

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CP ANCHORAGE HOTEL 2, LLC, d/b/a | Case Nos. 19-CA-193656, et al.
HILTON ANCHORAGE

And

UNITE HERE! LOCAL 878, AFL-CIO

CHARGING PARTY'S POST-HEARING BRIEF

Dmitri Iglitzin
Kelly Ann Skahan
BARNARD IGLITZIN & LAVITT, LLP
18 W Mercer St., Suite 400
Seattle, WA 98119
Phone: (206) 257-6003
Fax: (206) 257-6048
iglitzin@workerlaw.com

Attorneys for UNITE HERE! Local 878

TABLE OF CONTENTS

STATEMENT OF THE CASE..... 1

STATEMENT OF THE ISSUE..... 3

STATEMENT OF FACTS 3

ARGUMENT AND AUTHORITY 17

 I. Hilton Anchorage’s repeated failures to counter the Union’s proposals constitute bad-faith bargaining in violation of §§ 8(a)(1) and (5) of the Act..... 17

 II. Hilton Anchorage’s unilateral implementation of their access proposal violated §§ 8(a)(1) and (5) of the Act because the Union’s proposals had broken any impasse. 21

 A. The Hotel could not maintain that the 2014 impasse still existed in light of the Union’s substantial concessions in its 2017 proposals. 22

 B. Neither of the two exceptions to the requirement that “overall impasse” be reached prior to implementation of bargaining proposals existed in this situation..... 24

 C. The Hotel could not lawfully declare impasse here over the single bargaining issue of access. 26

CONCLUSION..... 28

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>A.M.F. Bowling Co.</i> , 314 NLRB 969 (1994)	22
<i>Airflow Research 7 Manufacturing Corp.</i> , 320 NLRB 861 (1996)	23, 24
<i>American Commercial Lines</i> , 291 NLRB 1066 (1988)	17
<i>Barry Wehmiller Co.</i> , 271 NLRB 471 (1984)	17
<i>Barstow Community Hospital</i> , 361 NLRB No. 34, slip op. (2014).....	22
<i>Berry Kofron Dental Lab.</i> , 160 NLRB 493 (1966)	18
<i>Bottom Line Enterprises</i> , 302 NLRB 373 (1991), <i>enf'd</i> , 15 F.3d 1087 (10th Cir. 1994).....	22, 25, 27
<i>CalMat Co.</i> , 331 NLRB 1084 (2000)	26, 27, 28
<i>Eagle Transport</i> , 338 NLRB No. 55, slip op.	25
<i>Fetzer Television v. NLRB</i> , 317 F.2d 420 (6th Cir. 1963)	22
<i>Grinnell Fire Protection Systems Co.</i> , 328 NLRB 585 (1999), <i>enf'd</i> 236 F.3d 187 (4th Cir. 2000).....	23, 24
<i>Herman Sausage Co.</i> , 122 NLRB 168 (1958), <i>enf'd</i> 275 F.2d 229 (5th Cir. 1960).....	18, 19
<i>Hondo Drilling Co.</i> , 213 NLRB 229 (1974), <i>aff'd</i> 525 F.2d 864 (5th Cir.), <i>cert. denied</i> 429 U.S. 818 (1976).....	17
<i>In re Industrial Wire Prod. Corp.</i> , 177 NLRB 328 (1969), <i>enf'd</i> 455 F.2d 673 (9th Cir. 1972).....	18, 19

<i>Ingredion, Inc. d/b/a Penford Products Co.,</i> 366 NLRB No. 74 (2018)	23
<i>Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co.,</i> 484 U.S. 539(1988).....	21
<i>Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co.,</i> 779 F.2d 497 (9th Cir. 1985)	21
<i>May Stores Co. v. NLRB,</i> 326 US 376 (1945).....	24
<i>Nat’l Mgmt. Consultants,</i> 313 NLRB 405 (1993)	18
<i>NLRB v. Advertisers Manufacturing Company,</i> 823 F.2d 1086 (7th Cir. 1987)	25
<i>NLRB v. American Nat’l Ins. Co.,</i> 343 U.S. 395 (1952).....	22
<i>NLRB v. Highland Park Mfg. Co.,</i> 110 F.2d 632 (4th Cir. 1940)	17
<i>NLRB v. Katz,</i> 369 U.S. 736 (1962).....	21
<i>NLRB v. Tomco Communications, Inc.,</i> 567 F.2d 871 (9th Cir. 1978)	26
<i>NLRB v. United Clay Mines Corp.,</i> 219 F.2d 120 (6th Cir 1955)	22
<i>Reed & Prince Mfg. Co.,</i> 96 NLRB 850 (1951), <i>enf’d</i> 205 F.2d 131 (1st Cir.), <i>cert. denied</i> 346 U.S. 887 (1953).....	17, 20
<i>Ryan Iron Works, Inc. v. NLRB,</i> 257 F.3d 1 (1st Cir. 2007).....	23
<i>Sierra Publishing Co. v. NLRB,</i> 888 F.2d 1394 (9th Cir. 1989)	26
<i>UPS Supply Chain Solutions, Inc.,</i> 366 NLRB No. 118 (2018)	17

Visiting Nurse Services of Western Mass., Inc.,
325 NLRB No. 212 (1998), *enfd*, 177 F.3d 52 (1st Cir. 1999)22

Statutes

National Labor Relations Act Sections 8(a)(1) and (5) *passim*

STATEMENT OF THE CASE¹

CP Anchorage Hotel 2, LLC, d/b/a Hilton Anchorage (the Hotel or the Hilton) operates the Hilton Hotel in Anchorage, Alaska. UNITE HERE! Local 878 (Union or Local 878) represents many of the employees who work at the Hotel, and the case at hand revolves around the Hotel's many attempts to frustrate the bargaining process by rendering those employees' decision to select an exclusive bargaining representative futile.

When the Hotel was purchased in 2005, its new ownership adopted its predecessor's collective bargaining agreement with the Union. That agreement expired on August 31, 2008. Jt. Ex. 2. After the parties engaged in bargaining for a new agreement in 2008 and part of 2009, the Hotel declared an impasse on March 30, 2009, and implemented certain key terms of its contract proposal. Jt. Ex. 3. After renewed bargaining in 2013-2014, the Hotel declared that impasse still existed and implemented its new health care proposal (effective April 1, 2014). Jt. Ex. 5. The parties have generally operated under those terms, along with the terms set forth in the expired agreement that the Hotel had not altered, since that date. At the time of this latter implementation, the Hotel asserted that impasse existed due to the parties' disagreement regarding four issues: wages, successor language, health insurance coverage, and the number of rooms housekeepers were required to clean on each shift. *Id.*

On March 2, 2017, the Hotel's manager contacted Local 878's president to tell him the Hotel intended to dramatically curtail the Union's access to the Hotel. Jt. Ex. 9. The Hotel intended to limit access to a single hour on Tuesdays and Fridays on days when the Union had provided adequate notice, when the Hotel had approved the visit, and when the Hotel had

¹ The Union adopts the General Counsel's statement of the case and statement of facts; the issues and facts outlined in this brief are intended to supplement the General Counsel's own briefing.

available meeting space for the Union to interview employees outside of their cafeteria. This was a dramatic change from past practice, which permitted the Union to enter the cafeteria during the time periods when the bargaining unit members were eating the free food provided to them by the Hotel in that location, and would have forced Union members to choose between eating the Hotel-provided food in the cafeteria during their meal break or both foregoing that opportunity and allowing themselves to be observed making specific efforts to meet with their Union representatives in an extremely visible location designated by the Hotel.

