.

In 2014, the parties resumed bargaining but on February 21, 2014, again reached impasse on wages, health insurance, successorship and housekeeper productivity standards. Jt. 5; Tr. 322-23. Respondent then implemented its health care offer by replacing the Union welfare trust with the same health care plan as its other employees. Jt. 5; Tr. 327, 320.

Union hotel access issues surfaced in mid-2015. A July 2, 2015 letter from Respondent's General Manager Bill Tokman to the Union complained that its representatives had distributed a survey form[2] in guest areas of the hotel during the evening of June 28, 2015.[3] R. 12. The Union

[2] The survey form sought information about room conditions, including presence of mold, and referenced Union website moldreportak.org, which at some point became a subject of the Union's boycott of the Anchorage Hilton. Tr. 336; R.Ex. 12, p. 4.

[3] The June 2015 incident was the latest of a number of Union access abuses. Respondent responded to a Union information request that other abuses included: (1) Union announcements interrupting the employee cafeteria, which is open to all employees, (2) unauthorized air sampling and other Union representatives being present in non-public and working areas, (3) employee meetings staged by the Union with a U.S. Senator and a news crew in the cafeteria,

did not disclaim responsibility for this trespass. Tr. 339. Respondent then sent a proposal to the Union to modify the contractual access language.[4] R. 13. The parties bargained for several months over the Respondent's access proposal as well as several other proposals.[5] However, after Union president Jones assured Tokman there would be no more Union leafletting inside the hotel under his leadership, the access proposal was tabled. R. 20; Tr. 523.

Late one night in early August 2016, less than a year after Jones gave his assurances, Union representatives again leafletted guest rooms. The incident occurred at sister hotel Anchorage Marriott, but the flyers shoved under hotel room doors that night disparaged the Anchorage Hilton. R.16 p. 3. Respondent immediately objected, R. 17. The stage thus was set for the bargaining events that commenced a few short months later, events that began with Respondent's March 2017 access proposal and led to the charges heard in this matter.

III. 19-CA-212950: the bad faith bargaining charge

A. The allegation.

> Since about February 2017, Respondent has failed and refused to bargain in good faith with the Union, including by failing to make counter-proposals, ceasing

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and (4) Union rally activity (clapping) in the hotel lobby in the presence of hotel guests. (7) Tr. 340; R. 15, pp. 1-2.

[4] At the time of this incident, Article IV, Section 1 of the implemented agreement stated (and still does):

> Business representatives or other authorized representatives of the Union shall be permitted to visit the premises of the Respondent at reasonable times during the working hours, provided such representatives first make their presence known to the Respondent or other appropriate management. No interview shall be held with employees during rush hours. Business representatives or other authorized representatives of the Union shall conduct employee interviews in non-working areas (i.e. employee cafeteria).

Jt. 4, p. 6.

[5] Glaser appeared for the Union for several of the bargaining sessions. Tr. 250-51, 339.

negotiations, refusing future bargaining, and unilaterally implementing its access proposal. GC 1(qq), ¶ 8.

B. Summary of the Respondent's position.

Respondent submitted a proposal to the Union to modify access terms of the labor agreement and requested to bargain over them in early March 2017. For the next ten months, Respondent repeatedly requested bargaining dates. Over a ten month period, the Union only showed up three times, and at that, for very short unproductive meetings. Instead of bargaining, the Union stymied negotiation of the access proposal at every turn. It conditioned bargaining over the access proposal on proposals it said it would make. It delayed bargaining by making substantial, often last minute, and usually irrelevant information demands. It delayed by not being available for months between sessions and abruptly cancelled one scheduled meeting. When the Respondent threatened to implement its proposal, the Union grudgingly returned to the table in late December 2017. At that time, it presented its first (and only) access counterproposal. However, the counterproposal was little different from the *status quo*, and after waiting for it for ten months, and based on everything else the Union had done to frustrate bargaining over it, Respondent reasonably deduced that further bargaining over it was pointless. Respondent thus legitimately declared impasse and attempted to implement its access proposal.

The Union did not respond or object to the impasse declaration, and it made no effort to break it.[6] It has never once asked Respondent to resume bargaining on its proposals and, in fact, ignored the Respondent's commitment made in successive informal settlement agreements to resume bargaining upon notice from the Union.

[6] Rather, the Union refused to acknowledge Respondent's impasse effort, openly defying the new language by continuing to hold meetings in the cafeteria nearly every day for the next two weeks. Respondent gave up on the new access terms when the local police department said it would not help enforce them.

In short, Respondent, after ten frustrating months of enduring Union avoidance tactics, legitimately sought to implement the single issue it had presented for bargaining in March 2017. Its announced intent to implement its access proposal did not violate Section 8(a)(5) because the parties had reached impasse on that single issue or because the Union's dilatory tactics allowed it to do so regardless of impasse. Respondent also did not refuse to bargain over the Union's proposals, once they finally were made, and the charges on that ground must also be dismissed.

C. Summary of facts related to the charge.

1. The Respondent's 2017 access proposal.

Upon becoming Respondent's General Manager in late January 2017, Bhattacharyya sought again to amend the access language in the labor agreement. Tr. 693-94. The proposal was drafted by Respondent's counsel, but he held off presenting it until hotel refinancing was finalized. Tr. 694-95. Respondent's access proposal, submitted to the Union on March 2, 2017. Jt. 1, ¶14; Jt. 9[7] Bhattacharyya explained why he felt the language needed to be changed:

> Q So why was it important to you to propose different access rules for the parties?
>
> A. Well, first and foremost, you know, I wanted to be in line with the implemented agreement as much as I could, just to make sure that we had some kind of structure as far as access to the hotel goes. And my second reasoning was, in the past, the Union was observed going to parts of the hotel that were not authorized for them.
>
> I mean, I remember the previous GM telling me the Union put flyers under every guest door of the Hilton Anchorage at the nighttime. I've seen Danny walk up to the second-floor banquet room without taking anyone's permission to see what banquets we had going on there. The previous GM told me he once found Danny in the boiler room, in the mech room.

[7] A day earlier, two employees complained that a Union representative had insisted on tape recording them in the employee cafeteria. Tr. 696 Bhattacharyya notified the Union about the complaints on March 3. Jt. 1, ¶15; R. 21

> I mean, these are very grave concerns. I mean, even for their security, for an outsider to come and look into the boiler room, which is essentially a mechanical room -- we don't want to be held liable for their safety. So hence those reasons why we proposed these changes to Article 4.

Tr. 695, l. 6 to 24.

2. The April 21, 2017 bargaining session.

The first meeting to discuss Respondent's access proposal did not occur until seven weeks later, on April 21. Negotiations began on a negative tone when Glaser referred to Respondent as "bottom feeders" and "bad people." Tr. 346-47. Respondent's negotiator Bill Evans testified that Glaser's speech in front two dozen hotel employees, Tr. 233, denigrated Respondent; "it certainly wasn't reaching across the table to try to get a deal." Tr. 554. He added that Glaser "was basically saying you guys are bad guys and you are responsible for this mess." *Id.* Glaser admits he made the "bottom feeders" reference. Tr. 237.

The parties briefly discussed the access proposal. The Union said that requiring that its representatives go to a different room would be a hardship on employees; Respondent contended that Union representatives' presence in the cafeteria was disruptive. Tr. 234-35. Otherwise, as described in Evans' April 29, 2017 email, the session "amounted to little more than a two-hour introduction" and the Union did not provide a counterproposal. Jt. 11, p. 2. Evans felt the Union's strident presentation made the negotiations more difficult. *Id.*

3. Between April 21 and August 3, 2017, the Union conditions further bargaining on an expanded scope and innumerable information requests.

Evans asked in his April 29 email if the Union would continue bargaining over the access proposal, and if so, when it could return to the table. *Id.* pp. 1-2. Glaser briefly responded on May 1 that the Union would continue bargaining. *Id.* p. 1. In a May 8 email, Glaser stated that the Union would send detailed information requests about the access proposal:

> Local 878 is going to need to obtain detailed answers to a number of questions that this bargaining proposal has raised, including questions designed to give us a better understanding of the reasons for your proposal, the manner in which it is likely to be applied, and alternative approaches that might serve the Respondent's needs equally well with less of a negative impact on the union. We intend to present these questions to you in writing.

Jt. 12, p. 2. Despite this statement, the Union only made one information request related to the access proposal, that coming a week later on May 16. Jt. 14, p. 3. Evans responded to this request on June 5 with detailed information. Jt. 16, pp. 3-4. Even though this was information about the Union's activity, on June 27, Glaser requested specific dates and written statements about the events related by Evans. Jt. 19, p. 3. Evans responded to these follow-up requests. Jt. 26, p. 3.

Glaser also said in his May 8 letter that the Union wanted to broaden the scope of bargaining after first sending "detailed" information requests:

> [I]t has become clear to Local 878 that these negotiations need to deal not only with the change to Article IV that the Hilton Anchorage proposed on March 2, 2017, but also with the entire range of unresolved issues that are preventing Local 878 and Columbia Sussex from reaching a new collective bargaining agreement.

Jt. 12, p. 2. Glaser conditioned bargaining over the access proposal on proposals the Union intended to make, claiming that the parties no longer were at impasse.[8] *Id.* at p. 3. Glaser stated that he believed the parties would need two bargaining days to address this expanded scope which, he indicated might be "ideally sometime in mid-to-late June." *Id.*

In a May 11 response, Evans disagreed that the parties were not at impasse, stating he was unaware of any changes in either parties' position on key issues.[9] Jt. 13. Evans said,

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[8] Glaser based his claim on the passage of three years since Respondent had implemented its health care proposal in April 2014, that there were changed economic circumstances in the hotel industry, likely changes J-1 Visa laws and new workplace safety rules. *Id.* p. 3

[9] Nor could Evans have known; Glaser testified he had not by the time of this letter communicated the Union's position on wages or other terms of employment. Tr. 244.

however, that given specific information about any changes in the Union's position on any material issue, he would revisit his position with Respondent. *Id*., pp. 1-2 Without that, he said, Respondent did not agree to a broader scope of negotiations but would respond to the Union's access-related information requests and to resume the access proposal bargaining. *Id.,* p. 2.