In response, the Union sought to bargain over both the access proposal and a proposed successor collective bargaining agreement. In doing so, it addressed not only the Hotel's access proposal, but also the four issues that had led the Hotel to contend that an impasse still existed in 2014. Through correspondence and face-to-face bargaining, the Union offered counterproposals that demonstrated substantial movement on its part with regard to each issue, including a comprehensive wage package and what ultimately amounted to acceptance of the Hotel's proposed terms with regard to room quotas. In response, the Hotel refused to offer any counterproposals, despite the Union's demonstrated willingness to compromise.

Despite the Union's proposals having broken the 2014 impasse, the Hotel ultimately unilaterally implemented its access proposal in January 2018. Then, when Union representatives sought to visit the Hotel outside of the hours prescribed in the Hotel's newly-imposed access requirements, the Hotel called the Anchorage Police Department to report that Union representatives were trespassing.

The Hotel's repeated failures to respond meaningfully to the Union's impasse-breaking proposals violate Sections 8(a)(1) and (5) of the National Labor Relations Act (the Act) in that they demonstrate one of the hallmarks of bad faith bargaining: a complete lack of willingness to

compromise, concede, or accept any terms other than the ones a party proposed itself. Likewise, the Hotel's unilateral implementation of its access proposal violates the same sections of the Act. The Hotel could not lawfully declare impasse or subsequently unilaterally implement its own proposals in light of the Union's substantial concessions in its 2017 proposals, including its acceptance of the Hotel's previous proposals. The Union had not engaged in tactics designed to delay negotiations, nor did any economic exigencies compel the Hotel to unilaterally implement its access proposal. Finally, the Hotel could not declare impasse regarding a single subject of bargaining, as no good-faith impasse existed even as to that issue and the Union's willingness to compromise demonstrated there had not been an overall breakdown in negotiations.

Accordingly, the Union respectfully requests that the ALJ find that the Hotel violated its duty to bargain in good faith under Sections 8(a)(1) and (5) of the Act by failing to counter any of the Union's proposals, declaring single-issue impasse, and subsequently implementing its access proposal unilaterally.

STATEMENT OF THE ISSUE

Did the Hotel's failure and refusal throughout 2017 to compromise, concede, or accept any terms other than the ones it had proposed, followed by its unilateral implementation of its proposed language for Article IV of the parties' collective bargaining agreement violate Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act?

STATEMENT OF FACTS

The Hilton Anchorage is a hotel located in Anchorage, Alaska. UNITE HERE! Local 878 represents many of the employees who work at the Hotel as part of a bargaining unit that

includes bartenders, banquet captains and servers, bellmen, cashiers, housekeepers, maintenance employees, and other workers employed by the Hilton. Jt. Ex. 1 ¶¶ 1, 5-6.

The parties' last collective bargaining agreement expired on August 31, 2008. Jt. Ex. 2. On March 30, 2009, after some bargaining had occurred, the Hotel advised the Union of its position that the parties were at an impasse in negotiations. Jt. Ex. 3. The Hotel subsequently implemented parts of its March 11, 2009, proposal on April 13. *Id.*; *see also* Jt. Ex. 4.

After renewed bargaining in 2013-2014, the Hotel declared that impasse still existed and implemented its new health care proposal (effective April 1, 2014). Jt. Ex. 5. The parties have generally operated under those terms, along with the terms set forth in the expired agreement that the Hotel had not altered, since that date. At the time of this latter implementation, the Hotel asserted that impasse existed due to the parties' disagreement regarding four issues: wages, successor language, health insurance coverage, and the number of rooms housekeepers were required to clean on each shift. *Id.*

The Hotel generally provides a free meal to its employees, including both unit members and non-union and management employees, in the designated employee cafeteria at 10 a.m. each morning, when most of its employees take their lunch break. Jt. Ex. 1, ¶ 11 Employees who choose to stay at the hotel for the lunch break are paid for their time, while employees who leave the hotel are not paid. *Id.* at ¶ 12-13.

On March 2, 2017, the then-General Manager of the Hotel, Soham Bhattacharya, sent a letter to Local 878 President Marvin Jones and Vice President Daniel Esparza outlining Article IV of its agreement with the Union, which covered Union representatives' access to the Hotel premises, and proposing a modification that dramatically limited the times during which the Union could access the premises to meet with workers. Jt. Ex. 9. Specifically, the proposed

language limited access to one hour on Tuesdays and Fridays, and required that the Union make advance arrangements with the Hotel, signed in and out at the front desk, and met with employees only in the meeting room the Hotel provided for it. *Id.* That proposal drastically changed the Union's practices, as representatives nearly always met with employees in the Hotel's employee cafeteria every weekday during the employees' scheduled lunch break at 10 am. Tr. 382:6-384:8. Mr. Bhattacharya's letter also requested that the Union notify him if it wished to bargain over its proposal no later than March 10, 2017. Jt. Ex. 9. Mr. Jones told Mr. Bhattacharya that the Union indeed wished to bargain over the change, Tr. 323:2-12, and the parties met on April 21 at the Hotel to bargain. Tr. 232:13-16; *See also* Jt. Ex. 1 ¶ 16.

At bargaining, Mr. Evans described the change proposed by the Hotel and Mr. Glaser, International Organizer for UNITE HERE, described the impact it would have on both the Union and the relationship between the parties. Tr. 233:3-23. Mr. Glaser then noted that the Union believed impasse had been broken because it wanted to bargain on several of the key issues in the successor agreement. *Id.* In response, Mr. Evans said he did not see any of the Union's problems as significant, that he felt the Hotel's proposal was a good one, that the Hotel only wanted to bargain on their access proposal, and that impasse still existed. Tr. 233:21-234:7. The session lasted for two to three hours, and no date was set for future bargaining, but Mr. Glaser indicated that the Union would be sending information requests in the future and Mr. Evans indicated that the Hotel would be responsive to those requests. Tr. 234:17-25.

Mr. Glaser followed up on May 8, Jt. Ex. 12, noting that in order for negotiations regarding the Hotel's access proposal to be useful, the parties would also need to deal with "the entire range of unresolved issues that [were] preventing Local 878 and Columbia Sussex² from

² Columbia Sussex Corporation owns the Hilton Anchorage.

reaching a new collective bargaining agreement.” Mr. Glaser pointed out that the Hotel’s past unwillingness to concede on any points during negotiations had been counterproductive, and that negotiations were much more likely to lead to an agreement if there was “a concession by Columbia Sussex regarding some *other* issue in dispute,” because “when there is only one issue on the table, it tends to be much more of a zero-sum game.” *Id.* (emphasis in original). Further, he noted that the Hotel could not unilaterally implement its new access proposal because “it [could] no longer be asserted that the parties [were] at an impasse in such bargaining,” as nearly ten years had passed since impasse had been declared, leading to dramatic changes in the economic circumstances, laws, and safety requirements at issue in negotiations. *Id.*

On May 11, Mr. Evans responded, disagreeing with Mr. Glaser’s assertion that the parties were no longer at impasse. Jt. Ex. 13. Mr. Evans argued that the Union had not introduced a counterproposal regarding access to the Hotel, and that none of the changes Mr. Glaser had noted taking place since impasse was declared — including the implementation of the Affordable Care Act, increases to the minimum wage in Alaska, dramatic changes to the J-1 visa program under the Trump administration, and updates required for workplace safety — affected the parties’ bargaining positions. *Id.*

Mr. Evans sent a letter to Mr. Glaser on June 5, 2017, responding to information requests the Union had sent regarding those issues. Jt. Ex. 16; *See* J. Ex. 14-15. At the letter’s conclusion, Mr. Evans noted that, though he did not believe either party’s position had changed since reaching impasse nearly nine years prior, the Hotel was “willing, as a showing of good faith, to consider opening bargaining on the issue of dues check-off,” and that “the proposal by the Hotel to limit Union representatives’ access” for some unexplained reason made “‘dues check-off’ . . . a fitting ‘union relationship’ issue that can be included in the negotiations.” J. Ex. 16. Mr. Evans

concluded by noting that “[p]erhaps if the parties can come to agreement on these two issues it may pave the way for a better working relationship moving forward.” The Hotel then requested that the Union send dates on which the parties could bargain over the access proposal on June 26, Jt. Ex. 17, and June 27, Jt. Ex. 18.

On June 27, 2017, Mr. Glaser responded to Mr. Evans’ June 5 letter, first addressing deficiencies in the Hotel’s response to the Union’s information request before discussing negotiations. Jt. Ex. 19. Mr. Glaser pointed out that, because the Hotel had refused to engage in give-and-take bargaining regarding any of its proposals, Mr. Evans’ assertion that the Union’s position did not appear to have changed could not possibly be based on actual knowledge of the Union’s position. *Id.* Mr. Glaser pointed out that the Hotel’s proposed half-day of bargaining would likely be insufficient, but the Union was willing to meet on either August 3 or 4. *Id.*

Mr. Evans responded on June 29. Jt. Ex. 20. He agreed to meet on both August 3 and 4. *Id.*

Mr. Glaser responded via email on July 24, 2017. Jt. Ex. 24. In that email, he listed the four factors the Hotel’s representative had identified in February 2014 as points of impasse: “(1) the number of rooms to be cleaned by room attendants, (2) wages, (3) health care, and (4) successor and assigns language.” *Id.*; *see also* Jt. Ex. 5. He noted that there was “substantial room for change regarding the Union’s past positions regarding all four of these items,” and that the Union had “no reason to doubt that the company’s position [would] be amenable to modification as well.” Jt. Ex. 24. He then went on to request additional information regarding those issues. *Id.*

On July 27, Mr. Evans emailed Mr. Jones, the Local’s president, to tell him that “a number of individuals were found to be trespassing in the hotel and engaging the housekeeping

staff, during their work hours, in conversations regarding the terms and conditions of their employment.” Jt. Ex. 27. Mr. Evan said the individuals were later identified as interns for the Union, that the Hotel would, “effectively immediately, formally (withdraw) its previously granted permission that allowed interns to be present in the Hotel,” and that interns were “no longer welcome on the Hilton property,” so Mr. Jones and Mr. Esparza could no longer bring them on visits to the Hotel’s workers. *Id.*

The Hotel and the Union met to bargain again on August 3 and 4, 2017. Jt. Ex. 1, ¶ 16. On August 5, Mr. Evans emailed Mr. Glaser to recap where he felt the parties stood after two days of bargaining. Jt. Ex. 37. Mr. Evans noted that the proposed access issue came up on the second day of bargaining, and that the Hotel received no written counterproposal from the Union but understood that the Union had agreed to a provision requiring representatives to notify the hotel if they planned to be on the property for reasons other than regularly scheduled meetings with employees and indicated it was amenable to seeking the Hotel’s permission before distributing leaflets on Hotel property. *Id.* He also said that the Hotel did not consider either to be significant counterproposals, and that it believed the notice and permission requirements already existed. *Id.* Mr. Evans also noted that the Union had indicated it wanted to bargain over wages, healthcare, the number of rooms to be cleaned by room attendants, and successorship, as its positions had changed substantially since impasse was originally declared, but that the Union had made no specific proposals and several issues went undiscussed altogether. *Id.* On August 7, Mr. Evans sent a follow-up email to schedule further bargaining dates. Jt. Ex. 38.

On August 9, Mr. Glaser sent Mr. Evans a letter confirming that the summary Mr. Evans had sent was accurate, but that it left out important details. Jt. Ex. 39. Mr. Glaser went on to note that the Union had been quite clear about what issues it intended to discuss at negotiations and

indicated willingness to compromise on those issues, and that the Hotel had not identified any other issues it thought would potentially prevent a new agreement. *Id.* He also pointed out that the Hotel's access proposal could not be evaluated or bargained about in isolation from all other terms of a potential agreement, and that because the status quo of hotel policies and procedures differed dramatically from the best and final offer implemented in 2009, it would be impossible for the parties to bargain without first establishing what the status quo actually was. *Id.* He went on to detail several examples of instances where the Hotel's current practices conflicted with the offer it implemented after declaring impasse in 2009. *Id.*

Mr. Glaser also specifically addressed Mr. Evans' summary of discussions regarding the Hotel's access proposal, asserting that his summary did not reflect that the Union had identified what it believed to be the Hotel's rationale in making changes to the Union's access and shared its own thinking on each of those issues in an attempt to find ways to address the Hotel's concerns. *Id.* He then pointed out that the status quo was that the Union had unrestricted access to the hotel, so the Union's agreement to provide notice and get permission for leafletting was itself a concession. *Id.*