In a May 16 letter, Glaser ignored Evans' request he identify changed positions that might affect impasse, and instead sent extensive and detailed information requests on a number of areas unrelated to the access proposal. Jt. 1, ¶26; Jt. 14. Respondent responded to these requests on June 5, Jt. 16. In the transmittal email, Evans asked that Glaser let him know if he needed more information and for "some dates on which we can again meet and hopefully conclude our negotiations." *Id*., p. 1. He added "I see no legitimate reason why we cannot schedule something for the end of this month," *Id.*, p. 4, which was consistent with Glaser's May 8 statement that negotiations could happen "in mid-to-late June." Jt. 12, p. 3.[10] So, as of early June, 2017, having complied with the Union's May 16 information requests, Respondent had good reason to think the bargaining would resume later that month in accordance with Glaser's statement about "ideally" meeting in June.

Inexplicably, however, the Union changed things and began delaying. Three weeks passed with no word from Glaser, so Evans emailed him on June 26 and June 27, asking about bargaining dates. Jt. 1, ¶19; Jt. 16; Jt. 17. Glaser finally responded later on June 27, attributing the delay on Iglitzin's extended vacation. Jt. 19, p. 2. His letter was combative and nitpicked the manner in which the extensive information compiled by Respondent had been assembled. *Id*.

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[10] Evans also responded to Glaser's statement in his May 8 letter that the access proposal might be more palatable if Respondent offered a *quid pro quo*, Jt. 12, p. 2, by stating that Respondent would consider resuming dues checkoff to address the Union's stated needs related to relations with members. Jt. 1, ¶ 18; Jt. 16, p. 4.

Glaser also dashed any thought that the Union would resume bargaining in June, stating without explanation that he and Iglitzin would be in Anchorage on August 3 or 4. *Id.* p. 4. On June 29, Evans confirmed availability then and that Respondent was "willing to set aside as much time as you deem necessary to make a real and honest effort at resolving this issue." Jt. 20, p. 1.

Evans forwarded additional employee information to Glaser on July 17. Jt. 21. Glaser responded the next day with the first of what was going to be a much much bigger wave of information requests. The initial request sought health care information on an individual employee basis. Jt. 22. A week later, the Union launched more requests:

1. San Francisco attorney Eric Myers sent requests on July 24 for detailed information about environmental conditions in the hotel. Jt. 23.

2. That same day, July 24, Glaser requested detailed information by individual employee, related to (1) all 2014-16 wages, (2) number of rooms cleaned by each housekeeper over that same time frame, including when assistance was required and where a housekeeper exceeded or fell short of the 17-room standard, and (3) all employee discipline dating back to January 1, 2013. He asked for all of the information within a week, by July 31. Jt. 24.

3. Union president Jones sent a request on July 25 for all punch in-out cards and extra room assignment sheets, requiring production by the second scheduled bargaining day, August 4. R. 27. On July 26, Jones sent a separate request for six months of banquet sign in and gratuity signature sheets. R. 28.

Glaser was aware that as he was making his extensive information requests shortly before the next scheduled bargaining date, so were other Union representatives. Tr. 351-52.

Respondent quickly began assembling and producing documents and information in response to this late July wave of requests. On July 27, Evans produced the health care information requested on July 18, Jt. 25, and a detailed letter followed up on earlier productions, Jt. 26. He noted that although Respondent was having to handle extensive requests from multiple Union offices, it was endeavoring to produce information as quickly as it could. On

July 31, Evans produced extensive disciplinary records dating back to 2013.[11] Jt. 28-34.

4. The August 3/4 bargaining.

The parties met for several hours on August 3 and again for part of the next day. The Union was represented by Glaser, Iglitzin, Jones, Esparza, Valades and a number of hotel employees. Present for the Respondent were Evans, Bhattacharyya, assistant manager Steve Rader, and a human resources representative. Tr. 245. The first day and part of the second were spent recapping current practices at the hotel. Tr. 557-58; Jt. 37. Partway through the second day, the parties finally got to Respondent's access proposal, but the Union still was not prepared with a counteroffer. Tr. 558-59; Jt. 37.

Despite Glaser's representations that the Union was hard at work on proposals,[12] it still did not make any written proposal or counterproposal during the August 3-4 bargaining session.[13] Tr. 362-63. Glaser claimed in an August 9, 2017 letter that the Union had not yet done so because it allegedly needed even more information. Jt. 39, p. 4. The pretextual nature of this representation is evident in that after this, the Union asked for little information or follow-up on prior requests.

5. Events leading up to the next bargaining session.

On August 7, Evans emailed Glaser asking for dates for the next bargaining session and if he would send written proposals in advance. Jt. 38. Iglitzin responded on August 15 without

[11] Glaser explained why he needed discipline records related to housekeeper room quotas, but he did not explain why the Union required the Respondent to produce all other disciplinary records for nearly five years. Tr. 289-90. In fact, he suggested that while he had asked for these records within a week, there was not an urgent need for them. Tr. 357.

[12] For instance, on July 24, in prefacing his additional last minute request for years of information about productivity, wages and disciplinary records, Glaser claimed "we have been hard at work . . " Jt. 24.

[13] It did apparently make several verbal counterproposals on the access issue. Jt. 37

explanation that he and Glaser were not available until October 24-25. Jt. 40. Evans replied that day that "while we would prefer an earlier meeting date, we'll take what we can get." *Id.*

On August 17, Evans sent additional information that had been requested during the August 3-4 session. Jt. 41. That was to be the extent of the information requests and responses.

Also on August 17, Evans wrote a letter responding to Glaser's assertion in an August 9 letter that the Union was willing to move on four issues: wages, 17-room quota, health care and successorship. Jt. 39, p. 1. Evans stated that while Respondent would bargain in good faith based on this representation, "we have no intention of forestalling negotiations on our access proposal indefinitely while we await the promised development of future proposals." Jt. 42, p. 3. This letter also contains an important statement about the parties' respective positions at this point on the access issue:

> You are absolutely correct that the Hotel has rejected the unwritten counter-proposals put forward by the Union regarding the access issue. As we have stated the verbal counterproposals did not satisfy our goals or reasons for putting forward our access proposal. If, as you suggest, the Union believes it currently has the unfettered right to be on Hotel property at any time and to bring any third party with them, the need for more defined and controlled access is all the more necessary.

Id., p. 3. There is no evidence that Glaser or the Union responded further to this letter.

Seven more weeks passed with no activity since Iglitzin had said the Union would not resume bargaining until late October. On October 5, 2017, Evans emailed asking for assurances that the Union did not need any more information to prepare proposals for that next bargaining session. Jt. 43. He also advised that Respondent wanted to start with the access proposal and he again asked that the Union send written proposals in advance of the meeting. *Id.*

On October 9, 2017, Union bargaining team member Bill Rosario was terminated for cause. A week later, on October 16, 2017, Glaser canceled the meeting long scheduled for

October 24-25. Jt. 44. Glaser's letter stated: "Unfortunately, as you are no doubt aware, the hotel just detonated a bomb under this process by summarily firing Bill Rosario . . . " *Id*., p. 1. He continued: "based on what I know right now, it appears that the hotel's decision to fire Mr. Rosario was outrageous, unjustifiable and unlawful." *Id*. After a lengthy trial earlier this year, NLRB Judge Anzalone disagreed and recommended dismissal of the Rosario complaint.[14]

Glaser's October 16 letter did finally include the Union's first written proposal, dealing with wages in eleven subparts. *Id.*, p. 3. Glaser intimated that the Union's willingness to return to the table was conditioned on its acceptance "*in toto*" of the wage offer (or a "reasonable counter offer") as well as "an acceptable explanation of the hotel's conduct towards Mr. Rosario or actions promptly remedying that conduct." *Id.* p. 4.

Glaser also commented on Respondent's access proposal, claiming without explanation that "the hotel's recent decision to dictate to the Union who it may and may not designate as its agents, for the purposes of entering the hotel, and the employee cafeteria to speak to bargaining unit members, has made it impossible for us to formulate a meaningful bargaining position at this time." *Id.,* p. 2. He conditioned further bargaining on the access proposal upon "that decision" having "been adjudicated by the NLRB."[15] *Id.*

Evans responded immediately, expressing frustration that after seven months, the Union still had not made any proposals other than including a wage proposal in the October 16 letter

[14] The facts related to Mr. Rosario's termination are set forth in Judge Anzalone's November 14, 2019 decision in Case No. 19-CA-215741.

[15] Glaser was referring to the Respondent's withdrawal of consent for Union interns to access the Anchorage Hilton following the July 26, 2017 incident at the Anchorage Marriott. Tr. 257. Although the Union filed a charge, 19-CA-203675, on August 1, GC 1(s), which was just before the early August bargaining session, there is no evidence that it had refused to bargain over the access proposal on that basis until Glaser's October 16 letter.

canceling negotiations. Jt. 45, p. 1. As for the Rosario termination, Evans wondered aloud how the Union could defend Rosario's behavior.[16] *Id*., p. 2. He also stated that Respondent intended to keep the October 24-25 negotiation dates. *Id.*

An October 20 response by Glaser accused Evans of being emotionally invested in the situation. Jt. 46. Evans responded on October 23, recapping Respondent's frustration with the Union's economic boycott and bargaining approach, and he worried aloud whether the resulting chasm between the parties might easily be bridged. He concluded that while Respondent would appear the next day as agreed, it no longer would "beg the Union to negotiate." Jt. 47, p. 9. Glaser did not respond. Tr. 594. Evans wrote again on November 21, stating that Respondent would implement its access proposal on January 1 if the Union did not return to the table. Jt. 48. Glaser replied on November 27, that the Union would agree to meet on December 19. Jt. 49.