With regard to wages, Mr. Glaser reminded Mr. Evans that the Hotel's representatives had acknowledged that the Hotel not having given employees a wage increase for ten years was unreasonable on its face, and that as a result Mr. Glaser expected the Union's future wage proposals would be met with negotiations rather than "a flat out 'no.'" *Id.* Mr. Glaser also noted that, while no discussion of successorship or room cleaning quotas occurred, the parties took up the entire scheduled bargaining session discussing other issues, and the Employer had not indicated any interest in engaging with the Union on any of the issues that went undiscussed. *Id.* Finally, he stated that the Union would send a written counterproposal regarding access issues

shortly, and that once it received more information from the Company regarding the Hotel's health plans it would provide a counterproposal on that issue as well. *Id.*

On August 17, Mr. Evans responded with a formal letter disputing Mr. Glaser's description of the prior negotiating sessions. Specifically, he noted that the Hotel felt the Union had only identified the Hotel's access proposal as an issue for bargaining, Jt. Ex. 42. However, Mr. Evans immediately contradicted himself by stating that "the Hotel [was] not proposing any other changes to the terms and conditions of employment," nor had it "changed its position on any of the four areas [the Union] had identified for bargaining (i.e. wages, health care, 17-room requirement and successorship)." *Id.* He went on to acknowledge that, while the Union has indicated it had changed its position in those areas, **"it would be a mistake to conclude that [the Hotel's] willingness to bargain signals an intention to offer [its] own proposals on any of the identified issues."** *Id.* (emphasis added). He again asserted that the Union had made no proposals of its own, and that Mr. Glaser was "absolutely correct that the Hotel [had] rejected the unwritten counterproposals put forward by the Union regarding the access issue."

On October 5, 2017, Mr. Evans emailed Mr. Glaser to ask if the Union needed any additional information to prepare for negotiations scheduled for later that month. J. Ex. 43. He also noted that the Hotel planned to negotiate the access issue first at those meetings, and that it had not received any formal proposals from the Union regarding other issues but was willing to consider proposals made in person during bargaining. *Id.*

On October 16, Mr. Glaser sent Mr. Evans a letter cancelling negotiations for late October. He noted that, though the Union had been dedicated to moving forward despite having filed multiple ULP charges against the Hotel, the Hotel's recent termination of bargaining team member Bill Rosario had so intimidated other members that the Union could not proceed with

bargaining until the Union could reassess Mr. Rosario's termination. Jt. Ex. 44. He went on to say that, despite the cancellation, the Union still wanted to make progress on the five issues the parties had identified, and he outlined the Union's position on those five issues. *Id.* Specifically, he noted that the Hotel's unilateral implementation of its access proposal and its insistence on dictating who from the Union could speak to bargaining members had left the Union unable to formulate a meaningful bargaining proposal, as they were unsure what the "status quo" of Union access actually was. *Id.* He included a comprehensive wage proposal and further stated that the Union was in the process of determining proposals regarding health plans and room attendant quotas. *Id.*

Mr. Evans responded the same day, asserting that, aside from the wage proposal in Mr. Glaser's most recent letter, "to date [the Hotel had] not received any proposals or counter-proposals from the Union." J. Ex. 45. Despite Mr. Glaser having canceled negotiations, Mr. Evans asserted that "the bargaining representatives of the hotel will be present at 9:00 a.m. on Tuesday to negotiate in good faith. If you show up, you show up; and if you don't, you don't." *Id.*

He went on to note that he assumed Mr. Glaser's reference to the Hotel dictating who could represent the Union was a reference to the Hotel having banned interns from the property, and that the Hotel disagreed with the Union's reasoning because their access proposal only concerned "where" Union representatives could meet, not "who" could be a representative in the first place. *Id.* Finally, he referred to the Union's ULP charges against the employer by rhetorically wondering how other employers responded "to being accused of all sorts of wrongdoing," and noted that "the ceaseless efforts at casting [the Hotel] as bad people and all of the unsubstantiated accusations do nothing but widen and harden the gulf between the parties." *Id.*

On October 20, Mr. Glaser responded. Jt. Ex. 46. He pointed out that the Union had made a full economic proposal and asked why the Hotel was unable to review that proposal and make a meaningful counterproposal before the parties met in person, and reiterated that the tenor of conversation regarding Mr. Rosario's termination indicated face-to-face negotiations would likely be counterproductive at that point. *Id.* However he again proposed that the parties continue bargaining through written correspondence, particularly with regard to the wage freeze the Hotel had already admitted it recognized as unreasonable. *Id.* Finally, Mr. Glaser noted that it was the Hotel who insisted on discussing only the "singular access issue" rather than any of the other issues the Union had identified as potential concessions, and that the Hotel had failed to make any proposals regarding any topic besides access issues since May. *Id.*

On October 23, Mr. Evans sent a nine-page response, asserting that he believed it was "important at this juncture to lay [the Hotel's] cards on the table regarding a number of topics that [were] causing animosity between the parties." J. Ex. 47. He then admitted that his previous letter "contained a greater dose of vitriol than previous correspondence. It was not unintentional." *Id.* He noted that, "having been involved in this dispute for approximately nine months now, [he could] knowingly declare that the situation [appeared] hopelessly entrenched." *Id.* He went on to point out the futility of the situation as it stands ("Because the economic impact of this sort of insurgency is drawn out and less immediate, it is unlikely to lead either party to change position soon. . . . The most predictable outcome is for the parties to simply continue in a pattern of hostility and harm . . ."), and repeated the Hotel's version of the parties' bargaining history to that point, admitting that the only issue the Hotel had discussed since March had been its own access proposal. *Id.* After noting that he had not previously provided any details of Mr. Rosario's termination and sarcastically asserting that he had "incorrectly assumed

that since the Union was allegedly ‘traumatized’ by the termination . . . that it understood why Mr. Rosario was terminated,” he again stated that the Hotel would be present at the negotiation sessions the Union had already canceled. *Id.*

On November 21, 2017, Mr. Evans sent Mr. Glaser another letter, notifying Mr. Glaser that the Hotel would implement its proposed change to the Union’s hotel access on January 1, 2018, if no agreement was reached before that date. Jt. Ex. 48. He again summarized the parties’ bargaining history, noting that the Union had notified the Hotel on May 8 that it “wished to expand negotiations to involve other topics which had led to the parties’ long-standing impasse,” but that the Hotel “was unaware of any changes in the parties’ positions on the impasse issues.” *Id.*

Mr. Glaser responded on November 27. Jt. Ex. 49. In a letter, he reminded Mr. Evans that the Union had suggested making proposals via correspondence in lieu of face-to-face bargaining, and that the Hotel had yet to make a counterproposal to the Union’s comprehensive wage proposal. *Id.* He asserted that there was no impasse between the parties, so the unilateral imposition of the Hotel’s access proposal “would be clearly unlawful.” *Id.* However, the Union proposed a date to meet in person on December 17. *Id.*

The parties ultimately met on December 20, at which time the Union presented written proposals that matched the same terms Mr. Glaser had presented to Mr. Evans the previous month. Jt. Ex. 50; Jt. Ex. 44; Tr. 30:13-18. The proposals were significantly different from the Union’s proposals in 2014, the last time impasse had been declared by the Hotel, and included concessions like agreeing to less expensive health coverage in lieu of the Union’s existing medical plan, an agreement that housekeepers would service up to 17 rooms on each shift, an agreement that the Union would no longer require that all compensation due to the employees be

deemed trust funds in the event of a sale or transfer to a successor owner or that employees would have the first claim upon those funds in the event of a bankruptcy, and an agreement that the Union would provide notice to the Hotel when Union representatives planned to visit the property. Tr. 300:18-307:20. The Company did not counter any of the Union's written proposals. Tr:307:23- 310:10.

On December 30, Mr. Glaser sent a letter to Mr. Evans summarizing the bargaining session and the Union's concessions on issues that had led to impasse in 2009. Jt. Ex. 51. He recapped the meeting, reminding Mr. Evans that the hotel had expressly declined to offer any counterproposal to offers the Union had made, including its wage proposal. *Id.* Regardless, Mr. Glaser urged the Hotel to "reconsider its position on this matter, consider all five of the Union's most recently communicated proposals seriously, and communicate meaningful counterproposals on each of [the issues] to the Union in writing." *Id.*

Mr. Evans responded with another nine-page letter on January 5, Jt. Ex. 52, again summarizing the parties' bargaining history. Though he did not dispute that the Hotel had offered no counterproposals, he noted that it had let the Union now it would "need to study [the Union's] proposals in greater detail and calculate the actual economic impact of each proposal," and that the Hotel was unlikely to have an answer for the union until after January 1. However, Mr. Evans also said that, "given the relationship between the Union and the Hotel, which was decidedly adversarial, [he] was not confident that [the Hotel's] positions on any of the economic issues would change." *Id.*

He then argued that the Union's concessions on health care and room quotas could not be "viewed as significant movement," but were "primarily symbolic," that the Hotel could not be expected to change its healthcare plan, and that the Union's concession regarding room quotas

was “essentially a wage issue for the room attendants” and thus should be addressed in setting a wage rate. *Id.* He added that the Hotel was not willing to agree to the Union’s proposed successorship language and preferred to rely on the Board’s baseline protections instead, and that the Hotel outright rejected the Union’s wage proposal because it was “very difficult to provide increased wages or benefits given the current animosity-laden relationship.” *Id.* Finally, with regard to the access issue, he noted that the Hotel refused to permit Union representatives to meet with employees in their cafeteria (ultimately penalizing employees who leave the property on their break to talk to Union representatives, because only employees who remain on the property are provided with a free food and paid for their time, Jt. Ex. 1 ¶¶ 11-13.), and asserting that the Union could use another room in the hotel on designated days instead of the cafeteria where employees already take their breaks. Jt. Ex. 52.

Mr. Evans concluded by reiterating that, “based on the ten months [the parties had] been discussing this issue, it would appear that the parties are at impasse.” *Id.* He then stated the Hotel would no longer allow the union access to the cafeteria beginning January 15, 2018. On January 12, Steve Rader, then the Hotel’s General Manager, emailed Mr. Jones, Mr. Esparza, and Local 878 organizer Dayra Valades to tell them the Hotel would be implementing its access proposal by designating certain times and days during which the Union would be able to meet with employees on Hotel property. Jt. Ex. 53. He also asked that the Union call ahead of time to let him know when Union representatives would be visiting, and that he would confirm whether their meeting room was available at that time. *Id.* Finally, he reminded them that “any area outside of the meeting room provided is off limits, ie [sic] the employee cafeteria.” *Id.*

On January 22, Mr. Rader sent Mr. Jones a letter summarizing two instances during which Mr. Esparza and Ms. Valades had accessed the property without prior approval and

proceeding to the Hotel's cafeteria after the Hotel's access proposal was implemented. Jt. Ex. 54. He also summarized an incident that had happened that morning, in which the Hotel's Director of Operations had asked Mr. Jones to leave the property and Mr. Jones had allegedly pushed around him to go to the cafeteria. *Id.* When Mr. Rader confronted him and asked him to leave with Mr. Esparza and Ms. Valades, he alleged that Mr. Jones pushed past him and said he would leave after he met with the Union's members. *Id.* Mr. Rader concluded by telling Mr. Jones that if he continued to access the property without permission, the Hotel would "have no other option but to involve law enforcement." *Id.*

Mr. Jones responded on January 25, noting that the Hotel could not choose if and when to bar representatives of the Union from taking advantage of their rights to enter the premises. Jt. Ex. 55. He reminded Mr. Rader that the Union had already filed an unfair labor practice regarding the Hotel's unilateral implementation of the access proposal, and that Mr. Rader's threat to "involve law enforcement" was itself unlawfully retaliatory. *Id.* Finally, he noted that neither he nor any Union representative had initiated physical contact with a Hotel representative at any point.

On January 31, 2018, the Hotel called the Anchorage Police Department to report that Union representatives had visited the Hotel outside the hours designated in its access proposal. Jt. Ex. 1, ¶ 22. Around 4 pm that day, police officers visited the Union's office and asked Ms. Valades what had happened that day before, telling her the Hotel had called the police to report that Ms. Valades had trespassed on Hotel property. Tr. 401:12:-404:22. The officers spoke to Ms. Valades for approximately fifteen minutes before leaving. Tr. 408:10-24. Ms. Valades later obtained the police report, 410:21-411:22, but no charges were filed. *See* GC Ex. 8.

ARGUMENT AND AUTHORITY

I. Hilton Anchorage’s repeated failures to counter the Union’s proposals constitute bad-faith bargaining in violation of §§ 8(a)(1) and (5) of the Act.

Though the Act does not require the making of concessions, the Board’s definition of good faith bargaining indicates that willingness to compromise is important if not essential ingredient for lawful negotiations. *See e.g. NLRB v. Highland Park Mfg. Co.*, 110 F.2d 632 (4th Cir. 1940). While the Act does not “compel either party to agree to a proposal or require the making of a concession,” *Barry Wehmiller Co.*, 271 NLRB 471, 472 (1984), the Board does consider the parties’ willingness to make concessions in evaluating whether the totality of the circumstances shows good faith bargaining. *See American Commercial Lines*, 291 NLRB 1066, 1079 (1988). And while the Board cannot force an employer to make a concession on any specific issue, “the employer is obliged to make some reasonable effort in some direction to compose its differences with the union if any §8(a)(5) is to be read as imposing any substantial obligation at all.” *Reed & Prince Mfg. Co.*, 96 NLRB 850 (1951), *enf’d* 205 F.2d 131 (1st Cir.), *cert. denied* 346 U.S. 887 (1953).