6. The December 20, 2017 bargaining session.

The parties met for a third session on December 20, over four months since August 3-4. The Union provided written proposals on the areas it first raised on May 16: wages, health care, access, successorship and room quotas. Jt. 50. The Union also made an access counterproposal for the first time. *Id*., p. 6.

After the Union explained its proposals, Respondent's team caucused and provided an initial reaction. Jt. 51, p. 2; Jt. 52, p. 8. The negotiators' post-bargaining letters are largely in accord that Evans advised the Union that due to the parties' adversarial relationship, he was not confident that Respondent's position on economics would change. *Compare* Jt. 51, p. 2 and Jt. 52, p. 8. He added that Respondent needed more time to study the proposals and as this was

[16] Rosario took photos of mold in several guest rooms but did not report it to a manager. Instead he reglued wallpaper over the mold and sent the photos to the Union. ALJ Decision, 19-CA-215741, p. 2. This act exposed hotel guests and coworkers to mold in those rooms. Jt. 47, p. 8.

right before the winter holiday interlude, he expected to respond further shortly into the new year. *Id.*

A December 30 letter from Glaser evidences an understanding that the Union proposals had not been positively received at the December 20 meeting. Jt. 51. In fact, it confirms that Evans had been adamant that Respondent would not accept the Union's access counterproposal:

> Regarding access, you stated that the Union's proposal would not work for you, and that the hotel was not willing to alter the part of its access proposal that would bar Union representatives from being in the employee break room at any time. You were absolutely clear on this: the hotel would not yield on this point.

Id., p. 3. Despite his recognition that Respondent had communicated it was sticking to its position on cafeteria access, Glaser did not offer any other approach. Instead, his December 30 letter pleads with Respondent to make a counteroffer to break that jam.

7. Respondent declares impasse on the access issue.

By a January 5, 2018 letter from Evans, Respondent advised the Union that it believed the parties were at impasse on the access issue and it therefore intended to implement its March 3 access proposal on January 15, 2018. Jt. 52, p. 10. This was hardly surprising to the Union in light of Glaser's recognition of Respondent's adamancy at the December 20 session that it would not brook any provision allowing cafeteria access.

The Union's December 20 access counterproposal had modified language in article IV but was completely illusory on the main issue of cafeteria access. The Union would agree to an alternative location for meeting with employees, as Respondent proposed, but wanted complete discretion to still meet whenever it wanted in the employee cafeteria. Jt. 50, p. 6. Evans testified that the counterproposal was unacceptable because "[i]t didn't address what the Company viewed as the fundamental problem, and the fundamental reason for the access proposal was that the cafeteria, in the Hilton's view, was an unworkable location for the Union to meet with its

employees." Tr. 595.

Evans' January 5 letter was unequivocal in explaining Respondent's position that the Union's insistence on use of the employee cafeteria as a daily meeting place, was the main sticking point after ten months of trying to get an agreement[17] and created the impasse:

> We have indicated that we were willing to negotiate the times when the Union representatives could be present, the days on which they could be present, the manner in which they needed to alert the Hotel to their presence and other similar logistical issues surround access to the Hotel. We also physically showed you the room that the Hotel has set aside for the Union and invited any comments you might have about its adequacy. Because the Union has been focused entirely on keeping the access point in the cafeteria, it has not made any proposals in nearly a year regarding any of those other logistical issues. Accordingly we are unaware of any preferences the Union may have regarding hours of visits, days of visits or the manner of checking in and as a consequence we cannot provide any counter-proposals that would address any of those items. We can only assume that because the Union has not presented any counter-proposals involving access at any location other than the cafeteria, the Union does not have any such proposals involving access at any location other than the cafeteria, the Union does not have any such proposals and its sole proposal is to maintain access to the cafeteria.
>
> Based on the ten months that we have been discussing this issue, it would appear that the parties are at impasse. The Hotel is not willing to continue allowing access to the cafeteria and the Union has made no counter-proposals that do not include maintaining such access. Accordingly, it is the Hotel's intention to implement its proposed changes to Article IV of the implemented agreement beginning January 15, 2018.

Jt. 52, p. 10.

Respondent also was not encouraged that the Union's other proposals were a reason to prolong negotiations on the stalemated access issue. For instance, the Union proposed that employees be on the Company health care plan, however this already had happened in 2014. *Compare* Jt. 50, p. 3; Jt. 5, p. 3; and Jt. 6, p. 16. It otherwise did not move the parties closer together; Glaser admitted it was "more expensive than the current medical coverage offered to

[17] On his August 17 letter, Evans advised Glaser that Respondent would not accept Union's efforts to have unfettered access rights. Jt. 42.

employees." Tr. 302. Evans felt that even though the Union now agreed to the Company plan, the Union proposal was as costly as the Union plan. Jt. 52, p. 8.

The Union's wage offer was set out in Glaser's October 16 letter with an addition of extra pay for carry-out work by banquet servers. *Compare* Jt. 44, p. 3 and Jt. 50, pp. 1-2. It also proposed a 17-room limit for housekeepers, with a premium for the 16th and 17th rooms. *Id.*, p. 4. Evans explained in the January 5 letter that Respondent "found it difficult to provide increased wages or benefits given the current animosity-laden relationship." Jt. 52, p. 9.

The Union's successorship proposal did not move the parties closer together as it would have saddled a successor with the labor agreement and obligated them to re-hire all existing members of the bargaining unit. Jt. 50, p. 5. The implemented contract does not have a successorship clause. Jt. 4, p. 42. The Union proposal was not appreciably different than the successorship clause of the 2005-08 collective bargaining agreement in requiring a successor to accept the labor agreement and hire the workforce. *Compare* Jt. 2, pp. 35-36.

Glaser did not respond to Evans January 5 letter. Tr. 312. He testified that the Union did not seek further bargaining after this because, in his view, Evans "declared us not to be good faith bargainers." Tr. 265. Thereafter, the Union ignored Respondent's execution several month later on April 6 of an informal settlement with Region 19 that committed Respondent to resume bargaining upon notice from the Union. R. 31.

D. Discussion

1. Introduction

While Respondent sought to bargain over the single issue of the Union's hotel access, the Union tried to expand bargaining to include issues over which the parties had been at impasse for some time. After ten months of a largely fruitless effort resulting from the Union's delay tactics, the parties were at impasse over the access issue. Even if they weren't at impasse over access,

the Union's dilatory conduct justified implementation. Respondent also did not violate Section 8(a)(5) with respect to the Union's proposals because the preexisting larger impasse on the main contract had not been broken. But even there no longer was an impasse, Respondent did not refuse to bargain over the Union's proposals. Rather, the Union failed to seek further bargaining, and it and not Respondent is responsible for the bargaining hiatus since then.

2. Respondent did not violate Section 8(a) by announcing it would implement its access proposal.

a. The parties were at impasse over the access issue at the end of 2017.

The 2017 bargaining was initiated by Respondent for the sole purpose of reaching agreement on its access proposal. Over the next ten months, it sought repeatedly to engage the Union in bargaining, and the few times that it succeeded in that, the Union avoided meaningful negotiation or formally responding to the access proposal. The Union's strategy included a heavy information request agenda and repeated promises it would make proposals aimed at breaking the impasse on the contract. The Union put off meetings for as long as it could; its cancellation of a scheduled meeting in late October caused a nearly five month bargaining hiatus.

While Respondent made clear that its primary objective was to get to an agreement on its access proposal, it did not refuse to meet about the Union's objectives. It responded to a heavy load of discovery requests that the Union claimed were necessary for its putative proposals. By mid-August 2017, nearly a half year after making its access proposal, Respondent had responded to innumerable information requests, but only had been given a couple of short bargaining sessions and no formal union proposals in return. On August 17, Evans responded on a handful of lingering discovery request items; it was to be the last of the information request activity between the parties. Jt. 41. Evans also wrote to Glaser that day and made two points that are of importance to the analysis: (1) Respondent's primary interest remained on the access proposal,

and (2) although the Union had not yet presented its long-promised proposals, Respondent would take the Union at its word that the proposals were aimed at moving the parties closer together and would bargain over them. Jt. 42. Evans added, however, "we have no intention of forestalling negotiations on our access proposal indefinitely while we await the promised development of future proposals." *Id*. at p. 3.

The "promised development of future proposals" finally happened four months later on December 20. However, the one item that Respondent was still looking for, a counterproposal on the access issue, quelled any thought that the Union would agree to limit access to the employee cafeteria. Evans wrote to Glaser several weeks later on January 5 that because, after ten months, the Union still was not willing to concede cafeteria access, the parties were impasse. Jt. 52, p. 10.

This situation is virtually indistinguishable from that in *New NGC. Inc*., 359 NLRB 1058 (2013). In that case, the Employer sought to move the bargaining unit into a defined contribution pension plan from the defined contribution plan. The Union tried to stave off impasse on that issue by making a last minute concessionary proposal on health care. The Board held that it was insufficient and that impasse had been reached on the pension issue. In this case, Respondent repeatedly made it clear that the cafeteria access issue was of prime importance to it. When, after ten months of avoiding a formal counterproposal, the Union finally presented one, the language changes were of little consequence and failed to disguise that the Union was continuing to insist on unfettered access to the employee cafeteria. The Union's other proposals were, as in *New NGC,* insufficient to stave off impasse over the single issue of importance to Respondent.

It is well settled that "overall impasse may be reached based on a deadlock over a single issue." Generally, a finding of single issue impasse has three requirements: (1) a good-faith

impasse existed as to a particular issue; (2) the issue was of "overriding importance" in the bargaining; and (3) the impasse as to the single issue "led to a breakdown in overall negotiations--in short, that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved." *Atlantic Queens Bus Corp*., 362 NLRB 604 (2015).