The Board considers the failure to make a counterproposal as an indicia of bad faith bargaining. In *UPS Supply Chain Solutions, Inc.*, the employer failed to present any substantive counterproposals in response to the union’s contract proposal during three separate bargaining sessions. 366 NLRB No. 118 (2018). The Board found that the employer thereby breached its duty to bargain in good faith and violated Section 8(a)(1) and (5) of the Act. *Id.*, slip op. at 4.

Whether a party advances proposals at all is a factor the Board considers when determining overall good faith bargaining. *Hondo Drilling Co.*, 213 NLRB 229 (1974), *aff’d* 525 F.2d 864 (5th Cir.), *cert. denied* 429 U.S. 818 (1976). When an employer gives no reason for rejecting the Union’s proposed collective bargaining agreement and makes no counterproposals,

the Board considers it an indication of bad faith bargaining. *Nat'l Mgmt. Consultants*, 313 NLRB 405 (1993).

The Board has also found that an employer's unwillingness "to accept or consider any contract other than its proposed contract" as evidence of bad faith. *Herman Sausage Co.*, 122 NLRB 168 (1958), *enfd* 275 F.2d 229 (5th Cir. 1960) (in which the employer was found to have bargained in bad faith when its counterproposals "constituted such a radical departure from a previous contract in eliminating approximately 26 benefits . . . as to be predictably unacceptable to the union."). An employer's withdrawal of its solitary proposal that itself embodied only existing conditions has been considered an element of bad faith, *see Berry Kofron Dental Lab.*, 160 NLRB 493 (1966), as has an employer's rejection or withdrawal of proposals that had been tentatively accepted. *In re Industrial Wire Prod. Corp.*, 177 NLRB 328 (1969), *enfd* 455 F.2d 673 (9th Cir. 1972).

The Hotel's conduct here falls squarely within the bounds of the bad faith behavior exhibited in cases like *UPS Supply Chain Solutions* and *Herman Sausage Co.* At every turn, the Hotel has refused to engage with the Union on any substantive topic of bargaining, instead insisting on days-long bargaining sessions over its own access proposal without so much as a hint that it is willing to compromise. Further, the Hotel has given no legitimate reason for rejecting the Union's proposals on wages, nor has it countered with any proposals of its own. Instead, after agreeing with the Union that forcing employees to go a decade without a wage increase was unreasonable, the Hotel insisted that the Union's boycott of the property (which presumably would end following agreement on a contract) prevented the Hotel from performing any economic analysis at all and precluded it from countering a wage proposal entirely.

Like in *UPS*, the Hotel has outright refused to counter any of the Union's substantive proposals, including the exhaustive economic package outlining wage increases. Similarly, when the Union offered a counterproposal to the Hotel's access proposal via correspondence, offering that it would agree to provide notice when its representatives planned to visit the property, the Hotel failed to introduce any meaningful counterproposal other than to reiterate its previous proposal.

Likewise, the Hotel's declaration of impasse in light of the Union's acceptance of the hotel's proposed housekeeping room quotas mirrors the bad behavior in *In re Industrial Wire Corp...* As the bargaining history outlined above demonstrates, the Union had resisted the Hotel's proposal that housekeepers be required to clean up to 17 rooms on each shift. Faced with potential impasse, the Union conceded and accepted the Hotel's proposed 17-room quota. Even in light of that acceptance, the Hotel resisted actually reaching an agreement on the issue. And like in *Herman Sausage*, the Hotel's access proposal is in itself a radical departure from the Union's current access to the hotel, virtually eliminating the Union's access to the hotel property in such a way "as to be predictably unacceptable to the Union." 122 NLRB 168 (1958).

The Hotel's repeated failure to offer any counterproposal or concessions in response to any of the Union's proposals demonstrates a textbook violation of its duty to bargain in good faith. In lieu of engaging in meaningful discussions with the aim of reaching an agreement, the Hotel's sole tactic has been to introduce proposals to which the Union could not possibly agree, receive the Union's counterproposal, and insist that there is no room to compromise before declaring impasse and unilaterally imposing its original proposal. Such a strategy frustrates the purpose of the Act entirely, in that it both discourages employees by communicating to them that their selection of a bargaining representative was futile and fulfills that promise by ensuring the

parties can never reach an agreement, even if the Union wholly accepts the Hotel's policies. Accordingly, it blatantly violates the Hotel's duty to bargain in good faith under Sections 8(a)(1) and (5) of the Act.

At hearing, the Hotel suggested repeatedly that because it told the Union in writing that it (the Hotel) was willing to continue meeting to negotiate, *see* Jt. Ex. 52, the Hotel could not properly be deemed to have refused to bargain in good faith. However, that same January 5, 2018, made it abundantly clear that the Hotel's refusal to make proposals or counteroffers to the Union regarding any of the issues in dispute would not change. Thus, the Union had, and to this date still has, no reason to conclude that the Hotel's standing offer to "meet" with the Union is anything but empty words. It certainly does not constitute an expressed willingness to bargain in good faith that in some way vitiates the clear evidence, described above, of the Hotel's actual demonstrated refusal to do so.³

The Hotel may also argue that its willingness to comply with the Union's concededly burdensome information requests demonstrates that it was bargaining in good faith. However, providing information in response to the Union's requests, even if that information assisted the Union in formulating its own proposals, does not satisfy the Hotel's obligation to "make some reasonable effort in some direction to compose . . . differences with the union." *Reed & Prince Mfg. Co.*, 96 NLRB 850. An employer's fulfillment of its duty to provide information does

³ For the same reasons, the Hotel's contention, not supported by any record evidence, that the Union should at some point subsequent to January 5, 2018, have (1) learned that the Hotel had indicated to Region 19 its willingness to "settle" the Union's pending unfair labor practice charges, through a settlement that would include a promise by the Hotel to bargain in good faith, and (2) inferred from that fact that the Hotel was genuinely interested in mending its ways and start bargaining in good faith, is risible. As was demonstrated by the testimony at hearing, the Hotel could at any time have posted the Notice of Settlement posters that Region 19 had sent it, or in some other way *informed* the Union and its members of its alleged change of heart. That it did neither of those things during the time period covered by the instant Complaint, and has still not done so as of today's date, proves beyond any dispute that no such change of heart has yet occurred. In light of those facts, the Union's failure to reach out to the Hotel following its receipt of the January 5, 2018, letter and the subsequent unilateral implementation of the Hotel's access proposal, to ask for additional bargaining dates, has no relevance to any issue before the ALJ.

nothing to close the gap between its position and a union's if, as was the case here, it is not coupled with fulfillment of the complementary duty to actually bargain in good faith over those position.

II. Hilton Anchorage's unilateral implementation of their access proposal violated §§ 8(a)(1) and (5) of the Act because the Union's proposals had broken any impasse.

It is well established that under the Act, an employer cannot make a unilateral change in mandatory subjects of bargaining, which are the subject of current collective bargaining efforts. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). In *Katz*, the Supreme Court first stated that “an employer’s unilateral change in conditions of employment under negotiation is ... a violation of § 8(a)(5) [of the NLRA], for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal.” “Unilateral action by an employer” before the employer has met its bargaining obligation, the Court stated, “must of necessity obstruct bargaining.” *Id.* at 747.

In *Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co*, 484 U.S. 539(1988), the Supreme Court explained why unbargained-for unilateral changes in conditions of employment “must of necessity obstruct bargaining,” stating:

Freezing the status quo ante after a collective agreement has expired promotes industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations on a new contract.

Id. at 544, n. 6 (quoting from *Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co.*, 779 F.2d 497, 500 (9th Cir. 1985).

Therefore, if the parties are engaged in bargaining in an attempt to reach a collective bargaining agreement (as is the case here), the employer’s duty to bargain in good faith under the NLRA encompasses the duty to refrain from implementing changes “unless and until an overall

impasse has been reached on bargaining for the agreement as a whole.” *Visiting Nurse Services of Western Mass., Inc.*, 325 NLRB No. 212 (1998), *enf’d*, 177 F.3d 52 (1st Cir. 1999); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), *enf’d*, 15 F.3d 1087 (10th Cir. 1994).

A. The Hotel could not maintain that the 2014 impasse still existed in light of the Union’s substantial concessions in its 2017 proposals.

While the duty to bargain does not require a party “to engage in fruitless marathon discussions at the expense of frank statement and support” of one’s position, *NLRB v. American Nat’l Ins. Co.*, 343 U.S. 395, 404 (1952), impasse only exists where irreconcilable differences in the parties’ positions remain after full good faith negotiations. *See Fetzer Television v. NLRB*, 317 F.2d 420 (6th Cir. 1963) (in which eight good faith bargaining sessions was sufficient to declare impasse). The Union’s demonstrated willingness to make concessions and compromises in its 2017 proposals indicates no impasse existed, and the Hotel’s subsequent unilateral implementation of its access proposal was therefore unlawful.

In *A.M.F. Bowling Co.*, the Board defined impasse as “the point in time when the parties are warranted in assuming that further bargaining would be futile.” 314 NLRB 969, 978 (1994) (citing *Pillowtex Corp.*, 241 NLRB 40 (1979)). However, when an employer enters into negotiations “with his mind hermetically sealed against the thought of entering into an agreement with the Union, he is guilty of refusing to bargain collectively in good faith as required by the Act and is therefore guilty of an unfair labor practice.” *NLRB v. United Clay Mines Corp.*, 219 F.2d 120, 124 (6th Cir 1955). “It is not sufficient for a finding of impasse to simply show that the employer had lost patience with the Union. Impasse requires a deadlock.” *Barstow Community Hospital*, 361 NLRB No. 34, slip op. at 9 (2014).

The Board generally assesses the parties’ fluidity of position in determining whether impasse exists, and find a willingness to move from initial positions; even in light of “limited

movement,” when a party is willing to offer additional concessions in bargaining the Board generally does not find a good-faith impasse exists. *See Ryan Iron Works, Inc. v. NLRB*, 257 F.3d 1, 3 (1st Cir. 2007). Impasse does not exist when, notwithstanding an employer having asserted that it had reached its final position, the Union declares its intention to be flexible and makes concessions, including seeking another bargaining session. *Grinnell Fire Protection Systems Co.*, 328 NLRB 585 (1999), *enf’d* 236 F.3d 187 (4th Cir. 2000).

Likewise, nearly any changed condition or circumstance that renews the possibility of fruitful discussion terminates an impasse, including a party’s willingness to change its previous position. *See Airflow Research 7 Manufacturing Corp.*, 320 NLRB 861 (1996). For example, when a party’s post-impasse proposals indicate a willingness to reduce some of its demands, especially when those changes ultimately accept the other party’s final offer, that change is sufficient to terminate an impasse. *Id.* A party making a new proposal after it declares impasse and the opposing party then offering further concessions can also serve as evidence that the parties had not yet exhausted the possibility of agreement. *See Ingredion, Inc. d/b/a Penford Products Co.*, 366 NLRB No. 74 (2018).

Here, the Union’s position on the issues that led to impasse in 2014 has changed substantially, as evidenced by the bargaining history outlined above. The Union wholly accepted the Hotel’s proposals regarding the number of rooms housekeepers must clean, substantially adapted its proposals regarding both successor requirements and health insurance coverage, significantly compromised regarding its access to the hotel, and offered a comprehensive economic package that conformed to the Hotel’s own admission that nearly a decade without a wage increase was facially unreasonable. Those concessions demonstrate significant fluidity of

position and a willingness to compromise that weighs heavily against a finding of good-faith impasse.

Like in *Grinnell Fire Protection Systems*, the Hotel here declared that it had reached its final position before ultimately asserting that the parties were at impasse. And like in that case, the Union here offered substantial concessions and declared its intention to be flexible in its positions in future negotiations. In that case, the Board found no good faith impasse existed. The same is true here.

The circumstances and conditions at play in the parties' 2017 bargaining are also dramatically different from those when the parties initially declared impasse, as outlined in the bargaining history above. Like in *Airflow Research*, the Union's post-impasse proposals demonstrated willingness to significantly reduce some of its demands to the point that they ultimately accepted the Hotel's proposed housekeeping room quotas.

Likewise, the Hotel's post-impasse access proposal and the Union's corresponding offer of further concessions in its December 2017 proposals both weigh in favor of finding that the parties have not yet exhausted the possibility of agreement. Accordingly, no good-faith impasse exists and the Hotel's unilateral implementation of that access proposal was unlawful.

B. Neither of the two exceptions to the requirement that “overall impasse” be reached prior to implementation of bargaining proposals existed in this situation.

The Supreme Court has recognized that unilateral changes “interfere with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent.” *May Stores Co. v. NLRB*, 326 US 376, 385 (1945). By proscribing unilateral action, the Act “prevent[s] the employer from undermining the union by taking steps which suggest to the workers that it is powerless to protect them.” *NLRB v. Advertisers Manufacturing Company*, 823 F.2d 1086, 1090 (7th Cir. 1987).

The Board has identified only two exceptions to the requirement that an employer may not implement unilateral changes absent reaching overall impasse. These are, first, when the union engages in tactics designed to delay negotiations and, second, when economic exigencies compel prompt action. *Bottom Line*, 302 NLRB at 374; *Eagle Transport*, 338 NLRB No. 55, slip op. at 6.