The facts readily show that impasse existed as to the access issue. The correspondence demonstrates that the access issue was "critical in the sense that it was of overriding importance in the bargaining." *Atlantic Queens, supra.* It was first raised by Respondent in mid-2015 after the Union engaged in numerous access abuses. The access issue was the sole trigger for starting bargaining in March 2017. Evans repeatedly stressed to the Union that it was of high importance to Respondent. Although Respondent agreed to consider other Union proposals, it made no bones about its access objective and not wanting it held up while the Union spent many months claiming to be "hard at work" on other proposals. When it became clear in December 2017 that the Union would not yield on unconditional cafeteria access, Respondent declared impasse and a timeline for implementation. The Union's failure to push for bargaining on its proposals after that is a tacit admission that the real 2017 bargaining had always been about the access proposal.[18]

The evidence also shows that the Union's failure to make any movement on the access issue while purporting to push its agenda for a new contract, "led to a breakdown in overall

[18] The General Counsel or Union may argue that the access proposal could not have been all that important to Respondent since it stopped trying to implement it after a couple of weeks. Such an argument would be disingenuous since the Union defied Respondent's repeated requests that it honor the new language. That defiance culminated in a letter from Union President Jones, who stated that the Union would continue to use the cafeteria until told otherwise by the NLRB. Jt. 55. Then, when Respondent learned from the police department that it would get no assistance in enforcing its property rights, any notion of implementation had to be tabled pending this process.

negotiations." *Atlantic Queens*, *supra*. The Union consistently showed it did not intend to meaningfully engage on the access issue and, instead, did all it could to hijack Respondent's request for bargaining over impasse for bargaining over the long-stalled contract.

b. The Union's conduct justified implementation.

There can be no serious question that while Respondent kept doing all it could to keep negotiations moving forward by repeatedly requesting dates and by responding to numerous information requests, the Union was doing all it could to slow things down to a crawl. The Union's delay efforts included (1) making multiple layers of demands for information that bore no relationship at all to the access issue, (2) making its representatives unavailable for months on end, (3) appearing at the first few sessions completely unprepared with proposals, and (4) using the fact of an unfortunate job termination to condition further bargaining on additional demands.

It is well-established that "if the union engages in conduct that prevents the parties from reaching either an agreement or a genuine impasse, the Respondent may be privileged to implement changes in working conditions that are consistent with its last offer." *Developing Labor Law,* (7th Ed. BNA 2017), page 13-170 (citing *Serramonte Oldsmobile*, 318 NLRB 80 (1995), 86 F.3d 227, (D.C. Cir. 1996) (dilatory tactics by union and efforts to delay bargaining*)*; *Paperworkers Locals 1009, 1973 & 98 (Jefferson Smurfit Corp.)*, 311 NLRB 41 (1993) (union delayed meetings, failed to address key Respondent proposals, made extensive last-minute requests for information already supplied to it); *Concrete Pipe & Products Corp.,* 305 NLRB 152 (1991), *aff'd* 983 F.2d 240 (D.C. Cir. 1993) (the Union conditioned bargaining on an improper request for the Employer's financial records thereby foreclosing a possibility of meaningful negotiations).[19]

[19] Evidence of bad faith delay tactics include "persistently not agreeing to meet at suggested

The Union's numerous delay tactics are highly relevant here.[20] Respondent's requests to meet during the summer and fall of 2017 were repeatedly stymied by the Union. For example, the parties' apparent agreement to meet in late June was abruptly changed when Glaser inexplicably cut it off until early August. Shortly after the August session, Evans requested another meeting "no later than mid-September," Jt. 38, but the Union claimed it could not meet again until late October. Jt. 40. The Union then canceled the October sessions (over Evans' pleas that they reconsider) because of the Rosario termination, an event which was unrelated to any of the issues being negotiated. The Union refused to negotiate until that termination was satisfactorily explained or remedied. Jt. 44, p. 4. This was a textbook example of the Union's bad faith. *Richfield Hospitality, Inc.***,** 368 NLRB No. 44 (2019) (the employer violated Section 8(a)(5) by cancelling a scheduled meeting at the last minute and refusing to meet again unless the union presented a new proposal.)

The situation here is not unlike that in *Matanuska Electric Ass'n*, 337 NLRB 680 (2002). In that case, the employer was focused in successor contract negotiations on the subcontracting language. Over a seven month period, the Union repeatedly slowed the bargaining by asking numerous questions about most aspects of the employer's proposal. The Board adopted the ALJ's finding that "questioning was a tactic and not a serious effort in most cases, to gather information." 337 NLRB at 682. He concluded that "the Union's bargaining tactics made reaching an agreement a virtual impossibility. I conclude that the Respondent had no reason to

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times," "canceling scheduled meetings without proposing any additional sessions," and "failing to make an economic proposal, after almost one year of bargaining." *The Developing Labor Law, supra,* p. 13-63

[20] Where the Union has been dilatory or engaged in bad faith bargaining, "the Board has refused to find bad faith on the part of the dilatory employer." *Developing Labor Law, supra,* p. 13-65.

believe that the Union would change tactics in the foreseeable future and therefore was permitted to declare impasse and implement its last offer." *Id.* at 685.

In short, Respondent did not violate Section 8(a)(5) by announcing it would implement the access language because impasse had been reached. This was true if for no other reason than the Union's evident strategy to unduly delay and frustrate Respondent's efforts at bargaining over that proposal.

3. Respondent did not unlawfully refuse to bargain over the Union's proposals.

The General Counsel also contends that Respondent refused to bargain over the Union's proposals and did so before early January 2018, when it declared impasse, and has continued to refuse to do so since. Respondent respectfully submits that neither scenario holds up. Prior to Evans' January 5, 2018 letter, Jt. 52, declaring impasse on the access proposal, the Union did nothing to break the impasse on the main contract other than talk about proposals it intended to make. In the absence of these putative proposals, Respondent reasonably disagreed that the impasse was broken. At the same time, however, Respondent did everything it could to keep the bargaining moving, including over whatever the Union wished to include, and it responded to the Union's wide-ranging information requests. When Respondent confirmed in August that it would bargain over the Union's proposals, the Union still did not present a proposal package for another four plus months. And after the January 5 impasse declaration on the access proposal, Respondent never once said it would not bargain over the Union's proposals and in fact, said it would in an informal settlement agreement with the Region. Despite this, the Union made no effort to resume bargaining.

a. Impasse on the contract was not broken as of the end of 2017

The Union claimed several times in 2017 that the underlying bargaining impasse between the parties was broken. Respondent replied that it was unaware of any evidence supporting the Union's claim. Merely claiming to have new flexibility on certain issues, as the Union did, is not sufficient to break an impasse. *Serramonte Oldsmobile v. NLRB*, 86 F.3d 227, 233 (D.C. Cir. 1996). ("[A] party's 'bare assertions of flexibility on open issues and its generalized promises of new proposals' do not represent 'any change, much less a substantial change' in that party's negotiating position" (quoting *Civic Motor Inns*, 300 NLRB 774, 776 (1990)). To establish that the impasse was broken, the Union had to show "changed circumstances sufficient to suggest that future bargaining would be fruitful." *Erie Brush & Mfg. Corp. v. N.L.R.B.*, 700 F.3d 17, 23 (D.C. Cir. 2012) (internal quotations omitted); *Laurel Bay Health & Rehab. Center v. NLRB*, 666 F. 3d 1365, 1376 (D.C. Cir. 2012) ("[I]t is incumbent on the party asserting that the impasse has been broken to point to the changed circumstances that would justify such a finding."). The Union did not meet its burden when it failed to produce substantial evidence of such a change.

There simply is no case to be made that before the Union finally presented its proposals on December 20, 2017, that the impasse had been broken.[21] While the Union said several times this was the case, it never provided evidence of that before then. And even then, Respondent does not concede that impasse was broken by the Union's December 20 proposals. On health care for example, while the Union was finally agreeing to that which it had not in 2014 – moving to the company health plan, Glaser testified it was more expensive than the plan implemented in

[21] The Union's wage proposals were first sent to Respondent on October 16, 2017, Jt. 44, p. 3. However, Evans was at that time trying to persuade the Union to return to the table. Jt, 45, Jt. 47 (though in the letter he also said Respondent had tired of asking and "will no longer continue to beg the Union to negotiate.")

2014. Tr. 302. The Union's successorship proposal likewise did not move the parties closer as it bound a potential successor in the same manner as the 2005-08 agreement.

b. Respondent has never refused to bargain over the Union's issues.

There is no evidence that Respondent refused to bargain at any time on anything other than its own access proposal after January 5, 2018. Before that date, while Respondent had said it disagreed that impasse had been broken, its actions were not inconsistent with good faith bargaining. It was the prime mover in setting bargaining dates and repeatedly and quickly tried to return to bargaining, it appeared without fail at all scheduled meetings, and it did yeoman work in quickly responding to the Union's extensive information requests. By August, Respondent confirmed that despite its disagreement over impasse, it would bargain over the Union's proposals—if only they were made.

There simply is no plausible argument, too, that Respondent failed to bargain after January 5, 2018. The January 5, 2018 letter was specific in its announcement that the parties were at impasse on the access proposal and said nothing to that effect about the Union's proposals. Regarding those proposals, while Respondent rejected them, the letter also expressed an open mind. For instance, it stated regarding health care that Respondent would "be looking for opportunities going forward that will make such coverage more affordable" and in that event would "make a proposal to change the current plan." Jt. 52, p. 8. Likewise, regarding wages (including the 17-room issue), the letter stated "we are always willing to meet and negotiate in good faith the terms and conditions of Hotel employees, [but] we are not willing to change our positions in the absence of a respectful and good faith partner." *Id.*, p. 9. Respondent's message thus was clear that while it had tired of the Union's antics, it nonetheless was willing to continue bargaining. Certainly if the Union was in any way confused by this statement, it need only have

asked for clarification. But, as Glaser admitted, the Union never followed up. Tr. 312.

Certainly any remaining doubt about where Respondent stood on any future bargaining should have been cleared up by Respondent's sign off on April 6, 2018 of an informal settlement with the Region that included various of the Union's charges through that date, including 19-CA-212950. R. 31. The settlement committed Respondent to resuming bargaining upon request from the Union, for a minimum of 16 hours per month, and with any variations at the Union's option. *Id*., p. 1. Respondent further agreed to include this commitment in a posting. *Id*., p. 5.

To summarize here, as with Respondent's announcement it would implement the access proposal, the General Counsel has not established that Respondent refused to bargain over the union's proposals. The General counsel did not establish that Respondent violated Section 8(a)(5) in any way and the charges in 19-CA-212950 should be dismissed in their entirety.

IV. 19-CA-193656: the Cafeteria Surveillance Charge

A. The allegation.

> Since about February 2017, Respondent engaged in surveillance by increasing the number of supervisors and/or managers who visited the cafeteria during the time the Union's representatives typically visited the cafeteria to interact with employees. GC 1(qq), ¶ 6(a).

1. Summary of Respondent's position.

The employee cafeteria is used both by bargaining unit members and by non-union employees and managers. Managers have the same rights as represented employees to take their breaks and meals in the cafeteria. The Union's claim of an increase in managers in the cafeteria was based on vague testimony. Moreover, there was no evidence that managers engaged in surveillance behavior when they were in the cafeteria.

2. Summary of facts related to the charge.

The employee cafeteria is available to all hotel employees including management. Tr. 677. Respondent provides free meals to its employees from 10 a.m. to 1:00 p.m. and again starting at 5:00 p.m. In the morning, hot food comes out at 10 a.m. Tr. 70. Union representatives go to the cafeteria four or five times each week, typically at 10 a.m., to talk to the employees.[22] Tr. 70, 145. Esparza claimed he also checks the food and calls the General Manager if he thinks it is unsatisfactory. Tr. 85.

The cafeteria, which is located in the hotel basement, Tr. 652, seats 40 or so people in two separated rooms. Tr. 675, 682. It is noisy when crowded with employees and difficult to hear across the room. Tr. 191-92, 654, 679. During the lunch break, employee conversation in several different languages makes it difficult to hear from table to table. Tr. 657.

The General Counsel claims that Respondent increased the number of managers during the lunch hour from one or two at a time. Union business agent Dayra Valades claimed in her testimony that this alleged increase in managers occurred between early February and late July 2017. Tr. 444-45. The claim of an increase was, however, supported by vague and uncertain testimony. Esparza knew that Daniel McClintock from the HR Department,[23] and housekeeping

[22] The Union is also able to communicate with employees at the Union hall, where employee meetings are held. Tr. 69, 457-58. The Union hall is approximately ten blocks from the hotel. Tr. 142. The Union representatives also communicate with Respondent's employees by phone or text message. Tr. 143-44, 456.

[23] The General Counsel claims McClintock was a Section 2(11) supervisor. McClintock was not a supervisor as he had no involvement in hiring and firing employees other than in a human resources advisory capacity. Tr. 690. Given his human resources duties McClintock was, if anything, a confidential employee. For most of the time claimed by the Union that manager presence was stepped up in the cafeteria, McClintock's job title was Human Resources Generalist. Tr. 687. When he was given the title of Human Resources Supervisor in July 2017, his duties did not change and it was a promotion in title only. Tr. 690.

Manager Ivan Tellis were regulars in the cafeteria prior to February 2017. Tr. 77. He also admitted he did not know for sure who else may have been in the cafeteria at break time during this time period, explaining that he was focused on his members. Tr. 166-67. Valades likewise was unsure who was or was not a manager. Tr. 419-20.

The Union witnesses' vague testimony about the presence of managers in the cafeteria prior to February 2017 was contradicted by the precise testimony of former managers Steve Rader and Brandon Donnelly. Both of whom testified to having had a consistent habit of taking their meals in the cafeteria around 10 a.m. prior to February 2017. Donnelly said that while Director of Rooms before January 2017, Tr. 653-54, he would arrive in the cafeteria between 10:00 and 10:15 a.m. to check the food quality and to eat.[24] Tr. 652. Rader had an eleven year practice of going into the cafeteria daily when the food came out at 10:00. Tr. 766. Coupled with the testimony from the Union witnesses that McClintock and Tellis were regulars, the evidence shows there were at least four managers[25] who fairly regularly were in the cafeteria at the same approximate time as the Union representatives.

Thus, not only was there a failure to establish an evidentiary baseline for an incidence of less than four managers in the cafeteria before February 2017, the evidence of manager presence between February and July 2017 altogether fails to suggest Respondent increased their number in the cafeteria during the morning break. If anything, the evidence only shows that the incidence of managers was largely unchanged. The Union's rough notes from then, CP 1, R. 7, show

[24] Donnelly often said hello to the Union representatives and never heard negative feedback from them. Tr. 657.

[25] If McClintock is to be considered in the tally of managers, it should be true both before and after February 7, 2017, the date the Union claims their presence increased. The same is true if he is to be excluded.

sporadic days when three or four managers allegedly were present. One cannot tell from these notes how long managers were there or whether they overlapped. *Id.*, Tr. 487-88.

The General Counsel also apparently relies on a claim that management began holding meetings in the cafeteria starting in early February 2017.[26] Actually, there were only two at most. Stand up meetings for management were spread around; only one or two were in the cafeteria. Tr. 672, 770-71. At least one meeting during this time period was to discuss guest evaluation ("SALT") scores and to acknowledge employees' good work. Tr. 89-90, 771-72. Valades remembered for one of the meetings with managers present there was discussion of scores and numbers. Tr. 471. Bhattacharyya invited the Union representatives to join the meeting, which they declined. Tr. 86.

There is little if any evidence in the record that when managers were in the cafeteria at the same time as Union representatives, they did anything other than eat their meals and visit with colleagues. Tr. 653, 766. There was a vague claim that Bhattacharyya followed Esparza one day, Tr. 473, but with little or no detail that would allow any conclusion other than two people were going in the same direction at the same time. Esparza testified, perhaps about the same alleged incident or perhaps not, that as Bhattacharyya was talking to someone named Maki, McClintock followed with food. Tr. 97-8. Testimony like this is impossibly vague and cannot point to anything other than normal interaction in a busy and crowded lunchroom.

The Union did not dispute the right of managers to be in the cafeteria. Tr. 233, *see also* Tr. 677, and was used to seeing managers in the breakrooms at other local hotels. Tr. 462.

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[26] Other evidence developed by the General Counsel or Union focused on General Manager Bhattacharyya. Witnesses alleged that when asked for approval to distribute Union flyers for a laundry meeting, he asked if he could go (the Union allegedly said yes). Tr. 80-1. On another occasion, Bhattacharyya allegedly asked if he could go to a rally and have pizza. Tr. 100-01. This kind of evidence was unrelated to the contention that manager numbers had increased.

During the entirety of a three year period in which McClintock had his lunch in the cafeteria virtually every day, Esparza never once raised a concern and never had difficulty in talking to employees despite McClintock's presence. Tr. 151. Besides the fact that managers took their breaks and meals in the cafeteria like everyone else, some work in the same proximate location. Tr. 418 (Security and Human Resources are nearby). Moreover, in addition to their admitted lengthy past practice of talking to their members in the cafeteria in plain view of people like Daniel McClintock and Ivan Tellis, Esparza testified it also was not uncommon to talk to employees in the hotel lobby with supervisors nearby. Tr. 142.

The evidence also shows there was never an agreement that managers could not be in the cafeteria when the Union was present. Tr. 224. Nor was there any evidence that managers were ever directed to step up their presence in the cafeteria. Bhattacharyya denied any manager had been directed to monitor the Union or to interfere with the Union's communications with members. Tr. 678. Valades testified that managers were neither rude nor disruptive while in the cafeteria. Tr. 429-31.[27]

B. Discussion

Whether supervisors unlawfully surveil employees in an employee cafeteria or other open space depends on the nature and duration of the observation. *Aladdin Gaming, LLC*, 345 NLRB 585, 585-86 (2005). Routine observation of employees engaged in open Section 7 activity on company property does not constitute unlawful surveillance. *Id.* (citing *Eddyleon Chocolate Co*., 301 NLRB 887, 888 (1991). Rather, to be unlawful, observation activity must be "out of the ordinary" and thereby coercive. *Id.* (citing *Sands Hotel & Casino, San Juan*, 306 NLRB 172

[27] Esparza testified vaguely that due to alleged manager presence, several members talked to him less, whispered, or looked around before talking. Tr. 108, 114, 116. The ALJ correctly ruled that such testimony is irrelevant in this proceeding. Tr. 110-11.

(1992), *enfd.* 993 F.2d 913 (D.C. Cir. 1993)). "Indicia of coerciveness include the duration of the observation, the Respondent's distance from its employees while observing them, and whether the Respondent engaged in other coercive behavior during its observation." *Id.*

Surveillance claims on employer property are rejected where supervisors ordinarily are present while Section 7 activity occurs, in the absence of extraordinary employer activity. For instance, in *Preferred Building Services, Inc*., 366 NLRB No. 159 (2018), the Respondent did not engage in unlawful surveillance when its owner, whose job required him to be in the lobby on a frequent basis, observed employee picketing there. The Board reiterated that observation of open activity in the workplace is not, without more, unlawful surveillance. In this case, the owner did not give the impression of taking photos or videos of the picketing employees. *See* also *Bellagio, LLC v. NLRB*, 854 F.3d 703 (D.C. Cir. 2017); *Wal-Mart Stores, Inc*., 352 NLRB 815 (2008) (no unlawful surveillance where a high-ranking manager to fill in for a frontline supervisor after the Union filed a representation petition; the manager did nothing "out of the ordinary" to suggest unlawful surveillance); *Metal Industries*, 251 NLRB 1523, 1523 (1980), (Respondent's longstanding practice in the employee parking lot of saying goodbye to departing employees not unlawful; observance of employees' Section 7 activity was inseparable from its regular and noncoercive practice).