As demonstrated by the record evidence regarding bargaining history between the parties, neither of these two possible exceptions to the requirement that “overall impasse” be reached prior to implementation occurred in the instant negotiations. First, no evidence supports any assertion that the Union attempted to delay negotiations.

The Hotel may argue, for example, that the Union spent the entirety of the August 3 negotiation session going through the Employer’s 2016 “contract document.” *See* J. Ex. 39. However, as Mr. Glaser explained in his August 9 letter summarizing negotiations, the time spent during the August 3 session was necessary in order for the parties to determine what terms and conditions actually existed at the Hotel and what provisions in the “contract document” the Hotel considered the true status quo, in an attempt to set a base line from which to negotiate. Similarly, the Hotel may argue that the Union’s information requests regarding topics of bargaining were filed in bad faith as an attempt to delay bargaining. However, the Hotel never objected to any of the Union’s information requests, and instead said it would be responsive to each request it received. Tr. 27:21-25. While negotiations did not happen frequently during 2017, there is simply no evidence that the Union was “dragging its feet” or that the delays in scheduling negotiation sessions contributed in any material way to the Hotel’s refusal to make a counteroffer, even regarding a wage increase (which it had agreed was, on its face, a reasonable thing for the Union to expect to be able to obtain for its members).

Second, no evidence supports any assertion that the Hotel was “compelled” to move ahead with its access proposal because of economic exigencies. At no point during negotiations did the Hotel ever suggest that the access proposal was prompted by any economic considerations, and the threatened implementation date of that proposal shifted several times during the bargaining process, demonstrating that the implementation itself was not so necessary as to require any urgency at all. Instead, the Hotel made it clear that it simply wanted to move ahead with its access proposal, regardless of whether an impasse had been reached.

Accordingly, the Hotel has not met its burden of meeting the factual predicates for either of the limited exceptions to the requirement that overall impasse be reached prior to the unilateral implementation of a proposal. Thus, absent proof that an overall impasse was reached, the Hotel’s unilateral implementation of its access proposal was unlawful.

C. The Hotel could not lawfully declare impasse here over the single bargaining issue of access.

The Board has held that an overall impasse can be reached over a single issue only where the issue is of such “overriding importance that it justifies an overall finding of impasse on *all* of the bargaining issues.” *CalMat Co.*, 331 NLRB 1084, 1098 (2000) (italics in original, citing *Sacramento Union*, 291 NLRB 55, 554 (1988), *enfd. mem sub nom. Sierra Publishing Co. v. NLRB*, 888 F.2d 1394 (9th Cir. 1989) and *NLRB v. Tomco Communications, Inc.*, 567 F.2d 871, 881 (9th Cir. 1978)).

In order to demonstrate that impasse on a single issue has created an overall impasse, a party must show three things: (1) the existence of a good-faith bargaining impasse; (2) that the issue as to which the parties are at impasse is a critical issue; and (3) that the impasse on this critical issue “led to a breakdown in the 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.” *CalMat*, 331 NLRB at 1098. *Accord: Bottom Line*, 302 NLRB at 379 (“Even if a party remains resolutely opposed to a particular proposal throughout negotiations, an employer does not reach impasse and cannot unilaterally implement its proposal unless ‘impasse on a single or critical issue creates a complete breakdown in the entire negotiations’”).

In this case, as was demonstrated above, the Hotel cannot show that there was a “good-faith bargaining impasse” as to its access proposal, which the Hotel presumably alleges is of such “overriding importance” that it justified a finding of overall impasse. To the contrary, the Union made a meaningful counteroffer regarding the Hotel’s access proposal, which the Hotel refused to counter and outright rejected without consideration. Further, the Union had indicated willingness to concede certain points regarding the four issues that had originally led to impasse in 2014, and the Union had provided comprehensive explanations of its willingness to compromise on each of those issues up to the date on which the Hotel implemented its access proposal. Accordingly, the Hotel cannot plausibly say that no resolution of the access issue was possible (and thus declare impasse), as the Union had already demonstrated a willingness to both negotiate and compromise its positions in the interest of reaching an agreement.

Moreover, as was noted above, the Hotel outright refused to negotiate or compromise even on matters which it admitted called out for modification of the status quo (i.e., wages), and was entirely unwilling to offer any “quid pro quo” to the Union in order to implement proposals it deemed significant. As such, the Hotel had at least one potentially fruitful means of avoiding “overall impasse:” actually offering a substantive response to the Union’s own counterproposals. To identify just one example of such an unexplored approach, the Hotel could have attempted to “buy” the Union’s consent to its access proposal by addressing the Union’s own “wish-list” of contract changes (including wages and room quotas) in a much less perfunctory manner than it

did. Instead, even after threatening to unilaterally implement its proposal absent the Union's rescheduling of a bargaining date, and even when the Union rescheduled that date and offered substantial concessions on both all issues that had originally led to impasse and the Hotel's most recent access proposal, the Hotel insisted the parties had made no progress and moved forward with unilateral implementation.

Ultimately, therefore, the Hotel cannot possibly show that there was impasse over its access proposal which "led to a breakdown in the overall negotiations," such that there could be "no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved." *CalMat*, 331 NLRB at 1098. To the contrary, the evidence shows that there was plenty of room for movement regarding both that specific issue and the four additional issues that led to impasse in 2009, such that no "overall impasse" sufficient to justify unilateral implementation existed.

CONCLUSION

For the foregoing reasons, the Union respectfully requests that the ALJ find that the Hotel violated its duty to bargain in good faith under Sections 8(a)(1) and (5) of the Act by failing to counter any of the Union's proposals, declaring single-issue impasse, and subsequently implementing its access proposal unilaterally.

Respectfully submitted this 17th day of December, 2019


Dmitri Iglitzin, WSBA No. 17673
Kelly Ann Skahan, WSBA No. 54210
BARNARD IGLITZIN & LAVITT LLP
18 West Mercer Street, Suite 400
Seattle, WA 98119
Tel: 206.257.6003
iglitzin@workerlaw.com
skahan@workerlaw.com

DECLARATION OF SERVICE

I, Jennifer Woodward, declare under penalty of perjury under the laws of the state of Washington that on this 17th day of December, 2019, I caused the foregoing to be sent via email to:

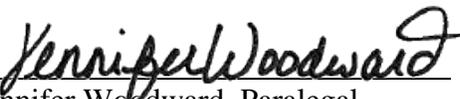
Douglas S. Parker
dparker@littler.com

Renea I. Saade
rsaade@littler.com

William J. Evans
evans@alaskalaw.pro

Helena Fiorianti
Helen.fiorianti@nlrb.gov

Signed in Seattle, Washington, this 17th day of December, 2019.


Jennifer Woodward, Paralegal