Aladdin Gaming, LLC, supra, rejected unlawful surveillance charges in an employee cafeteria room and has particular application here. In *Aladdin Gaming*, two supervisors watched for short time periods as employees solicited authorization cards in the employee cafeteria, an area where both managers and unit employees regularly dined. The Board overturned the ALJ's finding of unlawful surveillance with respect to two separate incidents. In one, a manager stood for two minutes by a table at which two off-duty employees were soliciting others. The manager

then spoke for eight minutes about management's perspective on unionization and then left the dining room. *Id.* at 585. A few days later, another manager observed another off-duty employee soliciting an employee to sign a card while in the dining room. He, too then told the employees how management viewed unionization. *Id.*

The Board held that the foregoing conduct was not unlawful as the dining room was an open area, and the union activity was in the open. The managers' presence and conduct there was routine and not "out of the ordinary," and neither engaged in coercive conduct. The Board distinguished the cafeteria encounters in this case from prior surveillance cases:

> Sapien's and Briand's observations were qualitatively different from those in other cases where the Board has found unlawful surveillance. For example, in *Sands Hotel & Casino*, 306 NLRB at 172, a Respondent unlawfully surveilled employees by posting security guards near employee entrances and in a nearby hotel room, where the guards viewed employees' Section 7 activity through binoculars. In *Eddyleon Chocolate Co., supra*, the company president watched employees engaged in protected activity from his car parked 15 feet away, all the while speaking on his cell phone. On another occasion, the president called the police and verbally threatened the employees as they passed out union handbills. The Board found that the Respondent unlawfully created an impression of surveillance.
>
> Sapien's and Briand's observation of employee open prounion activity was for an even shorter period of time than in other cases where the Board has not found unlawful surveillance. In *Wal-Mart Stores*, 340 NLRB No. 144, slip op. at 8 (2003), for example, the Board found that a manager's 30-minute observation while sitting on a bench outside the store of union handbilling taking place in the Respondent's public parking lot, unaccompanied by other coercive behavior, did not constitute unlawful surveillance. Similarly, in *Metal Industries*, 251 NLRB 1523, 1523 (1980), the Board found that an Respondent did not unlawfully surveil its employees where the Respondent had a longstanding practice of going to the employee parking lot to say goodbye to its departing employees at the end of the workday. The Respondent's observance of the employees' Section 7 activity was inseparable from its regular and noncoercive practice.

Aladdin Gaming, supra, p. 586

The foregoing authority requires dismissal of the claim that Respondent violated the Act in the first half of 2017. The General Counsel utterly failed to prove that manager presence

during that time was out of the ordinary. As discussed above, there was no discernable uptick in the numbers of managers who might take their lunch in the cafeteria on any given day. The Union activity had been openly conducted in front of Respondent's managers for years. There is no evidence that managers engaged in objectively coercive conduct, rather the General Counsel apparently is relying primarily on their mere presence, again claiming but not proving that it was increased from previous occasions. Finally, there is no evidence that managers listened in on, or otherwise discourage, employee conversations with Union representatives, meaning this is a much weaker set of facts than the Board confronted in *Aladdin Gaming*.

The record likewise shows that other indicia of surveillance which have violated the Act simply are not present here. Again, managers have long been eligible to take their meals in the cafeteria and there was no evidence that any were directed to increase their presence or that they did anything out the ordinary. The facts thus far fall short of cases like *Elano Corp.*, 216 NLRB 691 (1975), which involved a newly instituted rule that supervisors be present when employees ate lunch, or *Oakwood Hospital*, 305 NLRB 680 (1991), *enf. denied* 983 F.2d 698 (6th Cir.1993), which involved an elaborate plan requiring management team members to closely shadow a union representative while he met with employees in the cafeteria, and to take notes of who met with him and what they said. Similarly, *Liberty House Nursing Homes*, 245 NLRB 1194 (1979), where supervisors switched from taking their breaks in their own dining room to the employee dining area, is not applicable as managers have always used the cafeteria at Anchorage Hilton. Similarly not applicable is *Teksid Aluminum Foundry*, 311 NLRB 711 (1993), where a manager followed two employees wearing union insignia into a locker room, watched them while they changed clothes, and followed them out of the locker room. These employees were subsequently closely monitored by managers in the employee break room and parking lot.

In short, no facts or law support the contention that Respondent engaged in illegal surveillance and the charge in 19-CA-193656 should be dismissed.

V. 19-CA-193659 and 212923: the January and August 2017 Information Request Charges

A. The allegations.

> (a) Since January 3, 2017, the Union has requested that Respondent furnish the Union with the schedules, time cards and payroll records for bussers at the Hooper Bay restaurant from November 1, 2016, to January 3, 2017.
>
> (b) Since about August 22, 2017, the Union has requested that Respondent furnish the Union with the names of employees who complained that the Union was forcing them to agree to voice recording.
>
> (c) The information requested by the Union, as described above in paragraphs 9(a) and 9(b), is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit.
>
> (d) Since about January 3, 2017, and August 22, 2017, Respondent has failed and refused to furnish the Union with the information requested by it as described above, respectively, in paragraphs 9(a) and 9(b). GC 1(qq), ¶ 9.

B. Summary of Respondent's position.

The information request charges involve two separate instances where Respondent did not immediately respond to the Union's information requests. In the first instance, Respondent's General Manager, who had just returned from vacation, overlooked he had not provided time cards and schedules pertaining to one of four different issues the Union had raised in early January 2017 while he was out of the office. The second instance pertained to the Union's August 2017 request for the identities of two employees whom complained about *the Union's* conduct. The Union already knew what it had done (and so acknowledged at the hearing) and the General Manager acted out of concern that the employees' identities be protected from possible retaliation.

C. Summary of facts related to the charge.

1. The Union's January 3, 2017 information request.

Union president Jones complained in a January 3, 2017 letter to then Acting General Manager Bhattacharyya[28] that busser hours in one of the hotel restaurants had diminished. Jt. 7. Jones asked that busser hours be restored and they be made whole for allegedly lost hours, and he threatened a unilateral change unfair labor practice charge. *Id*. Embedded in this letter was a sentence requesting schedules, time cards and payroll records for the time period. *Id.;* Jt. 1, ¶24.

Jones also sent three other letters to Bhattacharyya at the same time, and while all threatened unilateral change charges and demanded reparations, none of the others requested information. R. 36a. One complained about Bellman uniforms and gave until October 13 for a response, *Id*. p. 2, another complained that line cook work was being performed by sous chefs and the chef, *Id*., p. 3, and the third concerned tip sharing by banquet captains. *Id*. p. 4.

Bhattacharyya was in Florida on vacation when the letters arrived. Tr. 701. Respondent's labor counsel emailed Jones that Bhattacharyya was away and would respond to the several letters after he returned. R. 37. Bhattacharyya emailed correspondence on January 20, 2018. R. 38. Included among the responsive letters was a specific response to the bussers complaint. *Id.* p. 5. However, Bhattacharyya overlooked that he had not included the requested information about the bussers with this email. Tr. 703, 709.

Despite continuous communication between Bhattacharyya and Union representatives during this time, no one from the Union followed up with Bhattacharyya that his response lacked the requested information. Tr. 702. The Union's unilateral change charge over busser hours filed on February 22, 2017, GC 1(o) (19-CA-193659) did not include a claim that Respondent

[28] Bhattacharyya became the General Manager in late January 2017. Tr. 666.

had not responded to the single sentence requesting information. Not until April 20, 2017 did it add a claim to that effect in an amended 19-CA-193659. GC 1(q). After receiving the amended charge alerting it to the deficiency in responding to the request for information about busser hours, Respondent produced the requested information on June 2, 2017. Jt. 1, ¶25; Jt. 15. Notably, the original complaint alleging that Respondent had unilaterally changed busser hours was not brought forward by the Region. Nor did the Union complain about Bhattacharyya's responses on January 20, 2017 to the Union's other complaints made in R. 36a.

2. The August 22 information request.

On March 3, 2017, Bhattacharyya wrote to the Union that employees had complained about being audio recorded by Union representatives during their break time in the cafeteria and asked that the Union respect employees' choice to take their breaks without being recorded. Jt. 10. Five months later, during a bargaining session in early August, the Union asked that the names of the complaining employees be disclosed. Jt. 39, p. 4. Respondent responded that while it would produce documents involving the complaints, it objected to disclosure of the employees' names out of a potential retaliation concern. Jt. 42, p. 3. The Union never responded to this objection or explained why the employee names were important to its bargaining position. Until the Union filed its charge in 19-CA-212923 on January 8, 2018 after Respondent's declaration of impasse on the access issue on January 5, Respondent had no indication that the Union had not accepted its objection.

Union president Jones confirmed at the hearing his knowledge that Esparza had been observed tape recording members and that it made them uncomfortable. Tr. 527. Esparza admitted he had been counselled by Jones to stop tape recording members. Tr. 224-25. In other words, the Union knew at the time that improper recording had occurred and certainly Esparza

would have known the involved members, especially from the product of his recorder.

3. Discussion

a. January 2017 inadvertent failure to produce documents.

An employer with an otherwise good track record in responding to Union information requests does not violate the Act by an inadvertent failure to produce in one instance, especially where, as here, (1) the Union never followed up before filing a charge and (2) the employer corrects once learning of its mistake. In *U.S. Postal Service,* 352 NLRB 1032 (2008), the Board affirmed dismissal of the Section 8(a)(5) charge under circumstances quite similar to those here. The employer had a history of prompt responses to information requests, and on one occasion inadvertently failed to produce requested documents. The employer cured that deficiency after becoming aware of it.

If anything, the facts in the instant case are perhaps more esculpatory than in *USPS.* There, the responsible manager "'dropped the ball' in not acting more expeditiously to furnish the Union with these documents. Meaker simply failed to appreciate the time element involved in responding to Auerbach's request for the records." 352 NLRB at 1042. The record here shows that Bhattacharyya simply overlooked attaching records when responding to several letters upon returning from vacation, including the January 3, 2017 busser letter.

In *USPS,* like here, the employer had a good record of responding to discovery requests. The Union did not follow up to ascertain why the employer had not produced the requested records before filing a charge. The ALJ commented that "it seems odd that Auerbach did not take his request for the records to another manager." *Id.* This left "the impression that timeliness was simply not of great concern to Auerbach." *Id.* Several facts support the same conclusion here that response timeliness, if not the records themselves, was not important to the Union: (1) lack of follow up when the records were not included in the January 20 response, (2)

the charge on the busser issue filed a month later did not include the information request, which was added two months later, and (3), the initial busser charge was never included in the complaint.

In light of Bhattacharyya's inadvertence and the utter lack of follow-up (and other facts showing the Union lacked concern for the documents), 19-CA-193659 should be dismissed.

b. The August 2017 request.

Respondent was not inadvertent in not identifying what employees claimed to have been tape recorded by Esparza, it acted purposefully in its decision to shield its employees who had come forward from possible retaliation. The evidence in this case shows that Esparza had in fact tape recorded Respondent's employees and certainly should have known who he tape recorded. The evidence also shows that the information was not important to the Union: Bhattacharyya informed the Union about employee complaints on March 3; the Union did not ask who had complained for five months at the early August bargaining session. The Union then did nothing for another five months after Respondent objected until it filed the charge.

The Board had not upheld Section 8(a)(5) charges when the Union already has the information in question. *See Manitowoc Ice, Inc.*, 344 NLRB 1222 (2005) ("the Union had independent access to most of the general information requested."); *United Parcel Service*, 362 NLRB 160 (2015). A somewhat recent ALJ decision, *U.S. Postal Serv.*, 29-CA-078913, 2012 WL 6021436 (2012), fairly squarely addresses the situation where, as here, the Union is demanding names of witnesses it already knows about:

> [A]s to DiMassimo, the Union's representatives were already aware that she had been interviewed because the Union's branch president had been present at her interview and had obtained a copy of the statement. Also, the Union was aware that Friedberg had been interviewed because Friedberg had told a union agent that he had been interviewed and that he did not hear what had been said by Morse.

> It seems to me that notwithstanding the Respondent's delay in furnishing the names of two of the witnesses, this was probably inadvertent, and under the circumstances, not prejudicial to the Union's right and ability to investigate and if necessary, to process a grievance on behalf of Murray. (In fact, no such grievance was ever filed on her behalf as to merits of her complaint). It is clear that the Union already knew the names of all witnesses and indeed had been present during some of the interviews, including DiMassimo's. It is also clear that by February 2012, the Union was aware that there was no dispute regarding the fact that Morse had made the offensive comments to Murray. I therefore find that the failure to list the names of Friedberg and DiMassimo until months later was, in these circumstances, at most, a *de minimus* violation of the Act. I therefore conclude this allegation should also be dismissed.

Decision, pp. 6-7 (footnote omitted).

In this case, the General Counsel and Union provided no fact or explanation that the names were intended to be used for any reason, and as discussed earlier in this memo, there is every indication that their request was solely intended as a means of delaying an agreement on Respondent's access proposal. 19-CA-212923 should be dismissed.

VI. 19-CA-218647: The Anchorage Police Report Charge

A. The allegation.

> On or about January 31, 2018, Respondent restricted Union access to the facility by calling the Anchorage Police Department and reporting that two Union officials were trespassing. GC 1(qq), ¶ 6(c).

B. Summary of Respondent's position.

Respondent advised the Union on January 5, 2018 that it intended to implement its access proposal on January 15. The implemented access language meant Union representatives no longer could access Respondent's employee cafeteria as it had in the past. Over a two week period beginning on January 15, the Union repeatedly refused to comply with the implemented language and informed Respondent it intended to continue to go into the cafeteria without limitation. Respondent conferred with the Anchorage Police Department about whether it could legally enforce its property rights with a trespass complaint. When informed that the police

department would not assist it in enforcement, Respondent discontinued its efforts to implement the new access language. The Union continues to access the cafeteria as it did in the past.

C. Summary of facts related to the charge.

Respondent's General Manager Steve Rader emailed Union president Jones regarding Respondent's previously announced intention to implement its access proposal on January 15, 2018. Jt. 53. In accordance with the access proposal, Rader asked that Jones call him to let him know when Union representatives planned to be at the hotel, allowing Rader to "confirm and make available a meeting room." *Id*. He also advised that pursuant to the implemented language, the representatives were expected to sign in and were not allowed to access the cafeteria. *Id.*

The Union ignored Rader's request, Tr. 774, and after the implementation date, its representatives repeatedly defied the new limitations by going to the cafeteria six or so times in the first two weeks. Tr. 777. For instance, Esparza and Valadez went to the cafeteria on January 16 and 17. Tr. 774-75, 777. Rader asked to talk to them outside to allow privacy from the employees in the cafeteria and asked that they leave. Tr. 775. They returned on January 22 accompanied by Jones and refused to leave when requested by Rader. Tr. 407-08, 778-79. Rader followed up with a letter that date advising that if the Union continued "to access the hotel without permission, it will be viewed as trespass and I will have no other option but to involve law enforcement." Jt. 54. The Union continued to send its representatives into the cafeteria. Tr. 779. On January 25, Jones wrote that the Union would continue to go into the cafeteria unless and until told otherwise by the NLRB. Jt. 55.

On January 31, Rader called the Anchorage Police and asked if Respondent had options. Tr. 780. Rader then met with police officers in his office and explained the situation. Tr. 782-

83. The officers next spoke to Valades at the Union hall for 15 minutes. Tr. 408. Rader was then informed that the police department would not act, at which point, Respondent discontinued efforts to implement the access language. Tr. 783-84. Union representatives have gone into the cafeteria ever since. Tr. 438, 784.

D. Discussion

Respondent attempted to enforce its property rights within the hotel by first seeking to bargain and, when that was unsuccessful, implement access language, and when that wasn't working, ask if local law enforcement might provide a solution. Missing in all of this is any allegation or evidence that Respondent's employees were aware of the implementation effort and especially that Respondent had conferred with the police department. In other words, there is no evidence that Respondent sought by conferring with the police to undermine the Union and, rather, its objective was properly to seek enforcement of its property interests.

When Rader talked to the Union representatives in January 2018 in an effort to enforce implementation of the access proposal, he did so away from employees in the cafeteria. In light of this, there is no plausible argument that Respondent was trying to undermine the Union or that it sought to interfere with employees' Section 7 rights.[29] Rather, Respondent was within its rights to inquire if local law enforcement might assist when the Union openly and repeatedly defied Rader's efforts to enforce the new restriction on access to the employee cafeteria.

An employer may call on the police for assistance where motivated by reasonable concerns including interference with legally protected interests. *Sprain Book Manor Nursing Home, Inc.,* 351 NLRB 1190, 1191 (2007). Thus, "an employer can take reasonable steps to

[29] *See Hempstead Motor Hotel,* 270 NLRB 121, 123 (1984) (no evidence that any employee overheard the employer's threat to call the police.

prevent nonemployees from trespassing onto private property." *Id*. Recent Board decisions have confirmed that employers have a right and ability to limit access to their property. In *UPMC Presbyterian Hospital*, 368 NLRB No. 2 (2019), the Board overruled its precedent that had allowed non-employee union representatives to access employers' public areas to solicit or promote union membership. Now, "absent discrimination between nonemployee union representatives and other nonemployees . . . the Respondent may decide what types of activities, if any, it will allow by nonemployees on its property."[30] *UPMC* was followed by *Kroger Limited Partnership*, 368 NLRB No. 64 (2019), where the Board dismissed the complaint, including charges that the employer unlawfully called the police to stop union solicitation in its parking lot.

Respondent took reasonable steps to seek guidance from the local police about whether it could protect its interest in its property by enforcing the implemented access limitation through a trespass action. After being advised that the police would not assist in such an action, Respondent backed from any further effort to implement.

VII. 19-CA-203675: the intern access charge

A. The allegation.

> Since in or about July 2017, Respondent has restricted Union access to the facility by barring interns. GC 1(qq), ¶ 6(b).

B. Summary of Respondent's position.

Respondent barred the Union's interns from the Anchorage Hilton after they trespassed at the Anchorage Marriott to solicit employees in working areas during their working time. Barring the interns for this reason was consistent with Board rulings that employers can legally determine

[30] In *Bexar County Performing Arts Center Foundation*, 368 NLRB No. 46 (2019) the Board noted the distinction between employees, who have a right to engage in Section 7 activities on their employer's property, and non-employees, who do not.

whether to allow non-employees onto their property. The interns' misconduct at the one property was more than sufficient reason for barring them from the other.

C. Summary of facts related to the charge.

On July 26, 2017, a week before bargaining was to resume in early August, the Union trespassed at the Anchorage Marriott. Union interns went into hotel working areas and engaged housekeeping staff members, while they were working, in conversations about their working terms and conditions. Jt. 27. Union president Jones admitted that it was inappropriate for the interns to have gone into working areas to talk to employees while they were working. Tr. 528. One of the offending interns was his son. *Id.*

The event resulted in Respondent barring Union interns at its properties including the Anchorage Hilton. Tr. 716. The decision was for safety and security reasons, and because the interns were deceitful when questioned about what they had been doing at the hotel. Tr. 713.

D. Discussion

Respondent was legally within its rights to have barred the Union interns from its property. For one thing, the General Counsel never established that the interns had an immutable right to be on Respondent's property or that they acted as the Union's agents when they were there. In fact, Glaser claimed he had been told by Esparza, Valades and Jones that the Union had never obtained permission for the interns to be there, Tr. 258-59, which obviously contradicts any contention by the Union that by barring them, Respondent unilaterally changed "the rules."[31]

For another, recent Board decisions confirm that an employer may limit access to its property by non-employees. *Fred Meyer Stores, Inc*., 368 NLRB No. 6 (2019) (Respondent did

[31] The Union's counsel sought to ask Bhattacharyya if he had contacted the Union "to bargain over a change in the rules relating to intern access." Tr. 741. Respondent's foundation objection that the Union had not established there was anything to bargain over was properly sustained.

not violate the Act by limiting union representatives' access); *Bexar County Performing Arts Center Foundation*, 368 NLRB No. 46 (2019) (non-employees do not have a right to access private property to engage in union activities.); *UPMC Presbyterian Hospital*, 368 NLRB No. 2 (2019) ("Respondent may decide what types of activities, if any, it will allow by nonemployees on its property." Moreover, the interns' conduct at the Marriott, which the Union admitted was improper, was a legitimate non-discriminatory reason for barring them from both hotels. *Fred Meyer, supra* (increasing number of Union representatives at the employer's facility removed any protection of the Act.)

VIII. 19-CA-228578: the Posting Charge.

A. The allegation.

> From about February through December 2018, Respondent bypassed the Union, dealt directly with its employees in the Unit, and denigrated the Union by posting a notice to employees by the time clock outside of the human resources office at the facility stating that:
>
> > (a) it wanted "to have a direct working relationship with our employees to solve issues and does not believe having a 3rd party labor union involved is necessary;"
> >
> > (b) the Union was wrong that without a union employees could lose benefits;
> >
> > (c) at its hotels without unions employees had the same benefits the Unit employees currently had "and more;" and
> >
> > (d) "our managers welcome you to come to us with any concerns you may have for solutions that are satisfactory to you." GC 1(qq), ¶ 7.

B. Summary of Respondent's position

Respondent's communication was intended to address a misleading and disparaging notice posted by the Union in the workplace and was not an effort to undermine the Union or to bargain directly with employees.

C. Summary of facts related to the charge.

In early June 2018, the Union posted a flyer on the Union's designated bulletin board next to the cafeteria. Jt. 56; Tr. 791. Sometime later that same month, Respondent posted a response on the bulletin board next to the time clock adjacent to the Human Resources office used for its postings for employees. Jt. 57, Tr. 794, 805-06.

The Union's posting contained a number of false statements. For instance, it stated that Respondent had tried to eliminate various benefits and that without the Union, it would provide no benefits whatsoever:

> This dispute occurred because your employer wanted to take away your wage increase, health insurance, pension, work load and job security. Obviously, this is a horrendous act by your employer. We've pushed back and have been able to maintain the majority of the benefits listed above. The only reason we've been successful, is because many of you have been courageous enough to stand up for what you deserve. Columbia Sussex will not give you these benefits unless all of us together demand that they give them to you. Because you have representation is the sole reason you keep the liberties you have working at the Hilton Anchorage. It is for certain that without the Union the Hilton will take all these benefits away from you.

Jt. 56. Because the Union's posting was disparaging and misleading, Respondent believed it necessary to respond. Tr. 792. Respondent's posting challenged the bold but false statements that Respondent would not provide its workforce with benefits or that it is somehow attempting to take wages, benefits or other terms of employment away from the workforce:

> We were recently made aware of a posting from the UNITE HERE Local 878 in which they claim if you were not a member of the union, you could lose your Pension, Holiday Pay, Paid Lunch Break, Job Security, Two 10 Minute Breaks, Representation, Seniority and other Benefits (see attachment). This statement is simply not true and frankly is one of the most dishonest statements we can imagine.
>
> Employees at each of our hotels enjoy each of these benefits and more, and most without a union presence. The idea that you would lose any of these items is simply not true. Importantly, the notion that you have these items only because

> you have union representation is also not true. Again, employees in our other properties have these benefits and more and most do not have union representation. We believe we can achieve more by working together versus having a 3rd party divide us as can be seen in our other locations. Our intentions should be clear that with the investment the company is making with our renovations, Columbia Sussex will be a contributing member of our Anchorage community for many years to come.

Jt. 57.

Respondent's posting also responded to the overall tone and general statements in the Union posting that Respondent's management was dishonest ("DON'T BELIEVE THE LIES . . ") and had engaged in "horrendous acts." Jt. 56. Respondent's posting justifiably expressed its appreciation for the employees, its open door policy[32] and commitment to investing in the Anchorage Hilton's operations and community in general.

> We care a great deal for all associates and our managers welcome you to come to us with any concerns you may have for solutions that are satisfactory to you. In spite of the fact that most businesses in Anchorage are downsizing and cutting out employee benefits such as employee events, Columbia Sussex continues to encourage us to have better holiday events, associate luncheons, associate rallies, and other events throughout the summer and the year.

Jt. 57.

Respondent's posting expresses opinion and does not propose certain wage, benefit or other workplace condition terms directly to the employees in an effort to bargain. Unlike the Union's posting, it does not disparage the other bargaining party.

D. Discussion

In order to establish a violation, the General Counsel must show that an employer's communication was intended to establish or change terms and conditions of employment or to undercut the Union's offer to establish or change them, and it must exclude the Union. *Southern*

[32] Respondent's Open Door Policy, R. 42, had been posted on the bulletin board by the time clock with no apparent Union objection since before Rader became General Manager. Tr. 792-93.

California Gas Co., 316 NLRB 982 (1995). An employer's free speech rights were more thoroughly explained in *Childrens Ctr. for Behavioral Dev.,* 347 NLRB 35, 35-6 (2006):

> Section 8(c) of the Act "implements the First Amendment" such that "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *NLRB v. Gissel Packing Co*., 395 U.S. 575, 617 (1969). It gives employers the right to express their opinions about union matters, provided such expressions do not contain any "threat of reprisal or force or promise of benefit." Section 8(c); *Progressive Electric*, 344 NLRB 426, 427 (2005); *see also United Technologies Corp*., 274 NLRB 1069, 1074 (1985), *enfd. sub nom NLRB v. Pratt & Whitney*, 789 F.2d 129 (2d Cir. 1986) (finding employer's communications "criticizing the Union's demands and tactics" was protected by Sec. 8(c) because "employees ought to be fully informed as to all issues relevant to collective-bargaining negotiations and the parties' positions as to those issues"). Thus, an employer may criticize, disparage, or denigrate a union without running afoul of Section 8(a)(1), provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees. *See Poly-America, Inc*., 328 NLRB 667, 669 (1999), *affd. in part and revd. in part* 260 F.3d 465 (5th Cir. 2001) (relying on proposition that "[i]t is well settled that Section 8(c) … gives employers the right to express their views about unionization or a particular union as long as those communications do not threaten reprisals or promise benefits [,]" the Board finds that employer did not violate Section 8(a)(1) through its agent's statements to employees that the Union was no good, that it had threatened to burn the plant, and that it would charge up to $300 in weekly or monthly fees); *see also Trailmobile Trailer, LLC,* 343 NLRB 95, 95 (2004) (finding that "flip and intemperate" remarks intended to make fun of some union representatives did not violate the Act). …"DArgumentation of this type is left routinely to the good sense of employees." *Optica Lee Borinquen, Inc*., 307 NLRB 705, 708-709 (1992), *enfd. mem*. 991 F.2d 786 (1st Cir. 1993). Although the Board has found that extreme denigration may rise to the level of interference with Section 7 rights, such cases are clearly distinguishable. *See, e.g., Sheraton Hotel Waterbury*, 312 NLRB 304 fn. 3 (1993), *enfd*. in relevant part 31 F.3d 79 (2d Cir. 1994) (employer violated Section 8(a)(1) by accusing the union of abusing employees at home, and in response hiring police to patrol its parking lot, thus implying to employees that their safety in the workplace was at issue, while at the same time comparing the union to a totalitarian regime that uses abuse and intimidation to quell dissent).

The employer in *Children's Center* issued the following memorandum to its employees:

> I am sure that you know that Children's Center for Behavioral Development is suffering from severe financial hardship. What many of you may not know is that, I believe that for months now, the Union has been doing everything in its power to harm Children's Center for Behavioral Development. The Union has

> interfered with our relationship with the United Way, which affected our funding. Now the Union is trying to arbitrate grievances on behalf of Eileen Redeker, which has caused the Children's Center for Behavioral Development to incur costs and legal fees, which it cannot afford. In addition, the Union is now claiming that it has a contract with CCBD, even though the Union rejected the Center's last offer earlier this year and the parties have not been back to the negotiating table since. I wanted to make all of you aware of these issues and ask that you not permit Union issues to distract us from our mission. It is only by working together that we can move forward and succeed in these difficult times.

Id. at 35. In concluding that the employer's memo did not violate Section 8(c), the Board held that it contained "nothing more than the Respondent's negative opinion of the Union's actions.[33] The first paragraph of the memo states the Respondent's opinion that the Union was attempting to harm the Respondent. The memo then cites specific examples of the Union's conduct that supported the Respondent's opinion." *Id.* at 36.

Respondent's posting which replied to the Union was a legal statement of fact and opinion subject to the protection of Section 8(c). It responded to disparaging comments by the Union to the effect that Respondent's management were liars, would rob the employees of their benefits and had engaged in "horrendous acts." In light of this, Respondent was certainly within its rights to respond and, as the Union had posted its memo, to have done likewise. The charge in 19-CA-228578 should be dismissed.

Dated this 17th day of December, 2019.

LITTLER MENDELSON
Attorneys for Respondent
CP Anchorage Hotel 2, LLC, d/b/a Hilton Anchorage

By: */s/ Douglas S. Parker*
Douglas S. Parker
Renea I. Saade

[33] *See also Park N Fly, Inc.*, 349 NLRB 132 (2007) (statement that the Union "would not do the employees any good" lawful opinion).

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of December, 2019, I served a full, true and correct copy of the foregoing:

- ☐ By delivery via messenger, or otherwise by hand,
- ☐ By facsimile,
- ☒ By e-mail,
- ☐ By mailing same, postage paid,

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